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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

THE 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

STRIKING 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 1890¹ 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

¹ 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 1889,² which formed the basis of the "Reagan Amendment" to the Sherman bill. The definitions there embodied references to combinations of capital skill or acts,³ 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

²This 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.

³This 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.⁴ Individuals participating in or causing the violations of corporations are frequently covered by a separate penal section.⁵ 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.⁶ 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,⁷ 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,⁸ 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 States⁹ 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.¹⁰

⁴ 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.

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

⁶ 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.

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

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

⁹ 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.

¹⁰ *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; *Uncles v. Colgate, et al.*, 25 N. Y. Supp. 672 (1893) aff'd, 148 N. Y.

Three States^{8b} 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.^{8c}

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.⁹ 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 Act¹⁰ and the Expediting Act.¹¹ 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"¹² 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).

^{8b} 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.

^{8c} *State v. Young*, 20 Oklahoma Cr. 383, 203 Pac. 484.

⁹ 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.

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

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

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 (1882), c. 47, art. 3, sec. 8728, (L. 1891, p. 186, sec. 7, superseded by L. 1895, p. 237).

ute,¹³ and provisions directed at the expedition of proceedings occasionally appear. Lengthy sections specifying procedure for hearings before a master enacted in Massachusetts in 1911,¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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

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

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

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

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

¹⁷ *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.¹⁸ 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.¹⁹ These laws include enactments closely paralleling the Interstate Commerce Act of 1887²⁰ in that respect. Indeed, the Missouri

¹⁸ 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).

¹⁹ Iowa Code (1935) sec. 8050 (Code of 1873, sec. 1297).

²⁰ 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.²¹ The Washington Constitution of 1889²² evidences the same concern. This found legislative expression in different States every few years until the Federal control of railroads was expanded in 1906.²³

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 Act²⁴ was directed at the interest of common carriers in commodities transported by them. Like legislation occurred in Pennsylvania in 1907²⁵ and in Kansas in 1911,²⁶ although the first might be regarded as merely implementing a constitutional prohibition, going back to 1874.²⁷ As early as 1867, Ohio had limited the stock interest that railroads might hold in grain elevators,²⁸ and in the last quarter of the century Tennessee specifically forbade any carrier to become a party to any combination to control cotton compressing,²⁹ and West Virginia forbade railroads to trade in coal.³⁰ 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,³¹ and the same practice was forbidden elsewhere, Wisconsin following suit as late as 1905.³² 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.³³ Missouri legislation addressed

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

²² Wash. Const. art. XII, sec. 14.

²³ 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).

²⁴ Same as 23, *supra*.

²⁵ 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).

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

²⁷ Const. art. 17, sec. 5.

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

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

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

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

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

³³ 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 1887.⁸⁴

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 1920⁸⁵ 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 control⁸⁶ 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,⁸⁷ and a prohibition in Ohio against the consolidation of parallel telegraph lines also came early.⁸⁸ Ohio cities were denied authority to grant exclusive rights in streets to gas companies in 1868⁸⁹ and the express mention of telephone companies in that State

⁸⁴ 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).

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

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

⁸⁷ 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).

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

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

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

Nebraska paid express attention to the consolidation of street railways as early as 1889,⁴² although the statute then enacted was in permissive form, and, as late as 1915,⁴³ 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.⁴⁴ 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.⁴⁵ Missouri legislation of the nineties made special reference to fire, storm, and property damage insurance in connection with the general antitrust laws.⁴⁶ 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-

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

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

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

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

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

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

⁴⁶ 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.⁴⁷ 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,⁴⁸ 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

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

⁴⁸ Ante, p. LIII.

until 1913.⁴⁹ Nebraska directed its attention to pooling by dealers in 1887,⁵⁰ 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.⁵¹ 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,⁵² and the subject of keeping exchanges open was attacked in 1919.⁵³

This last date is of course close to the Federal Packers and Stockyards Act of 1921,⁵⁴ 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 1919.⁵⁵ 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 1935.⁵⁶ 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

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

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

⁵¹ Ante, p. LIII.

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

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

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

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

⁵⁶ 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 1902,⁵⁷ but the Iowa law of 1909⁵⁸ 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 1928⁵⁹ or unfair competition in buying milk and cream in the Nebraska law of 1931.⁶⁰

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 1917⁶¹ and Louisiana in 1936⁶² 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

⁵⁷ 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).

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

⁵⁹ 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.

⁶⁰ 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.

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

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

from that of the Idaho Act of 1917⁶³ 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.⁶⁴ In the meantime, Nebraska⁶⁵ and Missouri⁶⁶ 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.⁶⁷

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.⁶⁸ Some of the provisions of the Federal war-time Lever Act⁶⁹ with a like orientation were, in substance, re-enacted in Maine in 1919.⁷⁰ 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.⁷¹

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.⁷² In 1897 Tennessee expressed a particular policy against agreements to raise the price or limit the production of coal.⁷³ A West Virginia statute of 1895 against railroads trading in coal seems⁷⁴ 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

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

⁶⁴ L. 1939, c. 10, sec. 6.

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

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

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

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

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

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

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

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

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

⁷⁴ 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 licensing⁷⁵ was declared unconstitutional because a license fee was held to be an undue burden on interstate commerce.⁷⁶ The law was amended in 1905 to eliminate this objection.⁷⁷ Three statutes against local price discrimination in petroleum products illustrate a trend in the development of formulas in that particular. The Iowa Act of 1906⁷⁸ 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,⁷⁹ 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.⁸⁰

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,⁸¹ and a California act of 1913 is directed against combinations between railroads and pipe lines.⁸² 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.⁸³ 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

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

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

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

⁷⁸ Iowa Code (1935), c. 432 (31 G. A., c. 169).

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

⁸⁰ 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.

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

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

⁸³ 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 1907.⁸⁴

In Pennsylvania,⁸⁵ Wisconsin,⁸⁶ and New York⁸⁷ 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.⁸⁸ 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.⁸⁹ The bulk of the statutes were passed in the decade from 1905-15, but California legislation followed as late as 1929.⁹⁰ 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.⁹¹

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 byproducts⁹² and a statute establishing special commission control over processors of sea food is comparably appropriate there.⁹³ In view of the large grapefruit output of southern Texas, Texas seems a suitable site for a statute concerning citrus marketing

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

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

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

⁸⁷ Highway Law (McKinney) sec. 39 (L. 1913, c. 80, sec. 25).

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

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

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

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

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

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

agreements,⁹⁴ and a special direction to the commissioner of agriculture in North Carolina to report on trusts in the production of commercial fertilizers⁹⁵ is entirely consonant with the activities of that State. An early West Virginia statute against intimidation of miners calls⁹⁶ 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.⁹⁷ 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 1905⁹⁸ and why Oklahoma was particularly concerned with advertising space and service 30 years later.⁹⁹ Similar observations apply to a Nebraska statute of 1893 against pooling and price fixing by coal and lumber dealers,¹⁰⁰ a Florida antitrust statute of 1897 relating to the sale of meat¹⁰¹ and the particular reference to ice in the Connecticut law of 1911.¹⁰² A Texas statute prescribing no connection between local mutual aid associations¹⁰³ 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.

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

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

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

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

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

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

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

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

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

¹⁰³ 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.¹⁰⁴ Apparently more germinal are the sweeping New Mexico act of 1933 against overbuying by exhibitors¹⁰⁵ and the North Dakota act of 1937 separating theater ownership from the production or distribution of films.¹⁰⁶

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.

¹⁰⁴ S. C. Code (1932) sec. 6326 (Acts 1931, No. 271).

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

¹⁰⁶ 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).

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 1911¹⁰⁷ 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 mentioned¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰

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

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

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

¹¹⁰ *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.¹¹¹ as well as to the corresponding provisions of the Clayton Act¹¹² appear in several States. The prohibitions of this section of the Clayton Act and of that concerning price discrimination¹¹³ 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,¹¹⁴ 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 Act¹¹⁵ 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-

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

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

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

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

¹¹⁵ 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 dairy¹¹⁶ and petroleum industries.¹¹⁷

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.¹¹⁸ The sudden outburst of this legislation, as well as

¹¹⁶ Ante, p. LVIII.

¹¹⁷ Ante, p. LIX-LX.

¹¹⁸ (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.¹¹⁹ 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.¹²⁰ 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.¹²¹ It has since been given the mission of administering the so-called Unfair Practice Act, which includes prohibitions of sales below cost¹²² and expressly provides for admitting trade association cost surveys as evidence of the costs of individual concerns.¹²³ It would thus seem to be a vehicle for promoting trade association price-maintenance combinations in direct opposition to traditional antitrust policy.

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

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

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

¹²² Mont. L. 1937, c. 80, sec. 3.

¹²³ 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.¹

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

¹*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.³ 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,⁴ 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.⁵ 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.⁶ The same is true of a definition in the general antitrust laws of Texas, that a combination to abstain from business is a trust.⁶ 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.⁷ He pointed out that covenants not to

³ See Watkins, *Industrial Combinations and Public Policy* (1927).

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

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

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

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

⁸ *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,⁸ 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.⁹ 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, or¹⁰ business to be void, with certain exceptions only, and including no exception of covenants by employees.¹⁰ 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.¹¹ 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.¹²

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.

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

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

¹⁰ 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).

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

¹² 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**.

ALABAMA

I. TRUSTS, COMBINATIONS AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. IV, sec. 103. The legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade, or business.

Const. art. I, sec. 22. * * * no ex post facto law, nor any law, impairing the obligations of contract, or making any irrevocable or exclusive grant of special privileges or immunities, shall be passed by the legislature; and every grant or franchise privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

STATUTORY PROVISIONS

Code Ann. (Michie, 1928)

Sec. 5212. (7579) (5557) Forming pools or combinations to regulate the quantity or price of products.—Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust, or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this state, or any person or corporation who enters into, becomes a member of, or party to, any pool agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this State, must, on conviction, be fined not less than five hundred, nor more than two thousand dollars. (Form 87 (87).)

Sec. 5213. (7580) (5558) Combinations to control corporations with intent to fix the price or production of commodities.—Any corporation chartered under the laws of this State, or any officer, stockholder, agent or employe of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix, the price, restrict or diminish the production, manufacture, sale, use or consumption of any article of commerce, must, on conviction, be fined not less than five hundred nor more than two thousand dollars.

Sec. 5214. (7581) Monopolies, penalty for.—Any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, or description of business; or which shall destroy or attempt to destroy, competition in the manufacture or sale of a commodity, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than two thousand dollars for each offense.

Sec. 5215. (7592) Three preceding sections given in special charge to grand juries.—The three preceding sections must be given in special charge to the grand jury.

Sec. 5697. (2487) Actions against trusts, combines, or monopolies.—Any person, firm, or corporation injured or damaged by an unlawful trust, combine, or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of five hundred dollars and all actual damages from any person, firm or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly; and may maintain the action therefor against any one or more of the parties to the trust, combine, or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. And all such actions may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of one or more of the defendants.

Sec. 5698. (2488) County in which action brought.—Actions under the preceding section may be brought in any county where the trust, combine, or monopoly was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found.

Sections 7206 and 7207 provide that foreign corporations may acquire stock in domestic corporations but that this shall not be interpreted as authorizing the creation of any monopoly or trust or unlawful combination in the nature of a trust or monopoly.

Sec. 3447. Conspiracy, combination, or agreement to interfere with or hinder business, unlawful.—Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying, or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business, shall be guilty of a misdemeanor. (1921, p. 31, sec. 1.)

Sec. 3450. Using force or threats against person engaging in lawful occupation.—Any person, firm, corporation, or association of persons who uses force, threats, intimidation, or other unlawful means to prevent any other person, firm, corporation, or association of persons from engaging in any lawful occupation or business shall be guilty of a misdemeanor. (Id., sec. 4.)

Section 3452 provides that any person or corporation who without just cause does any act with the intent or reason to believe that such act will injure, interfere with, hinder, delay, or obstruct any lawful business or enterprise in which persons are employed, or who shall destroy or threaten appliances used in the business of another, shall be guilty of a misdemeanor.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

An injunction to restrain a rival electric company from erecting its poles and wires along certain streets occupied by complainant was granted on the ground of the danger that may result to complainant company and its employees from adjoining poles, wires and power boxes. The public interest may at times be served best by a single rather than by competing utilities. *Consolidated Electric Light Co. v. People's Electric Light & Gas Co.*, 94 Ala. 372, 10 So. 440 (1891).

An agreement between a grower of peaches and a cooperative marketing association for the exclusive sale of peaches through the co-

operative was held invalid as an unreasonable restraint on trade. *Georgia Fruit Exchange v. Turnispeed*, 9 Ala. App. 123, 62 So. 542 (1913).

Application of Constitutional Provisions.

Const. art. IV, sec. 103 empowers the legislature to regulate any act which prevents "reasonable competition." Neither the constitutional provision nor sec. 5212, define "reasonable competition." Whether or not competition is reasonable must be determined by reference to the common law. Under it, an electric company inducing breach of contracts with another competing electric company will be enjoined. *Citizens Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 Fed. 553 (1909). Defamatory statements concerning the credit of a competitor will not be enjoined by a court of equity because the remedy is at law. *Ibid.*

The city of Birmingham may not grant an irrevocable franchise to operate a street railway. A city is merely the "creature of the State" and its delegated powers must be construed strictly. No such power was granted by the legislature either in the charter or by statute. But even though such delegation of power was attempted it would constitute a violation of Const. art. IV, sec. 22 which provides against the passage of any law "making any irrevocable grant of special privileges or immunities." *Birmingham & Pratt Mines Street Railway Co. v. Birmingham Street Railway Co.*, 79 Ala. 465 (1885). See also *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 22 Sup. Ct. 820, 46 L. ed. 1132 (1901).

The Uniform Text Book Law (L. 1903, p. 167) conferring upon the successful bidder the exclusive right to supply books to the free public schools for a term of 5 years at stipulated prices does not create a monopoly and grant an exclusive privilege within the prohibition of Const. 1901, sec. 22. The purpose of the Uniform Text Book Law is not to confer any pecuniary benefit upon the State or school officials or publishers, but to confer a benefit upon the public generally. *Dickinson v. Cunningham*, 140 Ala. 527, 37 So. 345 (1904).

An agreement between a member and a cooperative marketing association providing for the exclusive sale of all its produce through the association is a reasonable restraint not injurious to the public interest. Section 7152 (L. 1921, p. 38), authorizing cooperatives and producers to enter into such agreements, is not in violation of Const. art. IV, section 103. *Warren v. Alabama Farm Bureau Cotton Assn.*, 213 Ala. 61, 104 So. 269 (1925).

Application of Statutes.

For the purpose of eliminating competition, a combination, representing nearly all of the cottonseed buyers in the State, fixed the prices

to be paid for such cottonseed. The combination was enjoined for violation of sections 5212 to 5214 as a scheme for the purpose of fixing prices, thereby stifling competition. *Dothan Oil Mill Co. et al. v. Espy et al.*, 220 Ala. 605, 127 So. 178 (1930). See also *Southern Cotton Oil Co. v. Knox et al.*, 202 Ala. 694, 81 So. 656 (1919).

A ginning company, which had a virtual monopoly of the ginning business and engaged in the business of buying cottonseed, was enjoined from continuing the practice of ginning cotton only for such customers as agreed in advance to sell cottonseed to it in violation of section 5212. *Tallassee Oil & Fertilizer Co. et al. v. H. S. & J. L. Holloway*, 200 Ala. 492, 76 So. 434 (1917). See *Tying Contracts and Exclusive Dealing Arrangements*, *infra*.

A contract between two cotton buyers, under which each agreed to give the other one-sixteenth of a cent for each pound of cotton purchased in a certain district, was held to be in restraint of trade and unenforceable. The effect of this agreement was to give each an interest in the purchases of the other, thereby stifling competition, while at the same time conveying the impression of being engaged in competition with one another. *J. H. Arnold & Co. v. Jones Cotton Co.*, 152 Ala. 501, 44 So. 662 (1907).

In an action by a corn-products company for the purchase price of glucose, a plea setting up the violation of section 5212 was demurrable where it did not aver that the combination was formed, carried on, or maintained within the State, or that the illegal transaction occurred within the State. *Dreyfus Bros. v. Corn Products Co.*, 204 Ala. 593, 86 So. 386 (1920).

A milk dealer was prevented from hauling and selling his milk as a result of an unlawful trust contrary to secs. 5697, 6826, 6827 as amended by L. 1931, p. 647. In a suit for penalties and damages the Alabama rule allowed plaintiff to recover. *Nichelson v. Nestles Milk Products Corp.*, 107 Fed. (2d) 17 (1937).

The illegality of a combination under section 5212 is no defense to an action on a promissory note. The issue is collateral and payment cannot be avoided on that ground. *Stewart v. Capital Fertilizer Co.*, 207 Ala. 596, 93 So. 641 (1922).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

L. 1939, H. B. 102 Resale Price Maintenance

Sections 1 to 10 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal

agreements between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Code Ann. (Michie, 1928)
Cooperatives

Section 7152 provides that an agricultural cooperative marketing association organized pursuant to sections 7127 to 7155 shall not be deemed to be a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangement*, *infra*.

Judicial Decisions

Cooperatives.

Section 7152 (L. 1921, p. 38) exempting cooperatives from the anti-trust laws is constitutional. *Warren v. Alabama Farm Bureau Cotton Association*, 213 Ala. 61, 104 So. 264 (1925); *Bishop v. Alabama Farm Bureau Cotton Association*, 215 Ala. 388, 110 So. 711 (1926).

A bylaw of a cooperative organized under sections 7156 and 7161, providing for the payment of dues of 3 percent of the members' gross sales, whether or not sold through the cooperative, is a valid exercise of its power and not in restraint of trade. The cooperative is authorized to secure sufficient funds from its members for its operation and management. *Ex parte Baldwin County Producers Corp.*, 203 Ala. 345, 83 So. 69 (1919).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Code Ann. (Michie, 1928)
Railroads

Section 9978 provides that it shall be unlawful for two or more railroads to enter into any pool agreement, the purpose or effect of which is to prevent free competition among such companies or to operate in undue restraint of trade in the localities affected.

Section 5368 provides that any officer or agent of a railroad who aids in making or carrying out a pool agreement between railroads whereby trade is restrained, may be subjected to a fine.

Code Ann. (Michie, 2d Supp. 1936)

Sections 9988 (1) to 9988 (3) provide that no steam railroads or terminal railroads shall unify or consolidate where such unification

or consolidation would constitute an unreasonable burden upon the intrastate transportation of persons or property or would be inconsistent with the public interest of the state. Violations are subject to fines of not more than \$5,000 for each month of violation.

L. 2d Ex. 1936, act 66

Liquor

Section 21 (b) (6 and 7) provides that the application for distributors', wholesalers', and retailers' licenses shall contain the following information and statements: That the applicant is not in any manner pecuniarily interested either directly or indirectly in the profits of any other class of business regulated by this act; that he alone is pecuniarily interested in this business sought to be licensed; and that no other person shall be interested therein during the continuance of the license; all except as hereinafter permitted.

Section 24 (7) provides that it shall be unlawful for any licensee to be directly or indirectly employed by any other licensee engaged in the manufacture, storage, transportation, or sale of spirituous, or vinous liquors, alcohol, or malt, or brewed beverages.

Section 25 (5) provides that no manufacturer, and no officer or director of a manufacturer, shall at the same time be a distributor, wholesaler, or retail dispenser or an officer, director, stockholder, or creditor of any such, nor, except as hereinafter provided, be the owner or lessor of any place covered directly or indirectly by any distributor's or wholesaler's malt or brewed beverage liquor license. Section 25 (6) makes similar provisions concerning distributors or wholesaler.

Section 25 (7) provides that no licensee shall directly or indirectly own any stock of, or have any financial interest in, any other class of business licensed under this act.

Section 25 (8) provides that, except as hereinafter provided, no manufacturer, wholesaler, or distributor shall in any wise be interested, either directly or indirectly, in the ownership or leasehold of any property, or in any mortgage against the same, for which a liquor or retail dispenser's license is granted; nor directly or indirectly lend any moneys, credit, or equivalent thereof to any retailer in equipping, fitting out, or maintaining or conducting, either in whole or in part, an establishment or business operated under a liquor retail dispenser's license, excepting only the usual and customary credits allowed for returning packages or containers in which vinous and/or malt or brewed beverages were packed for market by the manufacturer. Section 25 (9) makes similar provisions concerning manufacturers interested in the licenses and business of distributors or wholesalers.

Section 25 (10) provides that no distributor, wholesaler, or retail dispenser shall in any wise, either directly or indirectly, receive any credit, loan moneys, or the equivalent thereof from any other licensee, or a subsidiary or affiliate thereof, or from any firm, association, or corporation except banking institution in which another licensee or any officer, director, or firm member of another licensee has a substantial interest or exercises a control of its business policy for equipping, fitting out, payment of licensee fee, maintaining, and conducting, either in whole or in part, an establishment or business operated under a distributor's, wholesaler's, or retail dispenser's license, excepting only the usual and customary credits allowed for the return of packages or containers in which vinous or malt or brewed beverages were packed for the market by the manufacturer.

Section 28 provides that wholesalers or manufacturers or distributors cannot directly or indirectly give, supply, furnish, or grant to any retailer any accessories, furniture, or fixtures, etc. Any person who violates any of the provisions of this section, or any rule or regulation promulgated in conformity therewith, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500 for each offense, and in addition may be imprisoned in the county jail for not more than 6 months.

2. Public Contract Provisions

Code Ann. (Michie, 1928)

Public Sales

Sections 6804 and 6806 provide that no person shall receive any consideration for bidding or not bidding at any public sale. All contracts in violation of this provision are declared void; and any person entering into such a contract may be subjected to forfeiture, to any person suing for the same, of double the amount of the consideration paid.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

Code Ann. (Michie, 1928)

Sec. 6826. Contract in restraint of trade, void.—Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent, void.

Code Ann. (Michie, Supp. 1936)

Sec. 6827. Exception in favor of purchaser and employers.—One who sells the good will of a business may agree with the buyer, and one who hires as an agent, servant, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or part thereof, so long as the buyer or any person deriving title to the good will from him, and so long as such employer carries on a like business therein. (1931, p. 647.)

Code Ann. (Michie, 1928)

Sec. 6828. Exceptions in favor of partnership arrangements.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same county, city or town where the partnership business has been transacted, or within a specified part thereof.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A covenant by the seller of an ice-cream business not to engage in a similar business in the same county for 5 years as owner or as agent or employee of another is valid. *Crossfield v. Lokey*, 212 Ala. 560, 103 So. 649 (1925).

A covenant by the seller of an insurance business not to engage in a similar business for a certain period, but in an undefined territory, is not in violation of section 6827. The territorial limitations intended by parties will be construed from the attendant circumstances of the contract. *J. L. Davis, Inc. v. Christopher*, 219 Ala. 346, 122 So. 406 (1929).

A covenant by the seller of a cotton-gin business not to compete with the purchaser within definite boundaries for such time as will materially depreciate the value of the property sold is valid and enforceable, even though vague and indefinite as to time. The court takes judicial notice of the nature of the business, and in applying the rule of reason finds the restriction a reasonable one. *Maddox v. Fuller*, 233 Ala. 662, 173 So. 12 (1937).

A contract for the sale of pine-land leases containing a provision that the seller will not engage in the turpentine business within 10 miles of a certain town so long as the buyer is engaged in that busi-

ness in the same town is valid. *Harris v. Theus*, 149 Ala. 133, 43 So. 131 (1907).

An agreement by a vendor of a livery business not to engage in a similar business in competition with the vendee in a certain city, although unlimited as to time, is not in restraint of trade and is enforceable. *Smith v. Webb*, 176 Ala. 596, 58 So. 913 (1912).

The seller of a barber shop who agreed not to engage in the same business in a certain town, was enjoined from doing so. The contract was reasonably restrictive even without a time limitation. *Fambrough v. Townson*, 204 Ala. 251, 85 So. 476 (1920).

A contract for the sale of a fruit business, under which the seller agrees not to grow, import, or sell fruit in competition with the purchasers, is unenforceable if it is shown that the contract aids in the creation of a monopoly in violation of the Sherman Antitrust Act. *McConnell v. Camors-McConnell Co.*, 152 Fed. 321 (C. C. A. 5th, 1907) (1907), reversing *Camors-McConnell v. McConnell*, 140 Fed. 412 (1905).

Restrictive Covenants Ancillary to the Sale of a Practice.

An agreement by a physician in connection with the sale of his practice not to engage in the practice in the city is not against public policy and is valid although unlimited in duration. The test of the validity of such contract is whether or not it affords only a fair protection to the interest of the party in whose favor it is made, without being so broad as to interfere with the public's interest. *McCurry v. Gibson*, 108 Ala. 451, 18 So. 806 (1895).

Restrictive Covenants Ancillary to Employment.

A contract was upheld under which an insurance agent forfeited his rights to commissions on renewals if, within 2 years after termination of his contract, he accepts work of another company granting similar benefits. *Himes v. Masonic Mutual Life Ass'n of District of Columbia*, 215 Ala. 183, 110 So. 133 (1926).

Laundry-route driver covenanted not to compete for 3 years in the same county after the termination of his employment. The contract is a reasonable restraint of trade, expressly sanctioned by Ala. Code Ann. (Michie, Supp. 1936), sec. 6287. The contract was none the less covered by the statute because it failed to expressly mention "the soliciting of old customers" in the language of the Act. *Shelton v. Shelton*, 192 So. 55 (1939).

Restrictive Covenants not Ancillary to the Sale of a Business.

In pursuance of a plan to eliminate competition, two lumber companies, ancillary to conveyances of land made to each other, agreed to restrict the operations of each to a territory within 20 miles on

either side of a county line. The agreement is an unreasonable restraint injurious to the public interest. *Flowers & Peagler v. W. T. Smith Lumber Co.*, 157 Ala. 505, 47 So. 1022 (1908).

An agreement between the owners of the only two ice plants in a city that one cease operating for a period of 5 years is unenforceable as an attempt to stifle competition for the purpose of creating a monopoly. *Tuscaloosa Ice Manufacturing Co. v. Williams*, 127 Ala. 110, 28 So. 669 (1900). See also *Pearson v. Duncan & Son*, 198 Ala. 25, 73 So. 406 (1916).

Two competing hardware companies entered into an agreement whereby one sold its entire stock of a certain type of plow shares to the other and promised not to handle a similar type thereafter in competition with the other in "the part of Alabama north of Birmingham." The contract was upheld as reasonably restrictive although unlimited in time. *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 So. 41 (1889).

Parol Evidence.

In a written contract for the sale of the goodwill of a business, the court did not admit parol evidence to establish, by implication, an agreement not to compete. *Collas v. Brown*, 211 Ala. 443, 100 So. 769 (1924).

Assignees Rights.

Assignees of a vendee's interest in a business and covenant not to compete may enforce the vendor's obligation on the covenant. *Knowles v. Jones*, 182 Ala. 187, 62 So. 514 (1913).

Remedies.

In a suit to restrain the breach of a contract between operators of a group of laundries and dry cleaning plants that each will not engage in the other's business in the county for a period of 10 years, the court held that the contract "if not wholly void" was unenforceable in equity. The remedy, if any, was at law for damages. *American Laundry Co. v. E. & W. Dry Cleaning Co.*, 199 Ala. 154, 74 So. 58 (1917).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Michie, 1928)
Cooperatives

Sections 7142 and 7152 provide that an agricultural cooperative marketing association organized under sections 7127 to 7155 may enter

into contracts with its members requiring them to sell, for any period of time not over ten years, all or any specified part of their products to or through the association and that such contracts shall not be considered illegal or in restraint of trade. See *Exceptions to General Anti-Trust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Tying Contracts.

See, *Tallassee Oil & Fertilizer Co. et al. v. H. S. & J. L. Holloway*, 200 Ala. 492, 76 So. 434 (1917); *General Antitrust Laws, supra*.

Exclusive Dealing Arrangements.

A contract whereby a retailer agreed to buy from one source all the beer required in his business for a certain period is not void as it in no way tends to create a monopoly or trust. *Terre Haute Brewing Co. v. McGeever*, 198 Ala. 474, 73 So. 889 (1916).

For cases on arrangements entered into with cooperatives, see *Warren v. Alabama Farm Bureau Cotton Assn.*, 213 Ala. 61, 104, So. 269 (1925); *General Anti-Trust Laws; Exceptions, supra*. See also *Bishop v. Alabama Farm Bureau Cotton Assn.*, 215 Ala. 388, 110 So. 711 (1926) and *Ex parte Baldwin County Producers' Corporation*, 203 Ala. 345, 83 So. 69 (1919).

ARIZONA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS Rev. Code Ann. (Struckmeyer, 1928)

Const. art. XIV, sec. 15. Monopolies and trusts shall never be allowed in this State, and no incorporated company, co-partnership, or association of persons in this State shall directly or indirectly combine or make any contract, with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders or with any co-partnership or association of persons, or, in any manner whatever, to fix the prices, limit the production, or regulate the transportation of any product or commodity. The legislature shall enact laws for the enforcement of this section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty declare a forfeiture of their franchises.

STATUTORY PROVISIONS Rev. Code Ann. (Struckmeyer, 1928)

Sec. 3212. Trust defined; declared void; prohibited; monopoly.—A trust is a combination of capital, skill, or acts, by two or more persons for any of the following purposes: To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by law; to increase or reduce the price of merchandise, products, or commodities, or limit the production thereof, or to control the cost or rates of insurance; to prevent any competition in the manufacture, making, transportation, sale or purchase of merchandise, products, or commodities, or to prevent competition in aids to commerce; to fix any standard or figure, for any article or commodity of merchandise, or product of commerce, intended for sale,

use, or consumption in this state, whereby its price to the public shall be, in any manner controlled or established; to make, enter into, execute or carry out, any obligation or agreement by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity that its price may in any manner be affected; or to regulate the transportation of any product or commodity. Any such combination is against public policy, unlawful and void, and no person may form or be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee, or otherwise, in any trust as herein defined. The creation or maintenance of a monopoly within the state, or the attempt to create or maintain a monopoly within the state, is unlawful and prohibited. (Secs. 1-2, ch. 73, L. '12; 579-80, 585, in part, P. C. '13, cons. & rev.)

Sec. 3213. Violation by corporation forfeits charter; duty of officers.—Any corporation organized under the laws of this state, or doing business in this state, violating any provision of this chapter, shall thereby forfeit its charter and franchise, and its corporate existence, or its right to do business in this state if a foreign corporation shall cease. The attorney general and the county attorneys, or either of them, shall institute civil and criminal actions to enforce the provisions of this chapter. (Secs. 3-4, ch. 73, L. '12; 581-2, P. C. '13.)

Sec. 3214. Violator may not do business in state.—Every person or corporation, within or without this state, their officers, agents, representatives, or consignees, violating any provision of this chapter, is prohibited from doing any business within this state, and persons within this state shall not deal with, directly or indirectly, any such person. (Sec. 5, ch. 73, L. '12; 583, P. C. '13, rev.)

Sec. 3215. Violations, penalty.—Every person or corporation who directly or indirectly, violates any provision of the three preceding sections of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not less than one hundred nor more than one thousand dollars, and, if a natural person, imprisoned not less than

thirty days nor more than six months, and for each and every day after a conviction hereunder that such violation shall continue, forfeit and pay the sum of one hundred dollars, which may be recovered in the name of the state. (Secs. 6-7, ch. 73, L. '12, 584-5, in part, P. C. '13, cons. & rev.)

Sec. 3216. Use as defense to action; grounds for damages.—In a civil action, relating to and growing out of transactions prohibited by this chapter, it shall be lawful to plead in the defense thereof that the plaintiff, or any other person interested in the prosecution of the action, is at the time, or has within one year next preceding the date of the commencement of such action, been guilty either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any provision of this chapter. Any person damaged by any such agreement, trust, or combination, may sue for and recover of any person in such a trust or combination such damages as he has sustained, together with a reasonable attorney fee. (Secs. 8-9, ch. 73, L. '12; 586-7, P. C. '13, cons. & rev.)

Sec. 3217. Duty of public officers; failure to perform; penalty.—All state and county officers having knowledge of any violation of the provisions of this chapter shall notify the attorney general and county attorney of their respective counties thereof, and furnish them with the names of any witnesses by whom such violation can be proved. If any officer shall fail to comply with the provisions of this chapter, he shall be guilty of a misdemeanor, and upon conviction, shall forfeit his office. (Sec. 10, ch. 73, L. '12; 588, P. C. '13, rev.)

Sec. 3218. Duties of superior courts and judges; witnesses; testimony.—The superior courts shall, upon good cause shown and upon written application of the county attorney or attorney general, cause to be issued and served subpoenas for such witnesses as may be named in the application to appear in such court and testify, and such witnesses shall testify to any knowledge they may have of a violation of any provision of this chapter. Any person so subpoenaed and examined shall not be liable to criminal prosecution for the violation of this chapter about which he may testify, nor shall the evidence of such witnesses be used against him in any criminal proceeding, except for perjury committed while so testifying.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

L. 1936, c. 11
Resale Price Maintenance

Sections 1 to 6 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal con-

tracts between producers, between distributors, or between retailers. Sec. 5. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Rev. Code Ann. (Struckmeyer, 1928)
Cooperatives

Section 574 provides that no cooperative agricultural marketing association organized under sections 556 to 575 shall be deemed a combination in restraint of trade or an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Rev. Code Ann. (Struckmeyer, 1928)
Railroads

Section 641 provides that a railroad cannot purchase or lease the property of another railroad unless the property purchased or leased forms a branch of or a continuous line with the purchasing railroad. While the section permits consolidation of railroads generally, it is expressly inapplicable to competing lines of railroad starting from and terminating at the same points within the boundaries of the state.

Insurance

Section 3212 provides that a combination to control the cost or rates of insurance is unlawful and void. See *General Antitrust Laws, supra*.

Rev. Code Ann. (Struckmeyer, Supp. 1936)
Dairy Products—Discriminations

Sections 943z8 and 943z3 provide that it shall be unlawful for any person engaged in the business of buying dairy products to discriminate as to price in different localities with the intention of destroying or injuring the business of a competitor or restraining in any manner open competition in said business.

See, *Tying Contracts and Exclusive Dealing Arrangements, infra*. Also Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

2. Public Contract Provisions

Rev. Code Ann. (Struckmeyer, 1928)
Supplies

Section 3219 provides that any contract for the purchase of public supplies shall be void if the contractor has been a party to a combina-

tion to prevent the making of bids, to fix the prices of the bids, or to induce another not to bid upon the contract in question. See projected Vol., *Governmental Purchasing*.

Textbooks

Section 1053 provides that any contract entered into by the State Board of Education for the purchase of schoolbooks with any contractor who is a party to any combination to control the prices of schoolbooks shall be void. See projected Vol., *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Code Ann. (Struckmeyer, 1928) Cooperatives

Section 568 provides that a cooperative agricultural marketing association may enter into contracts with its members, requiring the members to sell all or any specified part of their agricultural products or specified commodities exclusively to or through the association for a period of not over 10 years and that such marketing agreements shall not be deemed illegal or in restraint of trade. Sec. 574. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

L. 1939, c. 64, sec. 8

Liquor

Section 1886h as amended by L. 1939, c. 64 provides that it shall be unlawful for any person engaged in the business of distiller, winer, brewer, rectifier, blender, or other producer, or of wholesaler, of any spirituous liquor, directly or indirectly, or through an affiliate

(1) to require any retailer to purchase from such producer or wholesaler to the exclusion, in whole or in part, of liquors sold by others; or (2) to induce such unlawful conduct (a) by acquiring any interest in the license or property owned or used by the retailer in his business; or (b) in any way furnishing any equipment, supplies, money, or services, except as allowed by rules made pursuant to this act; or (c) by paying for advertising and distribution service; or (d) by guaranteeing financial obligations; or (e) by credit extensions; or (f) by quota requirements; or (g) by giving bonuses or compensation to retailers or their employees; or (h) by any other form of commercial bribery.

Rev. Code Ann. (Struckmeyer, Supp. 1936)

Section 1886i provides that any person violating any of the provisions of this act shall be guilty of a misdemeanor and punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than 30 days nor exceeding 1 year, or by both.

Section 1886d, as added by L. 1939, c. 64, sec. 4 (d) provides that any spirituous liquor license may be suspended or revoked by the superintendent for violation of or noncompliance with any provision of this act or of law, any rule or regulation issued pursuant to this act, or any condition of the license.

ARKANSAS

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Constitution art. II, sec. 19. Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges, or honors ever be granted or conferred in this State.

STATUTORY PROVISIONS

Dig. Stat. (Pope, 1937)

Sec. 9407. Conspiracy to affect prices.—Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation, or understanding whether the same is made in this State or elsewhere with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix either in this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, or to maintain said price when so regulated or fixed, or who are now, or shall hereafter enter into, become a member of, or a party to any pool, agreement, contract, combination, association, or confederation, whether made in this State or elsewhere, to fix or limit in this State or elsewhere, the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, shall be deemed and adjudged guilty of conspiracy to defraud and be subject to the penalties as provided by this act. Act January 23, 1905, p. 1, sec. 1, as modified by act April 17, 1907, p. 430.

Sec. 9408. Insurance companies.—Any foreign or domestic insurance corporation is hereby permitted to do business in this State without fine or forfeiture, upon compliance with the insurance laws of this State, provided, that such corporation is not a member of or a party to any pool, trust, agreement, combination, confederation, or understanding made in this State or elsewhere, to regulate, fix, or maintain insurance premiums on property in this State. Act April 17, 1907, p. 430.

Sec. 9409. Penalty.—Any person, partnership, firm, or association, or any representative or agent thereof, or any corporation or company, or any officer, representative, or agent thereof, violating any of the provisions of this act, shall forfeit not less than two hundred dollars, nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership, or association shall continue to do so shall be a separate offense, the penalty in such case to be recovered by an action in the name of the State at the relation of the Attorney General the moneys thus collected to go into the State treasury for the benefit of the common school fund of this State, except as hereinafter provided. Act January 23, 1905, sec. 2, as amended by act March 12, 1913, p. 680.

Sec. 9410. Forfeiture of corporate rights.—Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the preceding sections of this act, shall thereby forfeit its corporate rights and franchises, and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in this State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the laws of any other State or country, which shall violate any provision of the preceding sections of this act, shall thereby forfeit its right and privilege thereafter to do any business in this State, and, upon proper proof being made thereof in any court of competent jurisdiction in this State, its right and privilege to do business in this State shall be declared forfeited; and, in all proceedings to have such forfeiture declared, proof that any person who has been acting as the agent of such foreign corporation in transacting business in this State has been, while acting as such agent, and in the name, behalf, or interest of such foreign corporation, violating any provisions of the preceding sections of this act shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, also to the Insurance Commissioner, who shall take notice and be governed thereby as to the corporate powers

and rights of said corporation. Act January 23, 1905, p. 1, sec. 3, as amended by act March 7, 1917, p. 1038, sec. 6.

Sec. 9411. Acts prohibited.—No individual, company, or corporation shall be subject to any of the penalties of this act, unless such individual, company, or corporation shall do within this State some act directly tending to carry into effect a conspiracy prohibited by this act; and the purchase, sale, delivery or disposition of any article of commerce in a lawful manner within this State shall not be deemed an act done in pursuance of, or for the purpose of carrying into effect, any such conspiracy. Act March 12, 1913, p. 680.

Sec. 9412. Monopoly defined.—A monopoly is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, customs, skill, or acts of any other valuable thing or possession, by or between persons, firms, or corporations, or association of persons, firms, or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a monopoly, as thus defined and contemplated, includes not merely such combination by and between two or more persons, firms, and corporations, acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations, or incorporations of capital, skill, credit, assets, property, custom, trade, or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or any incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition, or control of shares or certificates of stocks or bonds, or other corporate property or franchises, and all partnerships and corporations that have been or may be, created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, property, customs, trade, corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the meaning of this act if so created or entered into for any one or more of the purposes named in this act; and a monopoly, as thus defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations, or association of persons engaged therein, shall be deemed and adjudged to be guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act. Act January 23, 1905, p. 1, sec. 5.

Sec. 9413. Penalties—who subject to.—If any person, persons, company, partnership, association, corporation or agent engaged in the manufacture or sale of any article of commerce or consumption produced, manufactured, or mined in this State, or elsewhere, shall, with the intent and purpose of driving out competition, or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way, or give away in this State, their productions for the the purpose of driving out competition, or financially injuring competitors engaged in similar business, said person, or persons, company, partnership, association, corporation, or agent resorting to this method of securing a monopoly within this State in such business, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and, on conviction thereof, shall be subjected to the penalties of this act. Id. sec. 6.¹

Sec. 9414. Affidavit required of corporations.—It shall be the duty of the Secretary of State, on or about the first day of July of each year, to address to the president, secretary, or treasurer of each incorporated company doing business in this State a letter of inquiry as to whether the said corporation has all or any part of its interest or business in, or with any trust, combine, or association of persons or stockholders as named in the preceding provisions of this act, and to require an answer under oath of the president, secretary or treasurer, or any director of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

AFFIDAVIT

STATE OF ARKANSAS,

County of _____,

"I, _____, do solemnly swear that I am the _____ (president, secretary, treasurer, or director) of the corporation known and styled _____ duly incorporated under the laws of _____ on the _____ day of _____ and now transacting or conducting business in the State of Arkansas, and that I am duly authorized to represent said corporation in making this affidavit; and I do further solemnly swear that said _____, known and styled as aforesaid, has not, since the _____ day of _____ (naming the day upon which this act is to take effect), created, entered into, or become a member of or a party to, and was not on the _____ day of _____, nor at any day since that date, and is not now a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, either in this State or elsewhere, to regulate or fix in this State the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of a party to any pool, trust, agreement,

¹ For further treatment of sec. 9413 see vol. *State Price Control Legislation; Prohibition of Predatory Price Practices.*

contract, combination, or confederation, to fix or limit in this State the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued and does not own any trust certificates, and for any corporation, agent, or employee or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract, or agreement would be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hands of any trustee or trustees, with intent to fix or limit the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any article in Arkansas.

(President, Secretary, Treasurer, or Director.)

"Subscribed and sworn to before me, a ----- within and for the county of -----, this ----- day of -----, 19-----."

[SEAL]

And on refusal to make oath in answer to said inquiry, or on failure to do so, within thirty days from the mailing thereof, the Secretary of State shall certify said fact to the Attorney General, and it shall be the duty of the Attorney General, at his earliest practicable moment, in the name of the State and at the relation of the Attorney General, to proceed against said corporation, if a domestic corporation, for the recovery of the money forfeit provided for in this act, and also for the forfeiture of its charter or certificate of incorporation; if a foreign corporation, to proceed against such corporation for the recovery of the money forfeit provided for in this act, and to forfeit its right to do business in this State. Provided, that within sixty days after the passage of this act, all foreign corporations desiring to do business in this State shall file a new bond, as the statutes direct; and such sureties and bondsmen shall be liable for the penalties and forfeitures, including costs, provided for in this act. *Id.* sec. 7, as amended by act March 12, 1913, p. 680.

Sec. 9415. Proceedings to enforce.—Whenever any proceedings shall be commenced in any court of competent jurisdiction in this State by the Attorney General against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trust of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this State, or to recover the penalties in this act provided, then, and in such case, if the Attorney General desires to take the testimony of any officer, director, agent, or employee of any corporation, or joint stock association proceeded against, or, in case of a copartnership, any of the members of said partnership, or any employee thereof, in any

court in which said action may be pending; and the individual or individuals whose testimony is desired are without the jurisdiction of this State, or reside without the State of Arkansas, then in such case the Attorney General may file in said court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons and for the production of any books, papers, and documents in his possession or under his control relating to the merits of any suit, or to any evidence therein, shall appoint a commission for that purpose, who shall be an officer authorized by law to take depositions in this State, and said commission shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or agent, or officer, or other employee, that the testimony of the person named in the application of the Attorney General is desired, and requesting said attorney or attorneys of record, or said officer, agent or employee to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employee, representative of said copartnership, or agent thereof, whose evidence is desired to take, together with such books, papers, and documents, at the place named in the application, shall then and there testify: *Provided, however,* That such application shall always allow in fixing said time the same number of days' travel to reach the designated place in Arkansas that would be allowed by law in case of taking depositions; provided, also, in addition to the above named time, six days shall be allowed for the attorneys of record, or the agent, officer or employee on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by any one authorized by law to serve a subpoena. Id. sec. 8, as amended by act March 12, 1913, p. 680.

Sec. 9416. Judgment by default when.—Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employee to attend before any court, or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is required, as above provided, shall fail to appear and testify and produce any books, papers, and documents they may be ordered to procure by court or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the Attorney General, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by the

said corporation, joint stock association or copartnership whose officer, agent, director or employee has neglected or failed to attend and testify and produce all books, papers, and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render judgment by default against said corporation, joint stock association or copartnership: *And it is further provided*, That, in case of any officer, agent, employee, director or representative of any corporation, joint stock association or copartnership in such proceedings, as hereinbefore mentioned, who shall reside or be found within this State, shall be subpoenaed to appear and testify or to produce books, papers, and documents and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding shall, on motion of the Attorney General, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership. Id. sec. 9, as amended by act March 12, 1913, p. 680.

Sec. 9417. Duty to enforce—expenses.—It will be the duty of the Attorney General to enforce the provisions of this act. As compensation for his services in this behalf, the Attorney General shall be entitled to his actual expenses incurred in the prosecution of such suits, to be paid by the defendant or defendants when judgment is rendered for the State, to be taxed as costs by the court hearing the cause. Id. sec. 10, as amended by act March 12, 1913, p. 680.

Sec. 9418. Expenses allowed—advancement of causes.—In all suits instituted under this act to forfeit the charter of corporations, or to forfeit the right of a corporation to do business in this State, where a judgment of forfeiture is obtained and the cause is not appealed to the Supreme Court, the circuit court rendering such judgment shall allow the Attorney General his actual expenses, to be paid out of the assets of said corporation. All actions authorized and brought under this act shall have precedence, on motion of the Attorney General, of all other business, civil and criminal, except criminal cases where the defendants are in jail. Id. sec. 11, as amended by act March 12, 1913, p. 680.

Dig. Stat. (Pope, 1937)

Discriminations

Sections 14297 to 14303 provide that it shall be unlawful for any person engaged in buying any product or commodity in general use to discriminate as to price between localities with the intention or purposes of destroying the business of a competitor. See Vol., *State Price Control Legislation: Antidiscrimination Legislation.*

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of Constitutional Provisions.

A contract involving the sale and purchase of gas at certain terms did not by its terms create a monopoly nor grant a right in perpetuity contravening provisions of Const. art. II, sec. 19. *Harding Glass Co. v. Twin City Pipe Line Co.*, 283 U. S. 353, 51 Sup. Ct. 476, 75 L. Ed. 1112 (1931).

Laws 1929, No. 55, page 10, provided that the Railroad Commission shall have authority and power to regulate the production, sale, and distribution of ice. It also provided for the issuance of licenses to do business at such points as the Commission found present facilities inadequate. The court held the act unconstitutional as the industry is not affected with a public interest. The benefit of such regulation to the public is remote and problematical. The classification is arbitrary and unreasonable. The limitation on competition is unwarranted and is therefore in violation of Const. art. II. *Cap F. Bourland Ice Co. v. Franklin Utilities Co.*, 180 Ark. 770, 22 S. W. 2d 993 (1929).

As the liquor business is dangerous to public health, safety and morals, a statute permitting the county court to issue liquor licenses at its discretion is valid. The general assembly, however, shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. The county court in issuing licenses to some and not to others renders the act unconstitutional in contravention of Const. art. II, sec. 18. *Ex parte Levy*, 43 Ark. 42 (1884).

Application of Statutes.

In General.

Section 9416 is not invalid as an undue extension of judicial power. It simply prescribes a statutory rule of procedure. *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S. W. 407 (1907) aff'd. 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530 (1908).

Agreements fixing the prices of laundry service and railroad passenger and freight rates have been held not to come within the statute. *State v. Frank*, 114 Ark. 47, 169 S. W. 333 (1914); *State v. Chicago, R. I. & P.*, 95 Ark. 114, 128 S. W. 555 (1910). The phrase "any article or thing whatsoever" in section 9407, as limited by the *ejusdem generis* doctrine in conjunction with the preceding words, "article of

manufacture, mechanism, merchandise, commodity, convenience, repair," is not sufficient to extend the statute to services contracts.

The sale by a gas company of a franchise to sell gas to a light company is not a combination prohibited by the act. The purpose of the statute is to prohibit combinations between competing enterprises. *Fort Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S. W. 975 (1910).

A rate-fixing agreement, entered into by a foreign insurance company as to business outside the state, was held sufficient ground for a proceeding pursuant to section 9408 in *Hartford Fire Insurance Co. v. State*, 76 Ark. 303, 89 S. W. 42 (1905). The legislature has the power to dictate the terms upon which foreign corporations can do business in the State. *Hammond Packing Co. v. State, supra*. Cf. *State v. Lancashire Fire Insurance Co.*, 66 Ark. 466, 51 S. W. 633 (1899); *State v. Aetna Fire Insurance Co.*, 66 Ark. 480, 51 S. W. 638 (1899), decided under a prior statute. The earlier act of 1905 which invalidated sales by parties to price-fixing agreements and authorized recovery of the purchase price by the buyer, was held not to apply to a sale of goods for interstate shipment into Arkansas. *Frank A. Menne Factory v. Harback Bros.*, 85 Ark. 278, 107 S. W. 991 (1908).

Transactions of parties alleged to have participated in combinations in violation of the statute but having no connection with the combinations are not invalid. *Midland Valley R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380 (1909); *Epstein v. Buckeye Cotton Oil Co.*, 106 Ark. 241, 153 S. W. 587 (1913).

Enforcement Provisions.

The failure of a corporation to file the affidavit called for by section 9414 is not a violation of the statute and the corporation is not liable to forfeiture of its charter for such failure on the ground that the section does not contain an express requirement and, being penal in nature, must be strictly construed. *State v. International Harvester Co.*, 79 Ark. 517, 96 S. W. 119 (1906).

An honest, reasonable effort to comply with an order to produce witnesses and documents under section 9415 is sufficient compliance with the statute. *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S. W. 407 (1907) aff'd. 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530 (1908).

Enforcement proceedings under the statute are not criminal in nature but are statutory actions for the recovery of penalties. *Ibid.*

Defense.

A plea by the defendant corporation that the corporation has been voluntarily dissolved, will abate action by the attorney general for violation of the statute. *State v. Arkansas Cotton Oil Co.*, 116 Ark. 74, 171 S. W. 1192 (1914).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Dig. Stat. (Pope, 1937)
Resale Price Maintenance

Sections 5606 to 5614 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between distributors, or between retailers. See Vol., *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 2310 provides that no cooperative agricultural marketing association organized under the cooperative marketing act, sections 2286 to 2314, shall be deemed to be a combination in restraint of trade or an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS
Transportation

Const. art. XVII, sec. 4, provides that no railroad or canal company shall consolidate with or purchase or control the property of any other railroad or canal company owning or controlling a parallel or competing railroad or canal and that the officers of one company cannot be officers of a competing company. The question whether a railroad or canal is a parallel or competing one is for the jury.

STATUTORY PROVISIONS
Dig. Stat. (Pope, 1937)
Railroads

Section 1080 provides that combinations or contracts for the pooling of freight by dividing the earnings of railroads or by equalizing or dividing between railroads the property or passengers carried, are unlawful.

Sections 11085, 11093, and 11109 to 11111 provide that parallel or competing railroads shall not consolidate or merge.

Insurance

Section 7663 provides that insurance companies which are parties to any pool, combination, or agreement to regulate, fix, or maintain rates for property insurance are prohibited from doing business in

the State. (Identical with sec. 9408, *General Antitrust Laws, supra.*) See also secs. 9410 and 9414, *supra.*

Mining

Sections 9407 and 9414 provide that the prohibition against combinations to fix prices of commodities specifically includes any products of mining. See *General Antitrust Laws, supra.*

Liquor

Section 14122 provides that it shall be unlawful for a manufacturer (a) to be interested directly or indirectly in any premises where malt, vinous, or spirituous liquors are sold at retail, or in any business devoted wholly or partially to the sale of such liquors at retail, by stock ownership, interlocking directors, mortgage or lien or any real or personal property or any other means; (b) to make any loan to any owner. Liens or other interests acquired on or before December 31, 1933, are not included within the provisions of this section.

L. 1939, Act 352

Section 1 provides that it shall be unlawful for any manufacturer, rectifier, wholesaler, salesman, carrier, or their agent, or any vendor of alcoholic or malt beverages to give any article of value or to make any loan, directly or indirectly, to a person engaged in the retail liquor business, or to any employees or agents thereof, or perform any services for the benefit of any retail liquor dealer; nor shall they sell any article to a retail liquor dealer other than alcoholic and malt beverages at the posted price; it being the intention of this section to prohibit them and their employees from offering any inducement such as secret discounts, rebates different from the posted price, or any loans, gifts, or fictitious sales to induce a retailer to purchase such beverages, and any such gifts, loans or sale, or rebates or discounts to induce such purchase shall be deemed a violation of this section.

Section 6 provides that any person violating any of the terms or provisions of this statute shall, upon conviction, be fined in any sum not less than \$25 nor more than \$100, and shall be cause for the Commissioner of Revenues, in his discretion, to revoke the license or permit of the person violating any of the provisions of this statute, whether convicted or not, if, in his opinion, such person is guilty of violation of any of the provisions hereof.

Dig. Stat. (Pope, 1937)

Section 14205 provides that no manufacturer, distributor, or wholesaler to whom this act applies shall have any interest, directly or in-

directly, in the business of any person applying for and securing or holding a permit as retail dealer, or in the furnishings or fixtures used in his place of business, or any lien thereon.

Section 14222 provides that any violation of the provisions of this act, or of rules and regulations made pursuant thereto, shall be a misdemeanor, and where a penalty is not specifically stated, shall be punishable by a fine of not more than \$500 and imprisonment for not more than 6 months in the discretion of the court. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

2. Public Contract Provisions

Dig. Stat. (Pope, 1937)
Printing

Section 11893 provides that the State Purchasing Board may reject all bids for public printing when it believes there has been a combination among the bidders. See projected Vol., *Government Purchasing*.

3. Anticoercive Financing Statutes

Dig. Stat. (Pope, 1937)

Sections 9419 to 9433 are identical in text with the California statute. See Cal. Gen. Laws (Deering, 1937), Act 5137, secs. 1 to 15, set forth in full at pp. 50-54, *infra*.

Judicial Decisions

Public Contracts Provision.

In an action to restrain Board of Commissioners from advertising anew for bids, the Court held that the legislature may disaffirm a contract for public printing upon evidence that the successful bidder was a member of a combination to suppress bids and stifle competition, such a contract being invalid as against public policy. *Woodruff v. Berry*, 40 Ark. 251 (1882).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

*Judicial Decisions***Restrictive Covenants Ancillary to the Sale of a Business.**

The general rule as expressed by one court is: "This court has upheld contracts in partial restraint of trade but in doing so we have recognized that * * * where the contract results in the creation of a monopoly it is void as contrary to public policy." *Patterson v. Rogers*, 148 Ark. 222, 229 S. W. 711 (1921). Under this rule it has been held that a contract in reasonable restraint of trade with reference to a particular business, where ancillary to its sale and the goodwill thereof, is valid and enforceable. *Wright v. Marshall*, 182 Ark. 890, 33 S. W. (2d) 43 (1930); *Bloom v. Home Insurance Agency*, 91 Ark. 367, 121 S. W. 293 (1909); *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645 (1914).

Application of Statute.

A contract not to compete is not in violation of section 9407 et seq., when its purpose is not to stifle competition. *Bloom v. Home Insurance Agency*, *supra*; *Kimbrow v. Wells*, *supra*.

It has been repeatedly held that a contract not to compete in the same city, town, or county is a reasonable restraint of trade and the restriction will be enforced. *McClure v. Young*, 193 Ark. 188, 98 S. W. 2d 877 (1936); *Hultsman v. Carroll*, 177 Ark. 432, 6 S. W. 2d 551 (1928); *Kruger v. Strom*, 174 Ark. 1179, 298 S. W. 882 (1927); *Robbins v. Plant*, 174 Ark. 639, 297 S. W. 1027 (1927); *Barnett v. Mays*, 153 Ark. 1, 239 S. W. 379 (1922); *Wakenight v. Spear & Rogers*, 147 Ark. 342, 227 S. W. 419 (1921); *Harris v. Irby*, 146 Ark. 403, 225 S. W. 635, (1920); *Hampton v. Caldwell & Hall*, 95 Ark. 387, 129 S. W. 816 (1910); *Daniels v. Brodie*, 54 Ark. 216, 15 S. W. 467 (1891).

A contract not to compete for a specific term of years when ancillary to the sale of a business is enforceable as a reasonable restraint. A contract not to compete for periods up to 20 years has been held valid. *McClure v. Young*, *supra*; *Kruger v. Strom*, *supra*; *Robbins v. Plant*, *supra*; *Harris v. Irby*, *supra*; *Daniels v. Brodie*, *supra*. It has also been held that a contract not to compete as long as the purchaser engages in that business is valid and enforceable. *Hultsman v.*

Carroll, supra; Barnett v. Mays, supra; Wakenight v. Spear & Rogers, supra; Hampton v. Caldwell & Hall, supra.

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

A contract by a physician to permanently retire from the practice of medicine in a particular city and vicinity, in consideration of \$250 upon "sale" of practice is reasonable and valid. The court stated that the reason for upholding this contract is as valid in the case of a profession as in the case of a trade or business. *Webster v. Williams*, 62 Ark. 101, 34 S. W. 537 (1896).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

Where plaintiff's predecessor had contracted with defendant to pay the latter \$400 annually if defendant would rescind his agreement with plaintiff's competitor to open a cotton gin in competition with plaintiff, such contract is against public policy and void. While a contract in partial restraint of trade, ancillary to the sale of business is enforceable, this contract was entered into for the purpose of suppressing competition and promoting monopoly and hence is unenforceable as an unreasonable restraint of trade. *Shapard v. Lesser*, 127 Ark. 590, 193 S. W. 262 (1917).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Dig. Stat. (Pope, 1937) Alcoholic Liquors

Section 14122 (c) provides that it shall be unlawful for a manufacturer of alcoholic liquors to enter into a contract with a retailer whereby the retailer agrees to confine his sales to the products manufactured by one manufacturer and that such a contract is void. See, *Special Antitrust Laws: Liquor, supra.*

Cooperatives

Section 2302 provides that a cooperative marketing association may enter into contracts with its members, requiring the members to sell all or any specified part of their commodities exclusively to or through the association for a period of not over 10 years. The statute further

provides (sec. 2310) that these marketing agreements shall not be deemed illegal or in restraint of trade. See *Exceptions to General Anti-Trust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

Exclusive marketing agreements embraced by section 2312 have been enforced against members of cooperatives. *Arkansas Cotton Growers' Co-op. Ass'n. v. Brown*, 168 Ark. 504, 270 S. W. 946 (1925); *McCauley v. Arkansas Rice Growers' Co-op. Ass'n.*, 171 Ark. 1155, 287 S. W. 419 (1926); *Loewer v. Arkansas Rice Growers' Co-op. Ass'n.*, 180 Ark. 484, 22 S. W. 2d 17 (1929).

A contract which restrains the business or industrial freedom of a person within reasonable limits is not against public policy. Under this general rule, an agreement to sell a particular brand of merchandise to one and not to other retailers in a town is not invalid. A contract by one company to purchase all its requirements from another company is also valid. *Keith v. Hirschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777 (1887).

Public utilities may enter into reasonable arrangements with their customers if the vendee or the public is not subjected to any disadvantage attributable to monopoly or restraint of trade. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353, 51 Sup. Ct. 476, 75 L. Ed. 1112 (1931) rev'g. 39 Fed. 2d 408 (C. C. A. 8th 1930) (1930). See also *Austeel v. Bridges*, 182 Ark. 518, 31 S. W. (2d) 958 (1930); *International Shoe Co. v. King*, 186 Ark. 799, 56 S. W. 2d 171 (1933).

CALIFORNIA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Gen. Laws (Deering, 1937)

Act 8702. Cartwright Anti-Trust Law (Stats. 1907, p. 984; Amended by Stats. 1909, p. 593).

Sec. 1. "Trust" defined—Exception.—A trust is a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations, or associations of persons, or of any two or more of them for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce.
2. To limit or reduce the production, or increase the price of merchandise or of any commodity.
3. To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity.
4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state
5. To make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or any commodity or any article of trade, use, merchandise, commerce, or consumption below a common standard figure, or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity, or transpor-

tation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void, provided that no agreement, combination, or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further, that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize, or own any interest in any association, firm, or corporation, having as its object or purpose the transportation, marketing, or delivery of such commodities. (Amended by Stats. 1909, p. 593.)

Sec. 2. Violation of act.—For a violation of any of the provisions of this act by any corporation or association mentioned herein, it shall be the duty of the attorney general or the district attorney of the proper county, to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises, or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state.

Sec. 2½. Agreements permitted.—It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage, or increase competition in any trade or industry, or which are in furtherance of trade. (*New section added by Stats. 1909, p. 594.*)

Sec. 3. Foreign corporations amenable—Duty of secretary of state.—Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings by injunction or otherwise. The secretary of state shall be authorized to revoke the license of any such corporation or association heretofore authorized by him to do business in this state.

Sec. 4. Penalty for violation of act.—Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty (\$50) dollars nor more than five thousand (\$5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

Sec. 5. What indictment must set out.—In any indictment, information, or complaint for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when, and where it was created.

Sec. 6. Prosecutions, what to prove—Books and papers must be produced when ordered.—In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such. In case any court of record, or in vacation any judge of said court in which is pending any civil, criminal, or other action or proceeding brought or prosecuted by the attorney general or any district attorney for the violation of any of the provisions of this act or in any action or proceeding for the violation of the law of this state, against conspiracy or combination in restraint of trade so orders, no person so ordered shall be excused from attending, testifying, or producing books, papers, schedules, contracts, agreements, or any other document in obedience to the subpoena or under the order of such court or any commissioner or referee appointed by said court to take testimony or any notary public or other person or officer authorized by the laws of this state to take depositions when the order made by such court or judge thereof includes a witness whose deposition is being taken before such notary public or other officer on the ground or for the reason that the testimony or evidence required of him may tend to

criminate him or subject him to any penalty; but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary, or otherwise, before any such court, person, or officer.

Sec. 7. Penalty, after notice by attorney general.—Each and every firm, person, partnership, corporation, or association of persons, who shall in any manner violate any of the provisions of this act, shall be for each and every day that such violations shall be committed or continued, after due notice given by the attorney general or any district attorney, forfeit and pay the sum of fifty (\$50) dollars, which may be recovered in the name of the people of the state of California, in any county where the offense is committed, or where either of the offenders resides; and it shall be the duty of the attorney general, or the district attorney of any county on the order of the attorney general to prosecute for the recovery of the same. When the action is prosecuted by the attorney general against a corporation or association of persons, he may begin the action in the supreme court of the county in which defendant resides or does business.

Sec. 8. Contracts in violation of act void.—That any contract or agreement in violation of the provisions of this act, shall be absolutely void and shall not be enforceable either in law or equity.

Sec. 9. Provisions cumulative.—That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.

Sec. 10. Trust certificates not lawful.—It shall not be lawful for any person, partnership, association or corporation, or any agent thereof, to issue or to own trust certificates, or for any person, partnership, association or corporation, agent, officer, or employee, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation, or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article, and any person, partnership, association or corporation that shall enter into any such combination, contract

or agreement for the purpose aforesaid shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than fifty dollars, nor more than five thousand dollars.

Sec. 11. Persons injured in business by trust may sue.—In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

Sec. 12. "Person" defined.—The word "person" or "persons" whenever used in this act, shall be deemed to include corporations, partnerships and associations existing under or authorized by the laws of this state or any other state, or any foreign country.

Sec. 13. Labor not a commodity.—Labor whether skilled or unskilled is not a commodity within the meaning of this act. [New section added by Stats. 1909, p. 594.]

Civ. Code (Deering, 1937)

Section 1673 provides that contracts whereby anyone is restrained from exercising a lawful profession, trade, or business of any kind are void. See *Contracts Not to Compete, infra*.

General Laws (Deering, 1937) Act 8781 Discriminations

Section 1 provides that it shall be unlawful for any person engaged in the production, manufacture, distribution, or sale of any article or product to discriminate as to price between different localities with the intent of destroying the competitor of any regular established dealer of such articles, or to prevent the competition of any person. Motion picture films when licensed are exempt from the provisions of this article. This act does not apply to any service controlled by the railroad commission of the State of California. See *Vol. State Price Control Legislation: Antidiscrimination Legislation*.

Judicial Decisions

GENERAL ANTITRUST LAWS

The Cartwright Antitrust Act is not inconsistent with the criminal conspiracy statute, Penal Code, sections 182-184, and is constitutional. *People v. Sacramento Butchers' Protective Ass'n*, 12 Cal. App. 471, 107 Pac. 712 (1910).

The 1909 amendment to the antitrust law permitting contracts to market commodities at a reasonable profit is invalid since it leaves the statute without a fixed standard of guilt. The entire Cartwright Act is unconstitutional by reason of the invalid amendment, the amendment not being severable. *Blake v. Paramount Pictures Inc.*, 22 Fed. Supp. 249 (Dist. Ct. Cal. 1938), citing and following *Cline v. Frink Dairy Co.*, 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146 (1927), which dealt with an identical statute in Colorado.

Application of Statutes.

In General.

The gravamen of the offense defined in the Cartwright Act is the combination to prevent competition in prices. It is not necessary to allege that the defendants controlled the trade or had a monopoly in the particular commodity. *People v. Sacramento Butchers' Protective Ass'n*, 12 Cal. App. 471, 107 Pac. 712 (1910).

A contract fixing the resale price of a commodity is valid where the vendor does not control the trade in the particular commodity. *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912) (ground chocolate); *Munter v. Eastman Kodak Co.*, 28 Cal. App. 660, 153 Pac. 737 (1915) (photographic supplies).

A contract providing for traffic arrangements to prevent ruinous competition between two water companies having connecting water mains is valid. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. 495 (1895).

Contracts between an association of stevedores and its members, fixing prices and providing for the distribution of profits are valid since the prices fixed are reasonable and the restraint of trade is limited to the members of the association. *Herriman v. Menzies*, 115 Cal. 16, 46 Pac. 730 (1896).

Several employers entered into an agreement with four hospitals for "hospital protection" by deducting \$1 per month from employees' wages. The agreement was held valid and not a conspiracy to injure

the business of plaintiff, a hospital not included in the plan, as the employees were not prohibited from going to the plaintiff hospital. *Union Labor Hospital Ass'n. v. Vance Redwood Lumber Co.*, 158 Cal. 551, 112 Pac. 886 (1910).

A contract between a trade association and labor union providing that the union shall allow its members to work only for members of the association is valid where membership in the association is open to all and where the object is to secure proper wages and hours for union members. A labor contract is not within the provisions of the antitrust law. *Overland Publishing Co. v. Union Lithograph Co.*, 57 Cal. App. 366, 207 Pac. 412 (1922).

The antitrust law was violated where an associate of butchers by agreement sold meat to nonmembers at higher prices than paid by members. *People v. Sacramento Butchers' Protective Ass'n*, 12 Cal. App. 471, 107 Pac. 712 (1910). See also *Overland Publishing Co. v. Crocker Co.*, 193 Cal. 109, 222 Pac. 812 (1924).

An agreement between wholesale bakers to boycott retailers not maintaining certain retail prices for bread is in violation of the Cartwright Act. *People v. Jevne Co.*, 179 Cal. 621, 178 Pac. 517 (1919).

Under Civil Code section 1673 prohibiting contracts whereby persons are restrained from exercising a lawful trade, an agreement between competing companies by which sale areas were divided, quotas of total business fixed and prices controlled, is void as in restraint of trade. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581 (1892).

Contracts between a trade association of cleaners and its members fixing minimum prices and eliminating competition between members of the association are invalid under Civil Code section 1673. *Endicott v. Rosenthal*, 216 Cal. 721, 16 Pac. (2d) 673 (1932); aff'g. 6 Pac. (2d) 321 (Dist. Ct. App. 1931).

Procedure and Remedies.

To bring an action under the Cartwright Act, the party "injured in business or property" must have been injured not only by actions of the alleged illegal combination but "by the unlawful restrictions in trade and commerce." A mere combination by defendant will not sustain action under the antitrust law unless the injury is suffered because of an illegal restraint on plaintiff directly in furtherance of the combination. *Krigbaum v. Sbarbo*, 23 Cal. App. 427, 138 Pac. 364 (1913); *Munter v. Eastman Kodak Co.*, *supra*.

An allegation that defendant conspirators combined with a labor union to destroy the business of plaintiff by boycott states a cause of action under the Cartwright Act for double damages. *Overland Publishing Co. v. Crocker Co.*, *supra*.

Under the permissive part of section 1 of the act, the plaintiff need not negative facts permitting associations organized to market commodities at a reasonable profit. The existence of such facts is to be pleaded and proven by the defendant. *People v. Jevne Co.*, 179 Cal. 621, 178 Pac. 517 (1919).

A conspiracy illegal under the statute can be effectuated by conduct, tacit agreement or mutual understanding. An express agreement need not be shown. *People v. Sacramento Butcher's Protective Ass'n*, *supra*.

A private person "injured in business or property" by a combination illegal under the Cartwright Act can recover double damages but cannot enjoin the illegal practices. See *Overland Publishing Co. v. Union Lithograph Co.*, *supra*.

That plaintiff is a member of an illegal combination is no defense to an action on an obligation not resulting from such combination. *Mortgage Guarantee Co. v. Patch*, 116 Cal. App. 584, 3 Pac. (2d) 35 (1931).

A bill to enjoin the breach of a covenant by a retiring partner not to compete was met with a cross bill praying that the dissolution of the partnership be rescinded because the continuing partner had fraudulently concealed the fact that the retiring partner's interest was increased in value from \$17,500 to \$25,000 by certain combinations and arrangements consummated with competitors. The cross bill was held demurrable. An injunction for the plaintiff was reversed only on the ground of plaintiff's failure to establish succession of interest. *Meyers v. Merillion*, 118 Cal. App. 352, 50 Pac. 662 (1897).

While the statute does not expressly so provide, the offense defined in the act is a misdemeanor. *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006 (1909).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Gen. Laws (Deering, 1937)

Resale Price Maintenance

Act 8782 permits contracts fixing the sale or resale price of branded commodities. The statute is inapplicable to horizontal contracts between producers, between wholesalers, or between retailers as to sale or resale prices. Sec. 2. Sec. 55.5 (d) of the Alcoholic Beverage Control Act, Gen. Laws (Deering, 1937) Act 3796, is to the same effect.

Agric. Code (Deering, 1937)

Section 1218 provides that a cooperative agricultural marketing association organized under Sections 1191 to 1221 shall not be deemed

to be a conspiracy or combination in restraint of trade or an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Gen. Laws (Deering, 1937) Act 2947h

Section 28 provides that a cooperative association for the manufacture, processing, canning, and distribution of fishery products organized under the act, sections 1 to 31, shall not be deemed to be a conspiracy or combination in restraint of trade or an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Commodities

Several statutes regulating competition in particular commodities provide that compliance with the statute shall be a valid and complete defense to any action brought under the anti-trust law. Agric. Code (Deering, 1937) sec. 1300.24 (d) (agricultural commodities); sec. 750 (manufactured dairy products); Gen. Laws (Deering, 1937) Act 146, sec. 16 (agricultural products), Act 2666, sec. 14b (processed foodstuffs). See Vol. *State Price Control Legislation: Administrative Price Control*.

Judicial Decisions

Cooperatives.

The marketing contracts between a cooperative marketing association and its members are not invalid under the proviso of the anti-trust law making the statute inapplicable to associations organized for the purpose of marketing its members' products at a reasonable profit. *Anaheim Citrus Fruit Assn. v. Yeoman*, 51 Cal. App. 759, 197 Pac. 959 (1921); *Poultry Producers of Southern California Inc. v. Barlow*, 189 Cal. 278, 208 Pac. 93 (1922); *California Bean Growers' Ass'n. v. Rindge Land & Navigation Co.*, 199 Cal. 168, 248 Pac. 658 (1926). See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Resale Price Maintenance.

A contract fixing the resale price of a commodity is valid in the absence of a combination to fix prices, the prices fixed being reasonable. *Munter v. Eastman Kodak Co.*, *supra*. The Cartwright Act permitting agreements to market commodities at a reasonable profit

validates resale price restrictions. *Ghirardelli Co. v. Hunsicker*, *supra*. See *State Price Control Legislation; Resale Price Maintenance*.

The offenses described in the Cartwright Act are practices by a horizontal combination. A wholesaler's refusal to sell to a retailer in order to maintain retail prices is therefore not a violation of the statute. *Munter v. Eastman Kodak Co.*, *supra*. See also, *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909).

Labor Agreements.

An agreement between a printers' trade association and a labor union whereby the union agreed to work only for members of the association for the purpose of enforcing certain restraints of trade created by the association is illegal under the antitrust law, notwithstanding the proviso exempting labor. Under the proviso a labor union may engage only in lawful acts for a legitimate object. *Overland Publishing Co. v. Crocker Co.*, 193 Cal. 109, 222 Pac. 812 (1924).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Civ. Code (Deering, 1937)

Railroads

Section 465 (12) provides that no railroad corporation shall purchase the property or hold the stocks or bonds of any railroad corporation operated in competition with it.

Gen. Laws (Deering, 1937)

Railroads—Oil Pipe Lines

Act 5634 provides that contracts, combinations in the form of trusts, and agreements between common carrier railroads and oil pipe lines, not common carriers, which transport crude oil, petroleum or the products thereof for a distance of at least thirty-five miles in the aggregate to any refinery or to any selling, marketing, consuming, or shipping point for such commodities, whereby such oil pipe lines secure or are enabled to secure unreasonable control or monopoly or to bring about unreasonable restraint of competition in the purchase, sale, or transportation of such commodities, are illegal.

The statute further provides that such a combination shall be deemed illegal, in restraint of trade, and contrary to public policy whenever:

(a) Such oil pipe line is constructed along the right-of-way of such railroad for a distance of at least five miles with the permission of such railroad, the oil pipe line is owned or controlled by the railroad or the pipe line and the railroad have common owners or directors, and the pipe line is engaged in the business or purchasing, transporting, and reselling petroleum or its products; and

(b) The schedule of rates for the transportation of such commodities filed by the railroad with the railroad commission is so high, compared to the actual cost of transportation, as to tend to prevent competition in such transportation between the oil pipe line and the railroad, to prevent competition among producers of such crude oil or petroleum or enable the oil pipe line to restrain competition, secure a monopoly, fix the price in the sale or purchase of such commodities, or secure a monopoly in the transportation of such commodities.

The statute defines "unreasonable" as the point at which the nature and extent of the restraint or control is injurious to the public welfare or hinders the necessary public use of the subject controlled or restrained.

The penalty for violation of the statute is a fine not exceeding \$5,000 or imprisonment not exceeding one year or both. The several district attorneys in the state are charged with the duty of enforcing the act and any person damaged by any violation may sue and recover actual damages. The statute further provides that upon violation, such oil pipe line shall either secure a license as a common carrier, subject to the complete supervision of the railroad commission, or secure from the railroad commission permission to procure a license from the Secretary of State to continue in business otherwise than as a common carrier, subject to the prohibitions set forth above, or, as a further alternative, cease to operate and do business.

The act includes several sections setting out the procedure to be followed in securing a license and requiring the filing of monthly reports with the railroad commission on the operation of the business.

Banks

Act 654, section 1 (c) provides that no corporation organized in the state to engage in the business of international and foreign banking without the United States shall purchase, own, or control the stock of another corporation which is or which controls the stock of a corporation which is in substantial competition with the purchasing corporation. Such a corporation shall not purchase, own, or control

the stock of any corporation engaged in the general business of buying or selling goods, wares, merchandise, or commodities in the United States. It is further provided that no such corporation shall control or fix the price of any such commodities. The license of any corporation violating these prohibitions is subject to forfeiture. Any agent of such a corporation is subject to fine or imprisonment or both.

Agric. Code (Deering, 1937)
Packing and Stockyards

Sections 430 to 433 provide that no packer shall own or control, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents or employees, any interest in a stockyard.

Gen. Laws (Deering, 1937)
Livestock

Act 372 provides that combinations or agreements to prevent any person from buying livestock, to fix the amount or minimum amount of commission in the sale of livestock received by commission merchants, to prevent a person from acting as commission merchant in livestock for such persons as see fit to engage his services, or to prevent the sale of livestock by commission merchants on such terms as they and the owners of such livestock shall agree, are unlawful.

The act, sections 2 and 3, further provides that any rule, regulation, or bylaw of any corporation which has the purpose or tendency of preventing its members or stockholders from purchasing livestock from any person lawfully having the same for sale, is unlawful and void. The penalty for violation of the statute is a fine or imprisonment of not more than one year, or both. Any person damaged by any violation may sue and recover actual damages sustained.

Hydroelectric Companies

Act 9152, section 28 provides that contracts, combinations, or conspiracies between hydroelectric companies, whether through leases, trusts, or other devices, to limit the output, increase the price, or prevent the lowering of the price of electric power or to restrain trade in the generation, sale, and distribution of electric power are prohibited. All rights to the appropriation or the use of water in the state shall be forfeited by any person, firm, or corporation violating this Act by proceedings to be instituted by the Attorney General either on his own initiative or upon demand of the Water Commission. Violation of the provisions of the Act or any order or regulation of the Water Commission is declared a misdemeanor, punishable by fine or jail sentence or both.

Agric. Code (Deering, 1937)

Food

Section 1161 provides that it is unlawful to destroy articles of food, fit for human consumption, in restraint of trade. Any person receiving any agricultural products for sale on commission or for sale for the benefit of any other person must secure a permit from the proper board of health or health officer before destroying such food.

Gen. Laws (Deering, 1937), Act 3796

Liquor

Section 16 provides that no retailer's on-sale license shall be issued to any person to whom or for any premises for which a manufacturer's, importer's, wholesaler's, or rectifier's license shall have been issued, and vice versa. Section 16 $\frac{1}{2}$ provides that rectifiers or wholesalers of distilled spirits shall be issued a retail package off-sale license only for the same premises for which their rectifier's or wholesaler's license was issued, except as otherwise permitted in this act.

Section 20 $\frac{1}{2}$ provides that no distilled spirits license of any kind except a manufacturer's or agent's license shall be issued to any person or to any officer, director, employee, or agent of any person who manufactures distilled spirits within or without this State. No distilled spirits manufacturer's or agent's license shall be held by any person who holds ownership or interest, directly or indirectly, by stock ownership, interlocking directors, trusteeship, loan, mortgage, or lien on any personal or real property or otherwise, in any distilled spirits wholesaler's, rectifier's, or retailer's license. Provisions of this section shall not be deemed to prevent the issuance of a wholesale license to any person who owns or operates a business which for 5 years immediately preceding the effective date of this act has maintained and operated in this State a bona fide jobbing and distributing establishment for the sale to retail dealers of goods, wares, and merchandise, the major portion of which business at the time of said effective date was goods, wares, and merchandise other than alcoholic beverages.

Laws 1939, c. 16, sec. 1, provides that no manufacturer, manufacturer's agent, rectifier, distiller, bottler, importer, or wholesaler or any officer, director, or agent of any such person shall—

(a) Hold the ownership, directly or indirectly, of any interest in any "on-sale" license;

(b) Furnish, give, or lend any money or other thing of value, directly or indirectly, to any person operating, owning, or maintaining any "on-sale" premises, nor guarantee the repayment of any loan or the fulfillment of any financial obligation of any such person;

(c) Furnish, give, rent, lend, or sell, directly or indirectly, any equipment, fixtures, or supplies, other than alcoholic beverage, directly or indirectly, to any person engaged in operating, owning, or maintaining any "on-sale" premises where alcoholic beverages are sold for consumption on such premises, provided that this subdivision shall apply only to manufacturers, bottlers, importers, or wholesalers of products of the brewing industry;

(d) Furnish, give, lend, or rent directly or indirectly to any person any decorations, painting, or signs except interior signs of designated size, or in any way pay for the privilege of a sign or window display on any such premises where alcoholic beverages are sold at retail;

(e) Own any interest, directly or indirectly, in the business, furniture, fixtures, signs, refrigeration equipment, or lease in or of any premises operated or maintained under any "on-sale" license, or in realty hereafter acquired upon which such "on-sale" premises are maintained unless permitted by regulations of the board;

(f) Own or control any interest directly or indirectly by stock ownership, interlocking directors, trusteeship, or mortgage of the premises or fixtures covered by the off-sale distilled spirits license other than their individual premises; except that any stockholder, member, officer, or director of a corporation or association, which held a wholesaler's distilled spirits license which was in force on May 1, 1937, or any renewal thereof under this act, may hold or own off-sale distilled spirits licenses other than those for which such wholesaler's distilled spirits license was issued;

The provisions of this subdivision shall not apply to any off-sale distilled spirits license held or to be held by any wholesaler when such off-sale distilled spirits license is necessary to enable said wholesaler to operate or continue to operate any concession or leased retail stand in any hotel, which concession or stand is required to be operated by such wholesaler pursuant to any lease or contract entered into prior to the effective date of this subdivision and such retail off-sale distilled spirits license may be issued to any such wholesaler for such premises and purposes.

The provisions of this subdivision shall not apply for a period of 1 year after the effective date of this section to any ownership or control, stock ownership, mortgage or direct or indirect interest in any off-sale distilled spirits license issued in the name of another person or the premises covered by said license by any distilled spirits manufacturer, rectifier, or wholesaler, when such ownership, interest, control, stock ownership or mortgage existed prior to May 1, 1937, and also provided that such ownership, control, or interest shall be disclosed to the board, in accordance with regulations adopted in connection therewith, within a period of 60 days after the effective date of this section and provided further that nothing in this subdivision shall prohibit any holder of a distilled spirits manufacturer's, manufacturer's agents, rectifier's or wholesaler's license or any officer, employee, or representative of such manufacturer, rectifier, or wholesaler from acting as a trustee for any off-sale distilled spirits licensee in any bankruptcy or other proceedings for the benefit of the creditors of such off-sale distilled spirits licensee.

(g) Directly or indirectly, deliver the possession of any alcoholic beverages to any "on-" or "off-sale" licensee under an agreement of consignment whereby title to such alcoholic beverages is retained by the seller or whereby such licensee receiving such beverages has the right at any time prior to sale to relinquish possession to or return them to the original seller;

(h) Directly or indirectly, give any licensee or any person any alcoholic beverages as free goods as a part of any sale or transaction involving alcoholic beverages;

(i) Give secret rebates or make any secret concessions to any licensee or the employees or agents of said licensee and no licensee shall request or knowingly accept from another licensee secret rebates or secret concessions;

(j) Wilfully or knowingly discriminate, in the same trading area, either directly or indirectly, in the price of any brand of distilled spirits sold to different retail licensees purchasing under like terms and conditions;

(k) Pay, credit, or compensate a retailer or retailers for advertising, display, or distribution service in connection with the advertising and sale of distilled spirits;

(l) Directly or indirectly, hold the ownership or any interest by stock ownership or otherwise, in any firm, corporation, partnership, or business, furnishing, supplying or dealing in any office, store, or restaurant furnishings or equipment, other than signs for interior use or supplies authorized to be given under this act to any person engaged in operating, owning, or maintaining any on-sale premises, provided that this subdivision shall apply only to manufacturers, bottlers, importers, and wholesalers of products of the brewing industry.

Any person violating any provision of this section shall be guilty of a misdemeanor and any holder of any retail on-sale or retail off-sale license who shall solicit the violation of the provisions of this section or accept or permit to be accepted on his behalf and with his consent any of the prohibited matters, articles, or acts herein designated shall be guilty of a misdemeanor: *Provided, however,* That the provisions of this section shall not apply to any equipment, fixtures, or supplies furnished, given, lent, or sold prior to the passage of this act so long as such equipment, fixtures, or supplies remain in the premises in which installed prior to such time, nor shall the provisions of this act apply to carbonic acid gas or tapping accessories furnished to any one on-sale licensee to a limit of not exceeding a value of \$5 per tap in any 1 calendar year.

Gen. Laws (Deering, 1937), Act 3796

Section 54.5 provides that no on-sale licensee or any officer, director, employee, or agent of such licensee shall hold any ownership or interest, directly or indirectly, in any manufacturer's, rectifier's, importer's or wholesaler's license issued under this act or the business conducted under such license or the property used in such business.

Section 65 provides that every person convicted for a violation of any of the provisions of this act for which another penalty or punishment is not specifically provided for herein, shall be guilty of a misdemeanor and shall be punished by a fine of not more than \$500 or by imprisonment in the county jail for not more than 6 months, or by both.

See *Tying Contracts and Exclusive Dealing Arrangements*.

2. Public Contract Provisions**School Code (Deering, 1937)****Textbooks**

Section 6.405 provides that in giving the necessary bond to secure approval of the State Board for the use and sale of schoolbooks in the state, the publisher shall agree not to become associated or connected with any combination to restrain trade in textbooks or to control prices or restrict competition in the sale of schoolbooks. See projected Vol. *Governmental Purchasing*.

Gen. Laws (Deering, 1937)**Cities of the First Class**

Act 5233, section 107 provides that in the letting of contracts by cities of the first class, the board of aldermen, having reason to believe that bidders have combined together to prevent genuine bidding, may reject all bids and advertise for bids anew. See projected Vol. *Governmental Purchasing*, **MARKETING LAWS SURVEY** Series.

3. Anticoercive Financing Statutes**Gen. Laws (Deering, 1937)**

Act 5137 (Stats. 1935, p. 1755). Sec. 1. Contracts invalidated.—It shall be unlawful for any person who is engaged, either directly or indirectly, in the manufacture or wholesale distribution of motor vehicles to sell or enter into a contract to sell motor vehicles, to any person who is engaged or intends to engage in the business of selling such motor vehicles at retail in this state, on the condition or with an agreement or understanding, either express or implied, that such person so engaged in selling motor vehicles at retail shall in any

manner finance the purchase or sale of any one or number of motor vehicles only with or through a designated person or class of persons or shall sell and assign the conditional sales contracts, chattel mortgages or leases arising from the sale of motor vehicles or any one or number thereof only to a designated person or class of persons, when the effect of the condition, agreement, or understanding so entered into may be to lessen or eliminate competition, or create or tend to create a monopoly in the person or class of persons who are designated, by virtue of such condition, agreement, or understanding to finance the purchase or sale of motor vehicles or to purchase such conditional sales contracts, chattel mortgages, or leases, and any such condition, agreement, or understanding is hereby declared to be void and against public policy of this state.

Sec. 2. Threats as evidence.—Any threat, expressed or implied, made to any person engaged in the business of selling motor vehicles at retail in this State by any person engaged, either directly or indirectly in the manufacture or distribution of motor vehicles, that such person will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell motor vehicles, to such person who is so engaged in the business of selling motor vehicles at retail, unless such person finances the purchase or sale of any one or number of motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages, or leases arising from his retail sales of motor vehicles or any one or number thereof only to a designated person or class of persons shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell the same on the condition or with the agreement or understanding prohibited in section 1 of this act.

Sec. 3. Threat presumed to have been authorized.—Any threat, expressed or implied, made to any person engaged in the business of selling motor vehicles at retail in this State by any person, or any agent of any such person, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles in this State and is affiliated with or controlled by any person engaged, directly or indirectly in the manufacture or distribution of motor vehicles, that such person so engaged in such manufacture or distribution shall terminate his contract with or cease to sell motor vehicles to such person engaged in the sale of motor vehicles at retail in this State unless such person finances the purchase or sale of any one or number of motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales

contracts, chattel mortgages, or leases arising from his retail sale of motor vehicles or any one or any number thereof only to such person so engaged in financing the purchase or sale of motor vehicles or in buying conditional sales contracts, chattel mortgages, or leases on motor vehicles, shall be presumed to be made at the direction of and with the authority of such person so engaged in such manufacture or distribution of motor vehicles, and shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell the same on the condition or with the agreement or understanding prohibited in section 1 of this act.

Sec. 4. Subsidies and discriminations forbidden.—It shall be unlawful for any person who is engaged directly or indirectly in the manufacture or wholesale distribution of motor vehicles to pay or give to or contract to pay or give any subsidy to any person other than an automobile dealer or automobile distributor, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail within this State or to discriminate in favor of or against any person, other than an automobile dealer or automobile distributor, engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail within this State, if the effect of any such subsidy or discrimination may be to lessen or eliminate competition or to create or tend to create a monopoly in the person or class of persons who receive such subsidy or who are benefited by such discrimination.

Sec. 5. Acceptance of subsidy or benefit forbidden.—It shall be unlawful for any person other than an automobile dealer or automobile distributor who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail within this State to accept or receive or contract or agree to accept or receive either directly or indirectly any subsidy or the benefit resulting from any discrimination as set forth in section 4 of this act from any person engaged directly or indirectly in the manufacture or wholesale distribution of motor vehicles if the effect of the acceptance or receipt of any such subsidy or benefit may be to lessen or eliminate competition or to create or tend to create a monopoly in the person or class of persons who receives such subsidy or who are thus benefited by such discrimination.

Sec. 6. Financing after receipt of subsidy forbidden.—It shall be unlawful for any person other than an automobile dealer or automobile distributor who hereinafter so accepts or receives either di-

rectly or indirectly any subsidy or the benefit resulting from any discrimination as set forth in section 5 of this act or hereafter so contracts either directly or indirectly to receive any such subsidy or benefit to thereafter finance or attempt to finance the purchase or sale of any motor vehicle or buy or attempt to buy any conditional sales contracts, chattel mortgages, or leases on motor vehicles sold at retail in this State.

Sec. 7. Suits for forfeiture of charter rights, etc.—For a violation of any of the provisions of this act by any corporation or association mentioned herein, it shall be the duty of the Attorney General or the district attorney of the proper county, to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the State.

Sec. 8. Foreign corporation violating act forbidden to do business in state.—Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises or functions of a corporation in this State, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any business in this State, and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise. The Secretary of State shall be authorized to revoke the license of any such corporation or association heretofore authorized by him to do business in this State.

Sec. 9. Violation of act a misdemeanor.—Any person who shall violate any of the provisions of this act, any person who is a party to any agreement or understanding, or to any contract prescribing any condition prohibited by this act, any employee, agent or officer of any such person who shall participate, in any manner, in making, executing, enforcing, performing, or in urging, aiding or abetting in the performance of any such contract, condition, agreement or understanding and any person who shall pay or give or contract to pay or give any thing or service of value prohibited by this act, and any person who shall receive or accept or contract to receive or accept any thing or service of value prohibited by this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00) or be imprisoned in a county jail not exceeding six months, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

Sec. 10. Contracts in violation of statute void.—Any contract or agreement in violation of the provisions of this act shall be absolutely void and shall be enforceable either in law or in equity.

Sec. 11. Provisions cumulative.—The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

Sec. 12. Right of injured person to recover damages.—In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to amount in controversy, and recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

Sec. 13. Definitions.—(a) The term “person,” as used in this act, means any individual, firm, corporation, partnership, association, trustee, receiver, or assignee for the benefit of creditors.

(b) The terms “sell,” “sold,” “buy,” and “purchase,” as used in this act, include exchange, barter, gift, and offer of contract to sell or buy.

(c) The term “wholesale distribution” as used in this act shall mean the sale or distribution of motor vehicles or any interest therein by the manufacturer thereof, or by any person directly or indirectly owned by such manufacturer.

Sec. 14. Short title.—This act shall be known and shall be cited as Automobile Dealers’ Anti-Coercion Act.

Sec. 15. Constitutionality.—If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

II. CONTRACTS NOT TO COMPETE

Civ. Code (Deering, 1937)

Sec. 1673. Contract in restraint of trade, void.—Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void. (Enacted 1872.)

Sec. 1674. Exception in favor of sale of good will.—One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein. (Enacted 1872.)

Sec. 1675. Exception in favor of partnership arrangements.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof. (Enacted 1872.)

Judicial Decisions

Restrictive Covenant Ancillary to the Sale of a Business.

At common law where the restraint is reasonable, a contract not to compete is valid if ancillary to the sale of a business to protect the good will thereof. *California Steam Navigation Co. v. Wright*, 6 Cal. 258 (1856); *Streeter v. Rush*, 25 Cal. 67 (1864). Under this rule, a contract not to engage in a similar business in the entire state is invalid as an unreasonable restraint of trade. *Wright v. Ryder*, 36 Cal. 342 (1868); *More v. Bonnet*, 40 Cal. 251 (1870). Where a vendor agreed not to engage in any branch of an industry, there being no limitation as to place, the restraint is invalid. *Callahan v. Donnelly*, 45 Cal. 152 (1872). See also *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388 (1896).

The cleaning and dyeing industry is a "business" under section 1673. *Endicott v. Rosenthal*, 216 Cal. 721, 16 Pac. (2d) 673 (1932) aff'g. 6 Pac. (2d) 34 (1931).

The searching or abstracting of records and titles is a "business" within the meaning of section 1674. *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628 (1898).

While section 1674 limits a contract not to compete to the same county, section 1675 limits such a contract to the same city or town. *Du Bois v. Padgham*, 18 Cal. App. 298, 123 Pac. 207 (1912).

Under section 1674 a contract not to compete in the same county and two contiguous counties is valid only as to the county in which the business is located. *City Carpet-Beating, etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841 (1894). Where the limitation as to territory would have been reasonable at common law, the court will uphold the contract only to the extent of the limitation permitted under the statute. *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249 (1899); *City Carpet-Beating Co. v. Jones*, 102 Cal. 506, 36 Pac. 841 (1894).

Section 1673, stating that contracts not within the exceptions in sections 1674, and 1675 are "to that extent void" means that such contracts will be upheld only insofar as permitted by statute, the invalid limitation being stricken out. *General Paint Corporation v. Seymour*, 124 Cal. App. 611, 12 Pac. (2d) 990 (1932) (contract not to compete in State good for county where business is located); *Edward v. Mullin, supra* (contract not to compete in specified territory equal to half the State, good for city where business located); *Stephens v. Bean*, 65 Cal. App. 779, 224 Pac. 1022 (1924) (unlimited covenant good for city).

Upon the sale of a business, a contract not to compete for a specific term of years is valid. As the restraint was reasonable at common law, the court will read into the contract the statutory limitation "as long as buyer is carrying on a like business." *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995 (1894); *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973 (1911); *Akers v. Rappe*, 30 Cal. App. 290, 158 Pac. 129 (1916). As in the case of territorial limitations, section 1673 saves that portion of a time limitation permitted by statute. *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995 (1884); *Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576 (1895).

The clause "any person deriving title from him" in section 1674 limits the right of enforcement to the vendee of the purchaser and does not include all persons deriving title under the purchaser. *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973 (1911).

Section 1673 prohibits all contracts in restraint of trade, whether partial or not, subject only to the exceptions under sections 1674 and 1675. *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479 (1916). Cf. *Davis v. Jointless Fire Brick Co.*, 300 Fed. 1, (C. C. A. 9th, 1924).

Where a contract for the sale of a business contains an illegal contract not to engage in the same business, the court will disregard the invalid restraint and uphold the remainder of the contract. *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*,

184 Cal. 21, 192 Pac. 847 (1920); *Rossiter v. Thompson*, 66 Cal. App. 491, 226 Pac. 806 (1924).

A contract not to engage "in a similar business" contemplates and includes an agency to carry on a similar business. *Meyers v. Meril-lion*, 118 Cal. 352, 50 Pac. (1897).

The clause "as long as vendee engages in business" implies a "similar business" so as to bring a contract not to compete within the provisions of section 1674. *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162 (1906).

A contract not to engage in a similar business includes employ-ment in a similar business. *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973 (1911).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

The term "business" in section 1674 is broad enough to include the medical profession and the sale of medical practice. *Crutchett v. Lawton*, 139 Cal. App. 411, 33 Pac. (2d) 839 (1934).

Restrictive Covenants Ancillary to Employment.

Where defendant was employed as exclusive sales agent for plastic furnace lining in California and agreed not to sell a competing prod-uct for 2 years after the termination of the agency, this was held invalid as an unreasonable restraint. *Davis v. Jointless Fire Brick Co.*, 300 Fed. 1 (C. C. A. 9th, 1924).

Contracts not to compete after termination of employment entered into by employees upon the commencement of employment have been interpreted under the Labor Code section 2860 (Civil Code sec. 1985) which provides that everything an employee acquires by virtue of his employment, except his compensation, belongs to his employer. Such a contract is not void under section 1673 of the Civil Code as being a contract in restraint of trade. See *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 130 Pac. 1180 (1913).

Restrictive Covenants Contained in a Deed.

A condition subsequent in a deed prohibiting the sale of liquor in the property conveyed is invalid where the object is to secure a monop-oly in the business to the grantor. *Burdell v. Grande*, 152 Cal. 376, 92 Pac. 1022 (1907). Such a condition is valid, however, where the question of monopoly is not involved. *Los Angeles Land & Water Co. v. Kane*, 96 Cal. App. 418, 274, Pac. 380 (1929).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

A contract between the assignor and assignee of an invention under which the assignor agreed not to engage in the sale of orchard heaters

embodying the invention is void as in restraint of trade. *Summerhays v. Scheu*, 10 Cal. App. (2d) 574, 52 Pac. (2d) 512 (1936).

An agreement between parties to divide the sales territory of the State of California between them and that each would not compete with the other, is not within purview of section 1675 and is void under section 1673. *Edwards v. Mullin*, 220 Cal. 379, 30 Pac. (2d) 997 (1934) reversing 24 Pac. (2d) 936 (1933).

An order of a referee in selling the assets and good will of a bankrupt insurance agency corporation, whereby the employees of the bankrupt corporation are restrained from using in an unrestricted area confidential information and customer lists of the corporation is invalid under section 1674. A violation of such an order is not a contempt. *Beauchamp v. United States*, 76 Fed. (2d) 663 (C. C. A. 9th, 1935).

A contract under which plaintiff assigned executory contracts for the purchase of salt to defendant, agreed to purchase all salt required during the next 2 years from defendant, and further agreed not to purchase salt from any other party is invalid under section 1673. *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 81 Pac. 416 (1905).

A stockholder selling shares of stock has no vendible interest in the good will of the business of the corporation and a contract not to engage in a business similar to the corporate business made upon the sale of the corporate stock is not within the statutory exception and is therefore void under section 1673 as in restraint of trade. *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 57 Pac. 468 (1899); *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879 (1904); *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479 (1916); *Cavasso v. Downey*, 45 Cal. App. 780, 188 Pac. 594 (1920); *California Linoleum & Shades Supplies, Inc. v. Schultz*, 105 Cal. App. 408, 287 Pac. 980 (1930).

In order to keep control of the corporation an agreement between purchasers of stock in a corporation to vote their shares in a block for 5 years is not invalid under section 1673, the contract merely restraining disposition of property. *Smith v. San Francisco & North Pacific Ry. Co.*, 115 Cal. 584, 47 Pac. 582 (1897).

Petitioner covenanted not to manufacture any machines for use anywhere at any time in manufacture of metal venetian blinds for anyone other than parties to an agreement without their consent, or for 10 years thereafter. The court held that this constituted an illegal restraint of trade contrary to Civ. Code, sec. 1673. *Hunter v. Superior Court in Riverside County*, 97 Pac. (2d) 492 (1939).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Agric. Code (Deering, 1937) Cooperatives

Section 1208 provides that a cooperative marketing association may enter into contracts with its members, requiring the members to sell all or any specified part of their agricultural products or specified commodities exclusively to or through the association for a period of not over 15 years, and that these marketing agreements shall not be deemed illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Gen. Laws (Deering, 1937)

Act 2947h, section provides that a cooperative marketing association for the manufacture, processing, canning, and distribution of fishery products may enter into contracts with its members, requiring the members to sell all or any specified part of their fishery products or specified commodities exclusively to or through the association for a period of not over 15 years and that these marketing agreements shall not be deemed illegal or in restraint of trade. Sec. 28. See *Exceptions to General Antitrust Laws, supra*.

Liquor

Laws 1939, c. 16, provide that no manufacturer, manufacturer's agent, rectifier, distiller, bottler, importer, or wholesaler or any officer, director, or agent of any such person shall give or furnish, directly or indirectly, to any employee of any holder of a retail on-sale or off-sale license only, anything of value for the purpose or with the intent to solicit, acquire, or obtain the help or assistance of any such employee to encourage or promote either the purchase or the sale of the alcoholic beverage sold or manufactured by the licensee giving or furnishing any such thing of value, and any such employee who shall accept or acquire any such thing of value contrary to the provisions of this subdivision shall be guilty of a misdemeanor. See *Special Antitrust Laws: Liquor*.

Judicial Decisions

A condition in an installment sale of gas ranges that until payments were completed vendee would purchase from vendor exclu-

sively all gas that was required at the place where equipment was installed is invalid as tending to stifle competition and create monopoly. The defendant being a public utility, the extent of the restraint is immaterial. *Combs v. Burk*, 40 Cal. App. 8, 180 Pac. 59 (1919).

An ancillary agreement that defendant, purchaser of filling station equipment on installment basis, agrees to purchase his entire requirements of gasoline and oil from conditional vendor exclusively is invalid under Civil Code section 1673 as in restraint of trade. *Fidelity Credit Assurance Co. of California v. Cosby*, 90 Cal. App. 22, 265 Pac. 372 (1928). See also *Vath v. Hallett*, 21 Cal. App. 290, 160 Pac. 1065 (1916), where an agreement under which plaintiff made loans to defendant liquor dealers on condition that defendants purchase all liquor supplies from plaintiff was held invalid and unenforceable for vagueness and lack of mutuality of obligation.

Exclusive Dealing Arrangements.

The provision in a cooperative marketing agreement that the grower sell all his products through the association is valid. *Poultry Producers of Central California Inc. v. Nilsson*, 197 Cal. 245, 239 Pac. 1086 (1925); *Poultry Producers of Central California Inc. v. Murphy*, 64 Cal. App. 450, 221 Pac. 962 (1923); *California Canning Peach Growers v. Downey*, 76 Cal. App. 1, 243 Pac. 679 (1925); *California Prune & Apricot Growers Inc. v. Baker*, 77 Cal. App. 393, 246 Pac. 1081 (1926); *California Bean Growers' Ass'n v. Sanders*, 86 Cal. App. 689, 261 Pac. 717 (1927); *Colma Vegetable Ass'n v. Bonetti*, 91 Cal. App. 103, 267 Pac. 172 (1928); *California Canning Peach Growers v. Harris*, 91 Cal. App. 654, 267 Pac. 512 (1928). See *General Antitrust Laws: Cooperatives, supra*.

Under Civil Code section 1673, a contract under which defendant agreed to sell limestone only to plaintiff and to no other person for a period of 6 months is not illegal as being in restraint of trade. *Schwalm v. Holmes*, 49 Cal. 665 (1875).

A contract whereby defendant leased property to plaintiff for storage of petroleum products and advertising purposes and plaintiff licensed defendant to use the property for the purpose of selling plaintiff's and other specified petroleum products at prevailing prices is not invalid under section 1673. Defendant was enjoined from selling petroleum products not specified in the license. *Associated Oil Co. v. Myers*, 217 Cal. 297, 18 Pac. (2d) 668 (1933); *General Petroleum Corporation of California v. Loughead*, 218 Cal. 554, 24 Pac. (2d) 457 (1933).

A contract whereby the plaintiff agreed to purchase warehouse receipts from defendant for all the whiskey plaintiff sells in the

state and not to sell whiskey from any other distillery as long as defendant will not sell its warehouse receipts in the State to any other person, except one, is valid under Civil Code section 1673. The contract was not in restraint of trade but aided plaintiff in promoting its business. *Great Western Distillery Products Inc. v. John A. Wathen Distillery Co.*, 10 Cal. (2d) 442, 74 Pac. (2d) 745 (1937) aff'g. 66 Pac. (2d) 717 (Dist. Ct. App. 1936).

Defendants contract to sell lumber to plaintiff only for a period of one year in aid of plaintiff's plan to control the supply is an unlawful restraint of trade. *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391 (1888).

A contract under which defendant agreed to sell grain bags manufactured by him to plaintiff exclusively is void as such contract is part of a scheme to create a monopoly. Plaintiff actually controlled 75 percent of the annual supply of the article. *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36 (1891).

An exclusive dealing arrangement for the sale of lobsters during the closed season in California and several other States was held invalid in an action for failure to accept lobsters as agreed. *Morey v. Paladini*, 187 Cal. 727, 203 Pac. 760 (1922).

A contract restraining trade may be invalid under Civil Code section 1673 whether the restraint is partial or complete. *Morey v. Paladini, supra*. Where the contract is reasonable, competition is not stifled and the public interest is not involved, the agreement is valid. *Associated Oil Co. v. Myers, supra*. See also, *Great Western Distillery Products, Inc. v. John A. Wathen Distillery Co., supra*, where the court stated that if the public welfare is not involved and the restraint upon one party is not greater than the protection required by the other, the contract will be sustained even though trade may be restrained in some degree.

Under Civil Code section 1673 providing that any contract whereby anyone is restrained from exercising a lawful trade is "to that extent void," a contract of sale containing a clause in restraint of trade will be upheld as to the valid provisions; the illegal terms will be disregarded. *Fidelity Credit Assurance Co. of California v. Cosby, supra*.

COLORADO



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. Ann. (Michie, 1935), c. 167

Sec. 1. Trust defined—Prohibited.—A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any, or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce, or commodities.

Third. To prevent competition in the manufacturing, making, transportation, sale, or purchase of merchandise, produce, ores, or commodities, or to prevent competition in aids of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state shall, in any manner, be controlled or established.

Fifth. To make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure; or

by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others so as to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or commodity; or by which they shall agree so to pool, combine, or unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected.

And all such combinations are hereby declared to be against public policy, unlawful and void; provided, that no agreement or association shall be deemed to be unlawful or within the provisions of this chapter, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided, further, that it shall not be deemed to be unlawful, or within the provisions of this chapter, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize, or own any interest in any association, firm, or corporation having as its object or purpose the transportation, marketing, or delivering of such commodities; and, provided further, that labor, whether skilled or unskilled, is not a commodity within the meaning of this chapter. [L. '13, p. 613, sec. 1; C. L., sec. 4036.]

Sec. 2. Lawful agreements.—It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage, or increase competition in any trade or industry, or which are in furtherance of trade. [L. '13, p. 614, sec. 2; C. L., sec. 4037.]

Sec. 3. Actions to forfeit charter.—For a violation of any of the provisions of this chapter by any corporation, or by any of its officers or agents mentioned herein, it shall be the duty of the attorney general of this state, or district attorney of any district in which said violation may occur, or either of them, upon his own motion to institute an action in any court in this state having jurisdiction thereof for the forfeiture of the charter, rights, and franchise of such corporation, and the dissolution of its existence. [L. '13, p. 614, sec. 3; C. L., sec. 4038.]

Sec. 4. Foreign corporations violating chapter.—Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this state, violating any of the provisions of this chapter, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney general to enforce this provision by bringing

proper proceedings by injunction or otherwise. [L. '13, p. 615, sec. 4; C. L., sec. 4039.]

Sec. 5. Violations of chapter—Penalty.—Each and every person, company, or corporation, the officers, agents, or representatives thereof, violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not more than one thousand dollars, or to imprisonment for not more than six months; and it shall be the duty of the attorney general of the state, or the district attorney of any district in the state, in which said violation shall occur, or either of them, to prosecute and enforce the provisions of this chapter. [L. '13, p. 615, sec. 5; C. L., sec. 4040.]

Sec. 6. Contracts in violation of chapter void.—Any contract or agreement in violation of any of the provisions of this chapter shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of this chapter. [L. '13, p. 615, sec. 6; C. L., sec. 4041.]

Sec. 7. Action for damages.—Any person, firm, company, or corporation that may be damaged by any such agreement, trust or combination described in section 1 of this chapter, may sue for and recover in any court of competent jurisdiction in this state, of any person, company or corporation operating such trust or combination, such damages as may have been thereby sustained. [L. '13, p. 615, sec. 7; C. L., sec. 4042.]

Sec. 8. Incriminating testimony.—In any proceeding pending in any court of record brought or prosecuted by the attorney general, or any district attorney, for the violation of any of the provisions of this chapter, no person shall be excused from attending, testifying or producing books, papers, schedules, contracts, agreements, or any other document, in obedience to the subpoena or under the order of such court, or any commissioner or referee appointed by said court to take testimony, or any notary public, or other person or officer authorized by the laws of this state to take depositions, when the orders made by such court, or judge thereof, included a witness whose deposition is being taken before such notary public or other officer, on the ground or for the reason that the testimony or evidence required of him may tend to criminate him or subject him to any penalty; but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary

or otherwise, before any such court, person, or officer. [L. '13, p. 615, sec. 8; C. L., sec. 4043.]

Stat. Ann. (Michie, 1935) c. 48
Conspiracy Statute

Sec. 177. If any two or more persons shall conspire or agree to charge or indict or be informed against or cause to procure to be charged or indicted or informed against any person for any criminal offense, or conspire to do, or to aid in doing any unlawful act, each of the persons so offending shall upon conviction be punished.

L. 1937, c. 261
Discriminations

Section 1 provides that it shall be unlawful for any person engaged in the production, manufacture, distribution, or sale of any commodity or service to discriminate as to price between different localities with the intent to destroy the competition of any dealer in such commodity. Motion picture film is not a commodity under this act. The act does not apply to services regulated by the Colorado Public Utilities Commission. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of Common Law.

A combination tending unreasonably to stifle competition is illegal at common law. Neither actual stifling of nor intent to stifle need be shown. The finding of a tendency as above described is sufficient. *Burns v. Wray Farmers' Grain Co.*, 65 Colo. 425, 176 Pac. 487 (1918). The Grain Company, a co-operative, adopted a bylaw providing for the payment of 1 cent per bushel to the company for each bushel sold by any of its members to any person competing with its company. It was held that this provision tended to stifle competition, and therefore was invalid. See also *Atkinson v. Colorado Wheat Growers' Association*, 77 Colo. 559, 238 Pac. 1117 (1925).

NOTE.—The methods indicated in the above cases were legalized by the 1923 Cooperative Marketing Act (Stat. Ann. [Michie, 1935], c. 106). In the *Atkinson case, supra*, the contracts were entered into prior to the passage of the act.

A combination of wholesale and retail dealers in food products to control prices and prevent others who were not members of the combination from purchasing said products, was held to be a criminal conspiracy. *Denver Jobbers' Ass'n v. Peoples ex rel Dickson, Att'y Gen.*, 21 Colo. App. 326, 122 Pac. 404 (1912).

Refusal of members of an association of builders and contractors in Denver to bid on a building job if other nonmembers' bids were received held not an illegal restraint. Since it appeared that the association had only 15 members as against more than 50 nonmember builders and contractors in the city no coercion or intimidation was shown. *Masters Builders' Ass'n v. Domascio*, 16 Colo., App. 25, 63 Pac. 782 (1901).

The general manager of a corporation, who took possession of a mill leased by him to the corporation, cannot interpose, as a defense to the corporation's action to quiet title, the illegality of the corporation. *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo 516, 108 Pac. 27 (1910).

Constitutionality of Statutes.

The Colorado antitrust law was held unconstitutional in *Cline v. Frink Dairy Company*, 9 Fed. (2d) 176, aff'd., 274 U. S. 445 (1927), on the ground that it violated the due-process clause of the Federal Constitution. The "reasonable profit" provisos were condemned as setting too uncertain a standard of legality. The court said:

These provisos make the line between lawfulness and criminality to depend upon: first, what commodities need to be handled according to the trust methods condemned in the first part of the act to enable those engaged in dealing in them to secure a reasonable profit therefrom; second, to determine what generally would be a reasonable profit for such a business; and third, what would be a reasonable profit for the defendant under the circumstances of his particular business.

The lower court, however, had proceeded on the theory that the act was in violation of the equal-protection clause since the exemption of agricultural cooperatives from its provisions established an unreasonable classification.

Application of Statutes.

The following cases were decided before the antitrust law was held unconstitutional in the *Cline case, supra*. It was held that contracts involving labor were not exempt from the provisions of subdivision 1 of Stat. Ann. (Michie, 1935), c. 167 (L. 1913, c. 161), and if their "obvious and natural tendency" was to achieve a monopoly, they were illegal under the act. An agreement by a master plumbers association and a local union that the former would employ only

members of latter and the latter would work only for the former is illegal. The tendency is to create a monopoly in the business of plumbing. Though labor is not a "commodity" within the price-control provision of the antitrust law (L. 1913, c. 161), a combination which controls a certain type of labor, in effect, controls the price of the commodity on which the labor is to be used and is unlawful under the act. *Campbell v. People*, 72 Colo. 213, 210 Pac. 841 (1922); *Johnson v. People*, 72 Colo. 218, 210 Pac. 843 (1922).

An indictment under Stat. Ann. (Michie, 1935), c. 167 (L. 1913, c. 161), need not contain allegations negating the provisos of the Act. *People v. Apostolos*, 73 Colo. 71, 213 Pac. 331 (1923).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. Ann. (Michie, Supp. 1938), c. 165 Resale Price Maintenance

Section 20, subsections (1) to (5), permit contracts fixing the resale price of branded commodities. The act is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers. See Vol., *State Price Control Legislation*.

Stat. Ann. (Michie, 1935), c. 106 Cooperatives

Section 42 provides that no agricultural cooperative marketing association organized under sections 14 to 45 shall be deemed to be a conspiracy or combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperatives.

Application of Common Law.

See *Denver Jobbers' Ass'n. v. People ex rel. Dickson, supra*; *Burns v. Wray Farmers' Grain Co., supra*; *Atkinson v. Colorado Wheat Growers' Association, supra*.

Constitutionality of Statute.

The Colorado Cooperative Marketing Act (Stat. Ann. (Michie, 1935), c. 106 (L. 1923, c. 142)) is constitutional. The exemption of

"agricultural products" combinations cannot be said to be an arbitrary or unreasonable classification. *Rifle Potato Growers Cooperative Association v. Smith*, 78 Colo. 171, 240 Pac. 937 (1925).

Application of Statute.

The act legalizes the type of contract involved in the *Burns v. Wray case, supra. Rifle Potato Growers Cooperative Association v. Smith*, 78 Colo. 171, 240 Pac. 937 (1925).

The contract, to be valid, must be: (1) entered into after the act was passed; (2) authorized by the act and executed in compliance therewith; (3) made by and between an association formed under the act, and a member of such association. Thus, where a contract was entered into after 1923, but before the corporation was organized as an association pursuant to sec. 40, Stat. Ann. (Michie, 1935), c. 106, the contract is invalid. Contracts "heretofore made" under sec. 32 (c) Stat. Ann. (Michie, 1935), c. 106, are contracts made prior to the passage of the act, and therefore invalid. *Colorado Wheat Growers' Ass'n. v. Thede*, 80 Colo. 529, 253 Pac. 30 (1927).

The act (Stat. Ann. (Michie, 1935), c. 106, secs. 40 and 40 (a)) cannot be applied retroactively. *Atkinson v. Colorado Wheat Growers' Association*, 77 Colo. 559 Pac. 1117 (1925).

Stat. Ann (Michie, 1935), c. 106, sec. 41, insofar as it imposes civil liability was applied and sustained in *Fort v. Cooperative Farmers' Exchange, Inc.*, 81 Colo. 431, 256 Pac. 319 (1927). It was held that an injunction would lie restraining defendant from inducing breach of plaintiff's marketing contract, whether or not the acts complained of were criminal.

Persons, whether members of the association or not, conspiring to defeat objective of marketing contracts are equally liable for all damages sustained by the association. Stat. Ann. (Michie, 1935), c. 106, sec. 32 (c) *Monte Vista Potato Growers' Co-op. Ass'n. v. Bond*, 80 Colo. 516, 252 Pac. 813 (1927).

Under Stat. Ann (Michie, 1935), c. 106, sec. 32 (c) (L. 1923, sec. 19 (c)) a tenant taking a lease from an association member, with knowledge of his lessor's marketing contract, can be enjoined by the association from making disposition of his crops in a manner not provided. He is charged with knowledge of the statutory provisions relative to marketing contracts and is liable for all damages incurred because of such violation. *Wilson v. Monte Vista Potato Growers' Ass'n.*, 82 Colo. 428, 260 Pac. 1080 (1927).

STATE ANTITRUST LAWS

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Railroads

Const. art. XV, sec. 5, provides that no railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning or controlling a parallel or competing line.

Telegraph Companies

Const. art. XV, sec. 13, provides that no telegraph company shall consolidate with, control, or purchase any other competing telegraph line and company.

STATUTORY PROVISIONS

Stat. Ann. (Michie, 1935), c. 139

Railroads

Sections 7 and 13 provide that no railroad shall consolidate with, lease, purchase, or sell a competing or parallel line.

Stat. Ann. (Michie, 1935), c. 41

Railroads and Telegraph Companies

Section 57 provides that no railroad or telegraph company may consolidate its stock, property, or franchise with any other railroad or telegraph company having under its control a parallel or competing line of railroad or telegraph.

Stat. Ann. (Michie, 1935), c. 69

Food

Sections 41 to 46 provide that destruction of food, whether unripe or not, grown for human or animal consumption, by any person, firm, or corporation for the purpose of fixing or increasing the price thereof, limiting or diminishing the quantity thereof, establishing and maintaining a monopoly in such articles or products, or restraining trade therein in any manner, is unlawful. Proof of voluntary destruction of such food, unexplained, is prima facie violation of the act. The penalty for violation is a fine or imprisonment from 30 days to 1 year, or both.

Stat. Ann. (Michie, 1935), c. 89

Liquor

Section 28 provides that it shall be unlawful (1) for any manufacturer, wholesaler, or any other person interested financially in or with any of the above licensees, to be interested financially, directly

or indirectly, in the business of any retail licensee, and vice versa; (2) for the above licensees in any manner to furnish, supply, or loan, directly or indirectly, to any retail licensee any financial assistance, or any equipment, fixtures, except exterior signs, chattels, decorations, or furnishings used in the storing, handling, or serving of food or alcoholic beverages within the premises, or for making any structural alterations or improvements in or on the building on which such premises are located; (3) for any retail licensee to receive and obtain from the above licensees, directly or indirectly, any of the above aid or materials; (4) for any person directly or indirectly interested in any retail liquor establishment or license to conduct, own, either in whole or in part, or be directly or indirectly interested in any other such establishment or license; (5) for any person or corporate licensee or stockholder thereof, to be a stockholder or interested, directly or indirectly, in any company of any kind whatsoever which shall make, own, or be interested, directly or indirectly, in any loan to any licensee. Any transaction, agreement, or arrangement prohibited by the above provisions shall be unlawful, illegal, and void, and any obligation arising therefrom shall be unenforceable in any court of this state by or against any of the parties involved. The purpose of these provisions is to prohibit and prevent the control of retail outlets for the sale of alcoholic beverages by any person other than the retail licensee.

Section 41 provides that any person violating any of the provisions of this act, or any other rules and regulations pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000 for each offense, or may be punished by confinement in the county jail for not more than 1 year, or both. The court trying such offense may decree that the present license be revoked and that no license shall thereafter be issued to the person convicted of such violation. These penalties shall be construed to be in addition to any and all other penalties.

Section 7 provides that it shall be unlawful (1) for any manufacturer, wholesaler, or any person financially interested in or with any such licensees, to be interested financially, directly or indirectly, in the business of any retail licensee, and vice versa; (2) for them to furnish, supply, or loan, in any manner, directly or indirectly, to any retail licensee, any financial assistance, or any equipment, fixtures, except exterior signs, chattels, decorations, or furnishings used in the storing, handling, or serving of food or fermented malt beverages within the premises or for making any structural alterations or improvements in or on the building on which such premises are located; (3) for any retail licensee in any way to receive and obtain such assistance, etc.; (4) for any person or corporation holding any

license, or any stockholder of such corporation, to be a stockholder or to be interested, directly or indirectly, in any company whatsoever which shall make or own or be interested, directly or indirectly, in any loan to any licensee, or for themselves to make or be interested directly or indirectly, in any loan to any other licensee. Any transaction, agreement, or arrangement prohibited by the provisions of this section shall be unlawful, illegal, and void, unenforceable in any court of this state by or against any of the parties involved.

Section 14 provides that any person violating any of the provisions of this act, or of any rules and regulations pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than \$300 nor more than \$1,000 for each offense, or may be punished by confinement in jail for not more than 1 year, or both. Upon conviction, such person's license shall be revoked and no license shall thereafter be issued to said person. *See Tying Contracts and Exclusive Dealing Arrangements.*

2. Public Contract Provisions

Stat. Ann. (Michie, Supp. 1938), c. 130
Public Printing

Section 84 provides that the Governor may set aside any bid for public printing if he has reason to believe there was collusion between any bidders. See projected Vol., *Governmental Purchasing.*

Section 88 provides that any person who gives or receives any consideration as an inducement not to bid on a contract for public printing, or to abandon such bid, shall be guilty of a felony.

3. Anticoercive Financing Statutes

Stat. Ann. (Michie, Supp. 1938), c. 16

Sec. 407. Contract to finance, purchase, or sale of motor vehicles through designated agency unlawful and void.—It shall be unlawful for any person who is engaged either directly or indirectly, in the manufacture or distribution of motor vehicles, to sell or enter into contract to sell motor vehicles, whether patented or unpatented, to any person who is engaged or intends to engage in the business of selling such motor vehicles at retail in this state, on the condition or with an agreement or understanding, either express or implied, that such person so engaged in selling motor vehicles at retail shall in any manner finance the purchase or sale of any one or number of motor vehicles only with or through a designated person or class of persons or shall sell and assign the conditional sales contracts, chattel mortgages or leases arising from the sale of motor vehicles or any one or number thereof only to a designated person or class

of persons, when the effect of the condition, agreement or understanding so entered into may be to lessen or eliminate competition, or create or tend to create a monopoly in the person or class of persons who are designated, by virtue of such condition, agreement or understanding to finance the purchase or sale of motor vehicles or to purchase such conditional sales contracts, chattel mortgages or leases, any such condition, agreement or understanding is hereby declared to be void and against the public policy of this state. [L. '37, p. 316, sec. 1.]

Sec. 408. Threat prima facie evidence of violation.—Any threat, expressed or implied, made directly or indirectly to any person engaged in the business of selling motor vehicles at retail in this state by any person engaged, either directly or indirectly, in the manufacture or distribution of motor vehicles, that such person will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell motor vehicles, whether patented or unpatented, to such person who is so engaged in the business of selling motor vehicles at retail, unless such person finances the purchase or sale of any one or number of motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages or leases arising from his retail sales of motor vehicles or any one or number thereof only to a designated person or class of persons shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell the same on the condition or with the agreement or understanding prohibited in section 407. [L. '37, p. 317, sec. 2.]

Sec. 409. Threat made by agent of manufacturer or distributor prima facie evidence of violation.—Any threat, expressed or implied, made directly or indirectly, to any person engaged in the business of selling motor vehicles at retail in this state by any person, or any agent of any such person, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles in this state and is affiliated with or controlled by any person engaged, directly or indirectly, in the manufacture or distribution of motor vehicles, that such person so engaged in such manufacture or distribution shall terminate his contract with or cease to sell motor vehicles to such person engaged in the sale of motor vehicles at retail in this state unless such person finances the purchase or sale of any one or number of motor vehicles only or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages, or leases arising from his retail sale of motor vehicles or any one or any number thereof only to such person

so engaged in financing the purchase or sale of motor vehicles or in buying conditional sales contracts, chattel mortgages or leases on motor vehicles, shall be presumed to be made at the direction of and with the authority of such person so engaged in such manufacture or distribution of motor vehicles, and shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell the same on the condition or with the agreement or understanding prohibited in section 407. [L. '37, p. 318, sec. 3.]

Sec. 410. To pay or give or to contract to pay or give any thing of value or service to eliminate competition unlawful.—It shall be unlawful for any person who is engaged, directly or indirectly, in the manufacture or wholesale distribution only of motor vehicles, whether patented or unpatented, to pay or give, or contract to pay or give anything or service of value to any person who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles sold at retail within this state if the effect of any such payment or the giving of any such thing or service of value may be to lessen or eliminate competition, or tend to create or create a monopoly in the person or class of persons who receive or accept such thing or service of value. [L. '37, p. 318, sec. 4.]

Sec. 411. To accept or contract to accept any thing of value or service to eliminate competition unlawful.—It shall be unlawful for any person who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles sold at retail within this state to accept or receive, or contract or agree to accept or receive, either directly or indirectly, any payment, thing or service of value from any person who is engaged, either directly or indirectly, in the manufacture of (or) wholesale distribution only of motor vehicles, whether patented or unpatented, if the effect of the acceptance or receipt of any such payment, thing, or service of value may be to lessen or eliminate competition, or to create or tend to create a monopoly in the person who accepts or receives such payment, thing, or service of value, or contracts or agrees to accept or receive the same. [L. '37, p. 319, sec. 5.]

Sec. 412. Unlawful for any person who accepts or contracts to receive any payment or thing of value to buy or attempt to buy chattel mortgages, etc., on motor vehicles.—It shall be unlawful for any person who hereafter so accepts or receives, either directly or indirectly, any payment, thing, or service of value, as set forth in section 411 of this article, or hereafter so contracts, either directly or indirectly, to receive any such payment or thing or service of

value to thereafter finance or attempt to finance the purchase or sale of any motor vehicle or buy or attempt to buy any conditional sales contracts, chattel mortgages or leases on motor vehicles sold at retail in this state. [L. '37, p. 319, sec. 6.]

Sec. 413. Quo warranto proceedings for violation.—For a violation of any of the provisions of this article by any corporation or association mentioned herein, it shall be the duty of the attorney general or the district attorney of the proper county, to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state. [L. '37, p. 320, sec. 7.]

Sec. 414. Foreign corporation violating provisions forfeit right to do business in state. Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this state, violating any of the provisions of this article, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings by injunction or otherwise. The secretary of state shall be authorized to revoke the license of any such corporation or association heretofore authorized by him to do business in this state. [L. '37, p. 320, sec. 8.]

Sec. 415. Violation of article—Penalty.—Any person who violates any of the provisions of this article, any person who is a party to any agreement or understanding, or to any contract prescribing any condition prohibited by this article, and any employee, agent, or officer of any such person who shall participate, in any manner, in making, executing, enforcing, performing or in urging, aiding or abetting in the performance of any such contract, condition, agreement, or understanding and any person who pays or gives or contracts to pay or give any thing or service of value prohibited by this article, and any person who receives or accepts or contracts to receive or accept any thing or service of value prohibited by this article, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not less than \$50 nor more than \$5,000 or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense. [L. '37, p. 320, sec. 9.]

Sec. 416. Contract in violation of article void.—Any contract or agreement in violation of the provisions of this article, shall be absolutely void and shall not be enforceable either in law or equity. [L. '37, p. 321, sec. 10.]

Sec. 417. Provisions held cumulative.—The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state. [L. '37, p. 321, sec. 11.]

Sec. 418. Damages arising from violation of article twofold.—In addition to the criminal and civil penalties herein provided, any person who is injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this article, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount of controversy, and to recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this article is pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending or not. [L. '37, p. 321, sec. 12.]

Sec. 419. Definitions.—(a) The term "person," as used in this article, means any individual, firm, corporation, partnership, association, trustee, receiver or assignee for the benefit of creditors.

(b) The terms "sell," "sold," "buy," and "purchase," as used in this article, include exchange, barter, gift, and offer or contract to sell or buy. [L. '37, p. 322, sec. 13.]

Judicial Decisions

Electric Power.

A city's contract with one of two electric power plants in the city to furnish the city with street lights for 10 years is not invalid, since the city did not enter into an exclusive contract with the electric company, and the contract is not discriminatory nor is it in violation of the antitrust laws. *City of Denver v. Hubbard*, 17 Colo. App. 346; 68 Pac. 993 (1902).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

An agreement in connection with the sale of goodwill that the seller will not compete with the buyer is valid, if the public is not adversely affected, and if the restriction is no greater than is reasonably necessary for the buyer's protection. The court looks with favor on contracts for the sale of goodwill and will seek to enforce them whenever possible. Sale of plate-glass company with agreement not to compete for 10 years in Colorado was held valid. *Barrows v. McMurry Mfg. Co.*, 54 Colo. 432, 131 Pac. 430 (1913).

Seller's agreement not to "reside or work, in any capacity whatever," within a radius of eight blocks of location of a tailoring business sold was held valid, in view of the nature of the business, which can be carried on at home. *Garf v. Weitzman*, 72 Colo. 136, 209 Pac. 809 (1922).

Sale of bakery business with covenant not to compete limited territorially, but unlimited as to duration, was held valid. Wife and daughter of seller were likewise enjoined from operating or attempting to operate a competing bakery. *Weber v. Nonpareil Baking Co.*, 85 Colo. 232, 274 Pac. 932 (1929).

In a suit to restrain defendants from competing with plaintiff under an agreement not to compete entered into for the sale of a business, the burden of proof is on defendants to show that the transaction is bona fide and that the family ownership was not fictitious to avoid the restrictive covenant. *Id.*

Two persons, jointly owning two drug stores, sold them and agreed not to compete with the buyer for a period of 5 years within a radius of five blocks of the stores. One of the two vendors in violation of the agreement subsequently engaged in a similar business. A restraining order was granted as the agreement was held enforceable against both vendors jointly or severally. *Smith v. Woodward*, 51 Colo. 311, 117 Pac. 140 (1911).

Restrictive Covenants Ancillary to Employment.

A physician hired an assistant on a month-to-month basis, who agreed not to compete in the same city for a period of 5 years after

the employment terminated. The assistant having been employed for a number of years, the agreement was held to be reasonable. An employee's agreement not to compete with his employer at termination is valid, if the restraint is necessary for the protection of the employer, is of no longer duration than is necessary to protect employer's interest, is not injurious to the public, and is founded on legal consideration. *Freudenthal v. Espey*, 45 Colo. 488, 102 Pac. 280 (1909).

Agreement by a laundry employee not to solicit customers of employer for a period of 6 months was held reasonable. *Axelson v. Columbine Laundry Co.*, 81 Colo. 254, 254 Pac. 990 (1927). An agreement by a tea and coffee salesman not to compete by taking orders for teas, coffees, "or other merchandise," after termination of employment was held reasonable. Rule of *ejusdem generis* was applied to "or other merchandise." *Jewel Tea Co. v. Watkins*, 26 Colo. App. 494, 145 Pac. 719 (1915).

Restrictive Covenants Not Ancillary to Sale of a Business Interest.

In consideration of loans made by certain brewers to the Dacono Town Site Co., it was agreed that the real-estate firm would include covenants prohibiting the sale of liquor within restricted areas in their conveyances of land. Defendant, a purchaser of such land, violated the covenant, contending that the prohibition was illegal and in restraint of trade. The court held the covenant valid, notwithstanding the agreement between the brewers and real-estate firm. The court added that the sale of intoxicating liquors is injurious to the public and should be restrained. *Fusha v. Dacono Town Site Company*, 60 Colo. 315, 153 Pac. 226 (1915). (The court failed to discuss a number of relevant objections raised by the defense.)

Provision for payment of a fixed sum for violation of a covenant not to compete held void as a "penalty" where intended to coerce performance by the covenantor rather than to compensate the covenantee for nonperformance. *Gougar v. Buffalo Specialty Co.*, 26 Colo. App. 8, 141 Pac. 511 (1914). But on a second appeal the court held there was no jurisdiction over the subject matter of the case. *Buffalo Specialty Co. v. Gougar*, 26 Colo. App. 523, 144 Pac. 325 (1914).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (Michie, 1935), c. 106
Cooperatives

Sections 31 and 42 provide that an agricultural cooperative marketing association organized under sections 14 to 45 may enter into contracts with its members, requiring the members to sell for a period of not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, and that these agreements shall not be deemed illegal or in unlawful restraint of trade, or a conspiracy or combination to accomplish an illegal purpose. See *Exceptions to General Anti-Trust Laws, supra*. See also *Cooperatives* in projected study.

Liquor

Stat. Ann. (Michie, 1935) c. 89, sec. 28 provides that it shall be unlawful for any owner or person interested, directly or indirectly, in any retail business to enter into any agreement with any other person to receive, possess, or accept any money, fixtures, supplies, services, or things of value from any other person whatever, whereby a retail licensee may be influenced or caused directly or indirectly to buy, sell, dispense, or handle the product of any manufacturer of alcoholic beverages. See *Special Antitrust Laws: Liquor*.

Judicial Decisions

A railway company owning a strip of land at a railroad station may, unless there is evidence of injury to the public, grant to one taxi company an exclusive license to use the land as a hack stand, provided the other companies have free access to and from the station to deliver and take away passengers. *Union Depot and Ry. Co. v. Meeting*, 42 Colo. 89, 94 Pac. 16 (1908).

The burden was on defendant, a salesman having an exclusive sales territory, to show that the contract was illegal when he defended an action by the plaintiff company for the sales price of goods sold. Defendant contended that plaintiff manufacturing company illegally and arbitrarily fixed unreasonably high retail prices for said goods. *Richards v. Rawleigh Co.*, 74 Colo. 463, 222 Pac. 650 (1924).

CONNECTICUT

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. I, sec. 1. That all men when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive public emoluments or privileges from the community.

STATUTORY PROVISIONS

Gen. Stat. (1930)

Sec. 6352. Combination to increase price of necessities.—Any person who, for himself or as a member of any firm or an officer or agent of any corporation, shall conspire with or enter into any combination or agreement with any other person or any firm or corporation for the purpose of fixing or maintaining a higher price, at wholesale or retail, for ice, coal, or any other necessity of life, than would prevail except for such conspiracy, combination, or agreement, or of limiting or restraining the production, manufacture, shipment or sale of any such commodity for the purpose of increasing the price thereof, shall be fined not more than one thousand dollars or imprisoned not more than five years or both. 1918, S. 6503.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

Where one company agreed to manufacture copper bands for a second company with copper furnished by the latter, the object being to aid the latter in performing its contract to deliver the finished bands to a third party, the arrangement was held not to be monopolistic nor

in unreasonable restraint of trade even though by entering into the arrangement, the first-named company was estopped from attempting to obtain the contract for itself by underbidding the second company. *Seymour Mfg. Co. v. Derby Mfg. Co.* 94 Conn. 311, 109 Atl. 395 (1920).

A grant by the legislature of an exclusive right to erect and operate a toll bridge for a limited time (100 years) was held to be a valid exercise of its power essential to the public welfare. *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. 40 (1845).

Application of Constitutional Provisions.

An act, L. 1893, c. 121, authorizing the officers of municipalities to exercise their discretion in granting or refusing to grant licenses to itinerant vendors with power to grant special privileges to licensees. was held to be in violation of Const. art. I, sec. 1, prohibiting the grant of exclusive privileges in that it permits local officials to prohibit, at their will, the pursuit of a legitimate business. *State v. Conlon*, 65 Conn. 478, 33 Atl. 519 (1895).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Gen. Stat. (Supp. 1937) Resale Price Maintenance

Section 593d permits contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers. Sec. 593d (g). See Vol. *State Price Control Legislation: Resale Price Maintenance*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Gen. Stat. (Supp. 1935) Liquor

Section 1027c, as amended by L. 1939, c. 280, provides roughly for three classes of permits: manufacturer, wholesaler, and retailer. Section 1012c (10) defines "backer" as the proprietor of any business or club engaged in the manufacture or sale of alcoholic liquor, in which business a permittee is associated, whether as an employee, agent, or part owner.

Section 1047c, as amended by L. 1939, c. 333, provides that no backer or permittee of one class shall be a backer or permittee of

any other class, except in the case of railroad and boat permits. No permittee or backer thereof and no employee or agent of theirs shall borrow money or receive credit in any form for a period in excess of 30 days, directly or indirectly, from any alcoholic liquor manufacturer or backer thereof, or from any member of their families or from any stockholder in a corporation manufacturing or wholesaling such liquor, nor shall they lend money or otherwise extend credit, directly or indirectly, to any such permittee or backer thereof or to their employees or agents. The commission shall revoke or suspend any permit for a violation of this section.

Section 1083c provides that any person convicted of a violation of any provision of this chapter, for which a specified penalty is not imposed, shall for each offense, be fined not more than \$1,000 or imprisoned for not more than 1 year, or both.

2. Public Contract Provisions

Gen. Stat. (Supp. 1937)

Section 58d (f) provides that in the purchase of supplies by the state, upon evidence of an agreement to fix prices shown in the submission of bids containing the same unit prices or total amount, the State Supervisor of Purchases may reject the bids and purchase the supplies in the open market for the same or at a lesser price. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

Contracts not to compete ancillary to the sale of a business are valid when they are reasonably limited as to place and time, according to the nature of the business or circumstances of the sale. *Cook v. Johnson*, 47 Conn. 175 (1879).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

The plaintiff, a dentist, purchased the defendant's practice under an agreement that the latter would not practice dentistry thereafter "within a radius of 10 miles of Litchfield." It was held that the contract was reasonable and valid. The limitation was construed to mean "within 10 miles of the center of Litchfield." *Cook v. Johnson, supra.*

Where the defendant agreed not to practice dentistry for 10 years within 15 miles of Hartford, but with a provision that he might do so on paying plaintiff \$1,000, it was held that a court of equity would not enjoin the defendant from practicing in the proscribed territory but would remit the plaintiff to his action at law to recover the \$1,000. *Dills v. Doebler*, 62 Conn. 366, 26 Atl. 398 (1892).

Restrictive Covenants Ancillary to Employment.

A covenant restricting the activities of an employee during or after the termination of employment must be confined within reasonable limits of time and place. *May v. Young*, 125 Conn. 1, 2 Atl. (2d) 385 (1938); *Milanesio v. Calvanese*, 92 Conn. 641, 103 Atl. 841 (1918).

A contract barring a clothing-store manager from engaging in the clothing business for 5 years after his term of employment in any place where the employer had a store, is void as against public policy, as the services of a clothing-store manager are not peculiar, special, or extraordinary, and such contract unreasonably interferes with the employee's pursuit of a livelihood. *Samuel Stores, Inc. v. Abrams*, 94 Conn. 248, 108 Atl. 541 (1919).

A covenant by a salesman of delicatessen products that he would not solicit the patronage of his former employer's customers upon whom he had called during his employment, for a period of 1 year after the termination of such employment, is reasonable and valid. *Roessler v. Burwell*, 119 Conn. 289, 176 Atl. 126 (1934).

A contract, under which a physician employed an assistant, providing that the assistant would not engage in the practice of medicine in the same town after the termination of the employment, is valid. The agreement is based on a valid consideration. It does not unreasonably interfere with the assistant's liberty in pursuing his profession elsewhere. Although not specifically limited as to time, the contract will be construed as effective during the lifetime of the employer-physician. *Styles v. Lyon*, 87 Conn. 23, 86 Atl. 564 (1913).

III. TYING CONTRACTS AND EXCLUSIVE DEALING
ARRANGEMENTS

Gen. Stat. (1930)
Cooperatives

Section 3534 provides that a cooperative marketing association may enter into contracts with its members, requiring the members to sell all or any specified part of their agricultural products or specified commodities exclusively to or through the association for a period of not over ten years. See *Cooperatives* in projected study.

DELAWARE

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Rev. Code (1935)

Discriminations

Section 3124 provides that it shall be unlawful for any person selling products to discriminate as to price between different localities for the purpose of destroying or preventing competition. See Vol., *State Price Control Legislations: Antidiscrimination Legislation.*

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of Common Law.

"A manufacturer who has sold his product outright may not by contract with his purchaser, or by cooperative methods, or by confederation with others dictate and maintain a fixed retail price. Such contracts and such practices are unfair competition, are in restraint of trade, and are contrary to public policy." *Chicago Flexible Shaft Co. v. Katz Drug Co.*, 6 Fed. Supp. 193 (1934). See Vol. *State Price Control Legislation: Resale Price Maintenance.*

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

L. 1937, c. 132

Cooperatives

Section 10 provides that a cooperative association organized under sections 1 to 28 and dealing in agricultural products and supplies

shall not be deemed to be a combination in restraint of trade nor an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also vol., *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Rev. Code (1935)

Railroads

Sections 2177, 2178, 2211, and 2212 provide that railroad companies may consolidate, merge, or enter into leasing arrangements where the result will be one continuous line.

Telephone and Telegraph Companies

Section 2192 provides that telephone and telegraph companies may consolidate if the effect is to form one continuous line.

Boulevard Corporations

Section 2241 provides that any boulevard corporation or a corporation which has leased from any boulevard corporation the right to construct telegraph lines, wires for transmission of electricity, pipe lines, or other construction, may consolidate with any other corporation engaged in the same business, if such consolidation forms one continuous line.

Rev. Code (1935)

Liquor

Par. 6144. Section 15 (4) provides that no "manufacturer" or importer or "person" interested, either directly or as a partner or stockholder of a corporation, or in any other manner, in the "manufacture," blending, bottling, or in any manner preparing for sale any "alcoholic liquor" shall own or be interested as owner, partner, or stockholder in any "establishment" holding a license to "sell" "alcoholic liquor," either by the "bottle" or by the glass, to the consumer thereof, for consumption either on or off the premises where sold.

Par. 6174. Section 46 (4), as amended by L. 1937, c. 254, provides that whosoever shall violate any provision of this act or any regulation pursuant thereto for which no penalty is provided herein, shall be guilty of a misdemeanor and shall upon conviction, in addition to the payment of the costs, be subject to fine or imprisonment, or both, in the discretion of the court.

Par. 6175. Section 47 provides that wherever the penalty for an offense committed consists of imprisonment in whole or in part and

the accused is a corporation, partnership, or other association of persons, such penalty shall be replaced by a fine of \$2,000 in addition to the costs.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A contract not to compete made by the seller of a business is valid if its purpose is to protect the enjoyment and goodwill of the business purchased; the covenant not to compete inures to the benefit of all taking title from the original purchaser. *Pildish v. Schafer*, 20 Del. Ch. 350, 176 Atl. 117 (1934).

Restrictive Covenants Ancillary to Employment.

A covenant made by an employee not to compete with his employer after his term of employment is valid when the purpose is to protect the employer from the injury which the employee's subsequent activity might occasion and the terms of the restrictive covenant are reasonable as to time and place. *Capital Bakers' Inc. v. Leahy*, 20 Del. Ch. 407, 178 Atl. 648 (1934). The rule of severability is applied to covenants too broad as to the territory covered. *Ibid.*

An agreement not to "accept employment from any competitive concern" does not preclude engaging in the business as a principal. *General Baking Co. v. Soles*. 18 Del. Ch. 343, 162 Atl. 58 (1932), nor does an agreement not to be "concerned or interested" in the ice cream business prevent a former employee from occasionally giving advice to several manufacturers without remuneration. *State v. Baker*, 20 Del. Ch. 48, 169 Atl. 598 (1933).

Restrictive Covenants Not Ancillary to the Sale of a Business.

A traffic agreement by which one street railway company agreed not to build tracks within the limits of a city in which another street railway company operated was declared void in *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.*, 8 Del. Ch. 468, 46 Atl. 12 (1900).

Damages.

Damages are allowable for breach of contract not to compete in spite of uncertainty in amount. Impaired value and loss of volume of business are to be considered. *Scotton v. Wright*, 14 Del. Ch. 124, 122 Atl. 541 (1923).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

L. 1937, c. 132
Cooperatives

Section 10 provides that an agricultural cooperative association and its members may execute marketing contracts by which the members agree to sell any or all of their commodities exclusively to or through such association for any period of time and such marketing contracts shall not be deemed an illegal monopoly or contract in restraint of trade. The bylaws of the association may require a common stockholder to sell all or part of his products or buy all his supplies exclusively through the association. See *exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Judicial Decisions

Injunction is the proper remedy to prevent a seller of sand from selling to anyone but the complainant with whom the seller had contracted to furnish all sand manufactured for a 5-year period. *Cramer v. Lewes Sand Co.*, 15 Del. Ch. 329, 138 Atl. 78 (1927).

FLORIDA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Comp. Gen. Laws Ann. (Skillman, 1927)

Sec. 7944. "Trusts" defined.—A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes:

1. To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.
2. To increase or reduce the price of merchandise, produce, or commodity.
3. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce.
4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State.
5. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which

they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

Provided, however, That no agricultural or horticultural nonprofit cooperative association heretofore organized and incorporated or hereafter to be organized and incorporated under the laws of the State of Florida, nor the members, officers, agents, or employees thereof or any of them, as such, shall be deemed to be a trust or a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between any such association and its members, or between any two or more of such associations, be deemed to be a trust, or be considered illegal or in restraint of trade. (Ch. 6933, Acts 1915, sec. 1; Ch. 10283, Acts 1925, sec. 1.)

Sec. 7945. Forfeiture of charter of domestic corporations for violations.—Any corporation holding a charter under the laws of the State of Florida which shall violate any of the provisions of this Article shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine. (Ch. 6933, Acts 1915, sec. 2.)

Sec. 7946. Dissolution proceedings instituted by Attorney General, etc.—For a violation of any of the provisions of this Article by any corporation mentioned herein, it shall be the duty of the Attorney General or any State attorney, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings for the dissolution of its corporate existence. (Id., sec. 3.)

Sec. 7947. Foreign corporation violating Article denied right to do business in State.—Every foreign corporation violating any of the provisions of this Article is hereby denied the right, and prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction, or other proper proceedings, in the name of the State of Florida. (Id., sec. 4.)

Sec. 7948. Combinations prohibited; penalty.—If any person shall be or may become engaged in any combination of capital skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase or reduce the price of merchandise, produce, or commodities.

3. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State.

5. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between themselves and others in the sale or transportation of any such article or commodity or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out and others in the sale or transportation of any such article or commodity or by which they shall agree to pool, combine, or unite out any of the stipulations, purposes, prices, rates, directions, conditions, or orders of such combinations, shall be punished by a fine of not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

Provided, however, That no agricultural or horticultural nonprofit cooperative association heretofore organized and incorporated, or hereafter to be organized and incorporated under the laws of the State of Florida, nor the members, officers, agents, or employees thereof, or any of them, as such, shall be deemed to be a combination prohibited under the meaning of this section nor shall the marketing contracts or agreements between any such association and its members, or between any two or more of such associations, be deemed to have created a combination prohibited herein. (Ch. 6933, Acts 1915, sec. 5; Ch. 10283, Acts 1925, sec. 2.)

Sec. 7949. Sufficiency of indictment.—In any indictment or information for an offense named in this Article it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, or acted with, or in pursuance of, it, without giving its name or description, or how, when, or where it was created. (Ch. 6933, Acts 1915, sec. 6.)

Sec. 7950. Rule of evidence.—In prosecutions under this Article it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant or defendants belonged to it or acted for or in connection with it, without proving all members belonging to it, or providing, or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. General reputation may be given in evidence in all prosecutions of alleged combinations under the provisions of this Article. (Id. sec. 7.)

Sec. 7951. Criminal liability of nonresident.—Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this Article, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without this State. (Id., sec. 8.)

Sec. 7952. Daily penalty for continued violations.—Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this Article, shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Florida in any county where the offense is committed, and it shall be the duty of the Attorney General and the State attorneys and county solicitors to prosecute for and recover the same. (Id., sec. 9.)

Sec. 7953. Contract in violation of Article void.—Any contract or agreement in violation of the provisions of this Article shall be absolutely void and not enforceable either in law or equity. (Id., sec. 10.)

Sec. 7954. Officers authorized to subpoena witnesses to testify as to violations; testimony of witnesses.—Any court, officer, or tribunal having jurisdiction of the offense defined in this Article, or the Attorney General or any State attorney or county solicitor or grand jury, may subpoena persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of

the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections about which he may testify fully and without reservation. (Id., sec. 11.)

Comp. Gen. Laws Ann. (Skillman, 1927)
Discrimination

Sections 3939 to 3943 and 7871 provide that it shall be unlawful for any person selling products to discriminate as to price between different localities for the purpose of destroying the business of a competitor. See Vol. *State Price Control Legislations: Antidiscrimination Legislation*.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

At common law the validity of an agreement in restraint of trade turns on the question of reasonableness; it is unreasonable if injurious to the public welfare. Thus in *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 So. 19 (1908), a sawmill corporation employing a large number of persons leased a store, formerly used by it as a commissary for its employees, to the plaintiff, who agreed to maintain a general store and pay 5 percent of the gross receipts as rent. The lessor agreed to induce its employees to purchase from the lessee and to issue merchandise checks against employees' unpaid wages, redeemable at lessee's store. In an action for damages for breach of the agreement it was declared void as an unreasonable restraint of trade, since it gave the contracting parties power to control the available supply of commodities to a considerable portion of the local public. Monopoly or restraint need not be complete to be illegal.

Constitutionality of Statutes.

In *Brock v. Hardie*, 114 Fla. 670, 154 So. 690 (1934), the court stated that sections 7944 and 7954 sufficiently describe the offense, and are not so vague and indefinite as to violate the due process clause of the Fourteenth Amendment. The exemption of cooperatives does not deny equal protection of the law, since the classification is reasonable.

Application of Statutes.

In *Ricon v. Crosland*, 81 Fla. 574, 88 So. 380 (1921), two principal, competing fish dealers agreed to pool profits from their combined

operations. Each was to have the exclusive right to handle certain kinds of fish. Sale prices for the different kinds of fish were fixed, and in the pooling of profits, each party was allowed to deduct a fixed percentage for expenses incurred in handling. In an action for an accounting under this agreement, the defendant's demurrer was sustained. The contract was held in violation of the antitrust laws. Its obvious purpose was to lessen competition unreasonably to the injury of producers and consumers. See also *Massari v. Salciccia*, 102 Fla. 847, 136 So. 522 (1931), *Contracts Not to Compete, infra*.

Sections 7944 to 7954 do not apply to fire-insurance contracts. Insurance is neither produced, consumed, manufactured, transported, nor sold within the terms of the statute. *Brock v. Hardie, supra*.

A warrant for the arrest of a person for violation of sections 7944 to 7954 is defective if it fails to allege that the restraint of trade was so unreasonable as to be injurious to the public welfare. *Ibid*.

The proper remedy to revoke the right of a foreign corporation to do business in the State because of violation of the antitrust laws is a proceeding upon an information in the nature of quo warranto, instituted by the attorney general. *State ex rel. Landis v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823 (1934).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Comp. Gen. Laws Ann. (Skillman, Supp. 1938) Resale Price Maintenance

Sections 7100 (14) to 7100 (22) permit contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. Sec. 7100 (21). See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Comp. Gen. Laws Ann. (Skillman, 1927) Cooperatives

Sections 7944 and 7948 provide that no agricultural or horticultural nonprofit cooperative association shall be deemed to be a combination in restraint of trade, a trust, an illegal monopoly, an attempt to lessen competition or fix prices arbitrarily, or a combination prohibited by section 7948. See *General Antitrust Laws, supra*.

Comp. Gen. Laws Ann. (Skillman, Supp. 1936)

Section 6489 provides that an agricultural cooperative marketing association organized under sections 6466 to 6494 or any similar association organized under any other law of this state or of any other state, shall not be deemed to be a conspiracy, a combination in un-

lawful restraint of trade, an illegal monopoly, or an attempt to lessen competition or to fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Comp. Gen. Laws Ann. (Skillman, Supp. 1936)

Section 6509 provides that a nonprofit agricultural cooperative association shall not be deemed to be a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Comp. Gen. Laws Ann. (Skillman, Supp. 1938)

Section 6508 (4) provides that a cooperative association organized under sections 6508 (4) to 6508 (8) for the purpose of dealing in commercial sponges shall not be deemed to be a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperatives.

Section 6509, exempting agricultural and horticultural cooperative marketing associations from the operation of the antitrust laws is valid under both the State and Federal Constitutions. *Lee v. Clearwater Growers' Ass'n.*, 10 Fla. 214, 111 So. 722 (1927); *Jellesma v. Tampa Better Milk Producers' Cooperative*, 109 Fla. 200, 147 So. 463 (1933); *Brock v. Hardie*, 114 Fla. 670, 154 So. 690 (1934).

C. SPECIAL ANTITRUST LAWS

I. Special Industry Antitrust Acts

Comp. Gen. Laws Ann. (Skillman, Supp. 1938)
Copyrighted Musical Compositions

Sections 7954 (1) to 7954 (20) provide that it shall be unlawful for authors, composers, publishers, or owners of copyrighted musical compositions, to form any kind of partnership, association, or combination for the purpose of fixing license fees or other charges for the use or rendition of such compositions for public or private use, when the members of such combination form a substantial number of the persons within the United States owning or controlling copyrighted musical compositions. The fixing of such fees and the col-

lecting or attempting to collect such fees is declared illegal and in restraint of trade, and subjects the offender to a fine of not less than \$50 or more than \$5,000, and by imprisonment for not less than one or more than ten years. Any person injured by a violation of this law may recover damages. The statute specifically provides, however, that nothing therein shall prevent authors and composers from determining and fixing the price to be charged for their copyrighted musical compositions, provided they act independently of any such combination.

Comp. Gen. Laws Ann. (Skillman, Supp. 1936)
Liquor

Section 4151 (228) provides that, except as hereinafter provided, any liquor license applicant may receive a license as a manufacturer and distributor, but no license shall be issued to a manufacturer and distributor as a vendor, nor to a vendor as a manufacturer or distributor. Also, no manufacturer, rectifier, or distiller, manufacturing, rectifying, or distilling spirituous liquors, in any State other than the State of Florida shall be licensed as a distributor.

Section 4151 (230) provides that no licensed manufacturer or distributor shall have any financial interest directly or indirectly in the establishment or business of any licensed retail vendor, nor assist any vendor by gift or loan of money or any other property or by the giving of rebates of any kind whatsoever. No vendor shall directly or indirectly accept any such assistance. Exception is made for supplies to transport such beverages, advertising materials, and credit extensions or trade discounts in the usual course of trade or business.

Section 3 amending section 7648 (6), provides that violation of any sections of the act is a misdemeanor, punishable by imprisonment in the county jail for not more than 6 months or by a fine of not more than \$500, or both. Upon a second conviction, the violator shall be deemed guilty of a felony and shall be punished by imprisonment for not less than 1 year nor more than 5 years in the State penitentiary or fined not more than \$5,000, or both.

Comp. Gen. Laws Ann. (Skillman, 1927)
Meats

Sections 7075 to 7079 provide that it is against public policy to enter into any contract or combination to obstruct the lawful sale of Florida meat or any other fresh meat, or to attempt to monopolize or control the sale or price of such fresh meat. Any corporation violating these provisions shall forfeit its charter. The circuit courts of the state are given jurisdiction to enjoin any violation of this law

and to enjoy any raising or lowering of the price of fresh meat with the intent or the tendency to prevent the sale of such fresh meat.

**Comp. General Laws (1927)
Conspiracy Statute**

Section 7543 declares conspiracies to fix the price or limit the supply of meats to be a misdemeanor.

2. Public Contract Provisions

No statutory provisions.

3. Anticoercive Financing Statutes

Comp. Gen. Laws Ann. (Skillman, Supp. 1938)

Sec. 4151. (459) Sale of motor vehicles to dealers under agreement that purchase shall be financed through designated finance company; definitions of terms used in law.—(a) The term “person” or “persons” as used in this Chapter means any individual, firm, corporation, partnership, association, trustee, receiver or assignee for the benefit of creditors.

(b) The terms “sell,” “sold,” “buy,” and “purchase,” as used in this Chapter, include exchange, barter, gift, and offer to contract to sell or buy.

(c) The term “manufacturer” shall mean any person engaged, directly or indirectly, in the manufacture of motor vehicles.

(d) The term “wholesale distributor” shall mean any person engaged, directly or indirectly, in the sale or distribution of motor vehicles to agents or to dealers.

(e) The term “dealer” shall mean any person who is engaged in, or who intends to engage in the business of selling motor vehicles at retail in this State. The term “dealer” shall also include “retail agent.”

(f) The term “finance company” shall mean any person engaged in the business of financing the sale of motor vehicles, or engaged in the business of purchasing or acquiring conditional bills of sale, or promissory notes, either secured by vendor’s lien, or chattel mortgages, or arising from the sale of motor vehicles in this State. (Ch. 18031, Acts 1937, sec. 13.)

Sec. 4151. (460) Contracts declared void.—It shall be unlawful for any manufacturer or wholesale distributor of motor vehicles to sell or contract for the sale of motor vehicles to any motor vehicle dealer on the condition, or with the agreement or understanding, ex-

pressed or implied, that such dealer shall in any manner finance the purchase or sale of any one or number of motor vehicles only through a designated finance company or shall sell and assign the conditional sales contracts or chattel mortgages or other paper arising from the sale of motor vehicles or any one or number thereof only to a designated finance company, when the effect of the condition, agreement or understanding so entered into may be to lessen or eliminate competition, or create or tend to create a monopoly in the finance company who is designated, by virtue of such condition, agreement or understanding to finance the purchase or sale of motor vehicles, or to purchase such conditional sales contract, chattel mortgages or other paper, and any such condition, agreement or understanding is hereby declared to be void and against the public policy of this State. (Id. sec. 1.)

Sec. 4151. (461) Threats by manufacturer or wholesaler as prima facie evidence of intent to violate law.—Any threat, expressed or implied, made directly or indirectly, to any motor vehicle dealer, by any manufacturer, or wholesale distributor on authority or with the knowledge of any such manufacturer, or wholesale distributor, that such person will discontinue to sell, or will terminate a contract to sell motor vehicles to such dealer unless such dealer finances the purchase or sale of motor vehicles only with or through a designated finance company or sells and assigns the conditional sales contracts, chattel mortgages, or other paper arising from his retail sales of motor vehicles only to a designated finance company, shall be prima facie evidence of the fact that such manufacturer or wholesale distributor has sold or intends to sell motor vehicles, on the condition or with the agreement or understanding prohibited in section 4151 (460). (Id. sec. 2.)

Sec. 4151. (462) Threats by finance company presumed to be made at direction of manufacturer or wholesaler.—Any threat, expressed or implied, made directly or indirectly to any motor vehicle dealer, by any finance company or agent thereof, who is affiliated with or controlled by any manufacturer or wholesale distributor of motor vehicles, that such manufacturer or wholesale distributor shall terminate his contract with or cease to sell motor vehicles to such dealer unless such dealer finances the purchase or sale of motor vehicles only with or through a designated finance company or sells and assigns the conditional sales contracts, chattel mortgages, or other paper arising from his retail sales of motor vehicles only to a designated finance company, shall be presumed to be made at the direction of and with the authority of such manufacturer or wholesale distributor of motor vehicles, and shall be prima facie evidence

of the fact that such manufacturer or wholesale distributor of motor vehicles has sold or intends to sell motor vehicles on the condition or with the agreement or understanding prohibited in section 4151 (460). (Id., sec. 3.)

Sec. 4151. (463) Paying or giving anything to finance company to lessen competition.—It shall be unlawful for any manufacturer or wholesale distributor of motor vehicles, to pay or give, or contract to pay or give anything or service of value to any finance company if the effect of any such payment or the giving of any such thing or service of value may be to lessen or eliminate competition, or tend to create or create a monopoly in the finance company which receives or accepts such thing or service of value. (Id. sec. 4.)

Sec. 4151. (464) Acceptance of anything of value by finance company resulting in lessening of competition.—It shall be unlawful for any finance company to accept or receive, or contract or agree to accept or receive, either directly or indirectly, any payment, thing or service of value from any manufacturer or wholesale distributor of motor vehicles, if the effect of the acceptance or receipt of any such payment, thing, or service of value may be to lessen or eliminate competition, or to create or tend to create a monopoly in the person who accepts or receives such payments, thing, or service of value, or contracts, or agrees to accept or receive the same. (Id. sec. 5.)

Sec. 4151. (465) Acceptance of benefits by finance company with object of lessening competition.—It shall be unlawful for any finance company who hereafter so accepts or receives, either directly or indirectly, any payment, thing, or service of value, as set forth in section 4151 (464), or hereafter so contracts, either directly or indirectly, to receive any such payment or thing or service of value to thereafter finance or attempt to finance the purchase or sale of any motor vehicle or buy or attempt to buy any conditional sales contracts, chattel mortgages, or other paper on motor vehicles sold at retail in this State. (Id. sec. 6.)

Sec. 4151. (466) Suit by Attorney General or State attorney for violation of law.—For a violation of any of the provisions of this Chapter by any corporation mentioned herein, it shall be the duty of the Attorney General or the State attorney of the proper county, to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation, and for the dissolution of the same under the general statutes of the State. (Id., sec. 7.)

Sec. 4151. (467) Foreign corporations violating law denied right to do business in State.—Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this State, violating any of the provisions of this Chapter, is hereby denied the right and prohibited from doing any business in this State, and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction, or otherwise. The Secretary of State shall be authorized to revoke the license of any such corporation or association heretofore authorized by him to do business in this State. (Id., sec. 8.)

Sec. 4151. (468) Contracts in violation of law declared void.—Any contract or agreement in violation of the provisions of this Chapter shall be absolutely void and shall not be enforceable either in law or equity. (Id., sec. 10.)

Sec. 4151. (469) Remedy for persons injured by violation of law.—In addition to the criminal and civil penalties herein provided, any person who is injured in his business or property by any other person, by reason of anything forbidden or declared to be unlawful by this Chapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, and to recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before whom any proceeding under this Chapter is pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending or not. (Id., sec. 12.)

Sec. 4151. (470) Laws declared to be cumulative of other laws.—The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State. (Id., sec. 11.)

Sec. 4151. (471) Effect of partial invalidity of law.—If any section, subsection, sentence, clause, or phrase of this Chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Chapter. The Legislature hereby declares that it would have passed this Chapter, and each section, subsection, sentence, clause, and phrase thereof irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional. (Id., sec. 14.)

Sec. 8135. (39) Violation of law relating to certain contracts between manufacturers or wholesalers and dealers in motor vehicles.—Any person who violates any of the provisions of sections 4151 (459)—4151 (471), relating to contracts, etc., between manufacturers or wholesalers and dealers in motor vehicles resulting in lessening of competition, any person who is a party to any agreement or understanding, or to any contract prescribing any condition prohibited by said sections, and any employee, agent or officer of any such person, who shall participate, in any manner, in making, executing, enforcing, performing or in urging, aiding or abetting in the performance of any such contract, condition, agreement or understanding and any person who pays or gives or contracts to pay or give anything or service of value prohibited by said sections, and any person who receives or accepts or contracts to receive or accept anything or service of value prohibited by said sections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five thousand dollars, or by imprisonment in the county jail not less than six months, or more than one year, or by both such fine and imprisonment, at the discretion of the Judge. (Ch. 18031, Acts 1937, sec. 9.)

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

The defendant sold his interest in a grocery business to his partner and covenanted not to engage in the grocery business for 2 years. Although unlimited territorially, the restraint was held reasonable in a suit for injunction by the vendee, since there was no attempt to limit production or control prices of commodities in the market. *Massari v. Salcioccia*, 102 Fla. 847, 136 So. 522 (1931).

Restrictive Covenants Ancillary to Employment.

Equity will not enforce by injunction a contract not to compete, in the absence of some special interest of the employer involving good will or peculiar skill or knowledge of trade secrets acquired by the employee. Thus an injunction was refused against a bookkeeper in a wholesale liquor establishment who had contracted never again

to become employed in the liquor business in the State after the termination of his employment and who afterward entered the employ of a competitor. The knowledge he had gained as bookkeeper involved no trade secrets, nor did he establish a personal following among the plaintiff's customers. *Simms v. Burnette*, 55 Fla. 702, 46 So. 90 (1908). *Simms v. Patterson*, 55 Fla. 707, 46 So. 91 (1908) (held similarly with regard to a salesman and shipping clerk in the same business).

Covenants by drivers of laundry, ice, and towel service trucks, not to solicit or convey information regarding the employer's customers within a year following the termination of employment, have recently been held unenforceable upon the ground that the employer has no legally protected interest in good will which has been built up by reason of the employee's personal qualities. *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1935); *Nettles v. City Ice and Fuel Co.*, 118 Fla. 345, 160 So. 42 (1935); *Lewis v. Kirkland*, 118 Fla. 350, 160 So. 44 (1935); *Wheeler v. Mickles*, 118 Fla. 348, 160 So. 45 (1935); *Drew Co. v. Sanford*, 118 Fla. 279, 151 So. 545 (1933) (a per curiam decision discussed in full in *Love v. Miami Laundry Co.*, *supra*; in this case the contract of employment was terminable upon a week's notice).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Comp. Gen. Laws Ann. (Skillman, 1927) Cooperatives

Sections 7944 and 7948 provide that marketing contracts between an agricultural or horticultural nonprofit cooperative association and its members shall not be deemed to be trusts or be considered illegal or in restraint of trade or to have created a combination prohibited by section 7948. See *General Antitrust Laws, supra*.

Comp. Gen. Laws Ann. (Skillman, Supp. 1936)

Sections 6482 and 6489 provide that an agricultural cooperative marketing association organized under sections 6466 to 6494 or any similar association organized under any other law of this state or any other state, may enter into marketing contracts with its members requiring them to sell, for any period of time, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any agencies designated by the association, and that such contracts shall not be considered illegal

or in unlawful restraint of trade, or part of a conspiracy or combination to accomplish an illegal purpose. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Comp. Gen. Laws Ann. (Skillman, 1927) as amended by Comp. Gen. Laws Ann. (Skillman, Supp. 1936)

Sections 6509 and 6513 provide that an agricultural cooperative association organized under sections 6509 to 6515 (1) may enter into marketing contracts with its members requiring them to sell, for any period of time not over ten years, all or any specified part of their agricultural products exclusively to or through the association, and that such contracts shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Comp. Gen. Laws Ann. (Skillman, Supp. 1938)

Section 6508 (4) provides that no marketing contract between a cooperative association organized under sections 6508 (4) to 6508 (8) for the purpose of dealing in commercial sponges, and its members, shall be deemed illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

A contract by a cooperative marketing association with a member, whereby the latter agrees to sell his products exclusively to the association, is valid. *Lee v. Clearwater Growers' Assn.*, 93 Fla. 214, 111 So. 722 (1927). However, where such a contract is for a term of 5 years and binds the member to sell all his dairy products at a price which is below the cost of production and the member, in order to avoid irreparable loss, withdraws from the association and refuses to perform, a court of equity will not grant specific performance but will leave the association to its remedy in damages. *Miami Home Milk Producers' Assn. v. La Course*, 117 Fla. 345, 158 So. 117 (1934).

In *McQuaig v. Seaboard Oil Co.*, 96 Fla. 275, 118 So. 424 (1928), an oil company agreed to build and equip a filling station for a dealer and to sell him petroleum products at the lowest market price. The defendant was enjoined from violating his agreement to sell the company's products exclusively for a period of 10 years.

While the furnishing of adequate telephone and telegraph facilities is one of the duties of a common carrier, a railroad is not a common carrier in its dealings with telegraph companies. In *State ex rel. Postal Telegraph Cable Co. v. Wells*, 96 Fla. 591, 118 So. 731 (1928), the Postal Telegraph Co. sought to have the State Railroad Commission order a railroad terminal company to extend to the petitioner terminal facilities for carrying on the telegraph business equal to those enjoyed by the Western Union Co. under an exclusive arrangement. A writ for mandamus to compel the commissioner to entertain this petition was denied, the court holding that the railroad terminal company was not acting as a common carrier subject to the jurisdiction of the commission. Thus, the railroad, if it so wishes, could favor one telegraph company over another. In a dictum the court stated that the exclusive arrangement did not create an illegal monopoly and was not in restraint of trade.

An arrangement to issue merchandise checks against wages due, to be redeemed exclusively by a store company leasing from the employer, has been held invalid. See *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 So. 19 (1908), *General Antitrust Laws, supra*.

GEORGIA

1. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1877) art. IV, sec. 2-2504 (6466), par. IV. **Buying stock, etc., in other corporations; competition.**—The General Assembly of this State shall have no power to authorize any corporation to buy shares, or stock, in any other corporation in this State, or elsewhere, or to make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly; and all such contracts and agreements shall be illegal and void.

STATUTORY PROVISIONS

Code Ann. (Park et al, 1936)

Sec. 20-504. Contracts against public policy; illustrations.—A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty.

Sec. 26-7404. Forestalling, regrating, and engrossing.—Any person who shall commit the offenses known to the common law as forestalling, regrating, or engrossing shall be punished as for a misdemeanor.

1. "Forestalling" is the buying or contracting for merchandise or victual coming to market, or dissuading persons from buying their goods or provisions there, or inducing them to raise their prices.

2. "Regrating" is the buying of corn or other dead victuals in any market and selling it again in the same market at an enhanced price.

3. "Engrossing" is the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. Acts 1863-4, p. 46; Stats. 5 and 6 Edward VI; 115 Ga. 429, 448 (41 S. E. 553).

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

Restraints on trade as to particular places and persons or for a limited time if founded upon a good and valuable consideration are valid; while general restraints on trade are universally prohibited. But the restriction in a conveyance of property that it should never be used for a tavern held not an illegal restraint on trade and valid. *Holmes v. Martin*, 10 Ga. 503 (1851).

Purchase by one railroad of one-third of the stock of a competitor in order to control it and destroy competition between them is illegal. *Central Railroad Co. et al. v. Collins et al.*, 40 Ga. 582 (1869).

Constitutionality of Statute.

The Antitrust Act of December 23, 1896 (Acts 1896, p. 68), violates the fourteenth amendment to the Federal Constitution by denying the equal protection of the laws since it exempts "agricultural products or livestock while in the possession of the producer or raiser." *Brown & Allen et al. v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553 (1902).

The C Railroad could not purchase control of a railroad running parallel with its main line connecting the same terminal points without violating Const. art. IV, sec. 2, par. 4. *Langdon et al. v. Branch et al.*, 37 Fed. 449 (1888). See also *Hamilton et al. v. Savannah F. & W. R. Co. et al.*, 49 Fed. 412 (1892).

Where the president of a trust company was attempting to bring about a common control of the C Railroad and two competitors, the trust company would not be allowed to vote the stock of the railroad since that would violate Const. art. IV, sec. 2, par. 4. Foreign corporations would be similarly prohibited. *Clarke v. Central Railroad and Banking Co. of Georgia et al.*, 50 Fed. 338 (1892). See also *Georgia Granite R. R. Co. v. Miller*, 144 Ga. 665, 87 S. E. 897 (1916).

In considering whether or not a railroad has lessened competition, the results in their entirety must be looked to, including the effect upon the general public. The fact that competition was decreased at a few points will not alone make a railroad combination unlawful.

State v. Central of Georgia Ry. Co. et al., 109 Ga. 716, 35 S. E. 37 (1900).

It does not follow that because the number of competitors in a given business is diminished, that competition is lessened to the injury of the public. *Ibid.*

There was ample evidence in this case to authorize the conclusion that the consolidation of the two railroads did not and was not intended to defeat or lessen competition or to encourage monopoly within the meaning of Const. art. IV, sec. 2, par. 4, since one road was a feeder of the other; these roads were not competing lines, and since the public interest was not injured by the consolidation. *Ibid.*

Purchase by one railroad of a majority of the stock of a road capable of acting as a feeder to it was held not to lessen, but to create competition. *Weed et al. v. Gainesville, Jefferson & Southern Railroad Co. et al.*, 119 Ga. 576, 46 S. E. 885 (1903).

The meaning of Const. art. IV, sec. 2, par. 4 is that contracts and agreements between corporations to buy shares of stock in another corporation in Georgia which tend to defeat or lessen competition in the business of such corporation, or which may have the effect or tend to encourage monopoly are illegal and void. *Hamilton et al. v. Savannah, F. & W. Railroad Co. et al.*, *supra*.

This clause of the Constitution is self-operative and needs no legislation to enforce it, and the import of the clause may be regarded as prohibiting the legislature from changing the common law upon the subject. *Ibid.*

Const. art. IV, sec. 2, par. 4 is applicable to street railways as well as to other corporations but does not forbid a consolidation of two competitive companies to a limited extent when it appears that the result will be to provide better and cheaper facilities for the public. *Trust Co. of Georgia et al. v. State of Georgia*, 109 Ga. 736, 35 S. E. 323 (1900).

This section is declaratory of the common law and does not prohibit all corporations from buying stock in other corporations. *Id.* See also *Winter et al. v. Southern Securities Co. et al.*, 155 Ga. 590, 118 S. E. 214 (1923).

Application of Statutes.

In General.

A combination of the members of a retail drug association coercing a nonmember to sell merchandise at prices fixed by the association is contrary to public policy and void under section 20-504. *Brown & Allen et al. v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553 (1902).

A conspiracy by 58 retail drug stores against 1 cannot be justified by the contention that they are seeking to defend themselves against price cutting by a single proprietor, and it does not follow from the

freedom of individual dealers that all members of an association may lawfully enter into a general and unlimited agreement to purchase only from such dealers as will sell to members exclusively. The defendants were enjoined from carrying the conspiracy into effect. *Ibid.*

A combination of a group of printers in a city conspired to fix maximum prices, compel all printers in the city not to cut these prices, and divide the city's printing business among themselves was held void as their aim was to create a monopoly and stifle competition in the industry. The conspirators were held liable for damages sustained by a third person and were enjoined from continuing such practices. *Employing Printers Club et al. v. Doctor Blosser Co.*, 122 Ga. 509, 50 S. E. 353 (1905).

A provision in the bylaws of an insurance agents' association preventing business transactions with nonmembers constituted an illegal combination in restraint of trade, and an injunction issued to prevent its enforcement. *Atlanta Association of Fire Insurance Agents et al. v. McDonald*, 181 Ga. 105, 181 S. E. 822 (1935).

An agreement between an insurance company and an undertaking establishment that burial policies sold by the insurance company specifically provide that in case of death all funeral services be performed by the undertaking establishment was declared void in violation of section 20-504. The plaintiffs, undertakers in the area where such policies were sold, obtained an order restraining such practices. *Blackmon et al. v. Gulf Life Insurance Co. et al.*, 179 Ga. 343, 175 S. E. 798 (1934).

Agreement by one partner in a medical partnership to retire from the practice in consideration that the other partners pay him a fixed sum monthly, which payment was to be suspended in the event he subsequently reengaged in the practice, was valid and not within the prohibition provided for under section 20-504. *Scott v. Hull et al.*, 56 Ga. App. 467, 192 S. E. 920 (1937).

Franchises and Ordinances.

The legislature may authorize the public service commission to prescribe the conditions on which a public highway may be used by a carrier for the transportation of goods provided such regulation does not tend to create a monopoly in violation of section 20-504. *Georgia Public Service Commission et al. v. Saye & Davis Transfer Co.*, 170 Ga. 873, 154 S. E. 439 (1930).

A city ordinance fixing a maximum fare to be charged by busses and minimum and maximum fares to be charged by taxicabs was held not void as an attempt to create a monopoly or restrain trade. *Clem et al. v. City of La Grange et al.*, 169 Ga. 51, 149 S. E. 638 (1929).

Where jewelry dealers combined to secure passage of a city ordinance limiting the hours for sale of jewelry at auction and requiring the deposit of bonds by such auction sellers, the ordinance was held not invalid as in restraint of trade. *Clein et al. v. City of Atlanta et al.*, 164 Ga. 529, 139 S. E. 46 (1927).

An ordinance granting to private individuals an exclusive 25-year franchise for the slaughter of all except federally inspected meat in the city was held invalid as an attempt to create a monopoly thereby preventing all other butchers from slaughtering their own animals. *City of Waycross et al. v. Caulley*, 163 Ga. 372, 136 S. E. 139 (1926).

Persons Not Parties to Agreement or Combination.

Where a lease of water power provided for its assignment, the lessor could not obtain cancellation of the lease on the ground that the assignment tended to create a monopoly. *Columbus Railroad Co. et al. v. City Mills Co.*, 135 Ga. 626, 70 S. E. 242 (1911).

Plaintiff not being a party to the contract nor engaged in a similar business at the time could not secure injunctive relief against its provisions although it was in restraint of trade and he was allegedly damaged thereby. *Palmer v. Atlantic Ice and Coal Corporation et al.*, 178 Ga. 405, 173 S. E. 424 (1934). See also *Blackmon et al. v. Gulf Life Insurance Co. et al.*, 179 Ga. 343, 175 S. E. 798 (1934); *Southern Ice and Coal Co. v. Atlantic Ice and Coal Corporation*, 143 Ga. 810, 85 S. E. 1021 (1915).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

**Code Ann. (Park et al., Supp. 1938)
Resale Price Maintenance**

Sections 106-401 to 106-409 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. Sec. 106-408. See Vol., *State Price Control Legislation: Resale Price Maintenance*, MARKETING LAWS SURVEY Series.

**Code Ann. (Park et al., 1936)
Cooperatives**

Section 65-220 provides that no agricultural cooperative association organized under sections 65-201 to 65-226 shall be deemed to be a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Code Ann. (Park et al., 1936) Railroads

Section 94-311 provides that railroads other than competing lines may consolidate, and forbids contracts among them designed to lessen competition.

Section 94-318 provides that a railroad may sell to or consolidate with other railroads, except in the case of competing lines.

Street Railways

Section 94-1013 provides that street railway companies may consolidate if such action does not lessen competition or encourage monopoly.

Section 94-1014 provides that electric railway corporations may consolidate if the effect is not to lessen competition or encourage monopoly.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Cooperatives.

Section 65-220 does not violate the Constitution in that it contains matter not expressed in the title. *Harrell v. Cane Growers' Cooperative Association*, 160 Ga. 30, 126 S. E. 531 (1925).

Public Contract Provisions.

Where two contractors wanted to do separate parts of work on a bridge, it was not illegal for A to agree not to bid in consideration that B give him the contract for that part of the work should he become the successful bidder. *Virginia Bridge & Iron Co. v. Crafts*, 2 Ga. App. 126, 58 S. E. 322 (1907).

A city, though not required to let contracts for public work to the lowest bidder, has no authority to adopt an ordinance requiring that all the city's printing be done by union labor. Such an ordinance is in restraint of trade and illegal. *City of Atlanta et al. v. Stein*, 111 Ga. 789, 36 S. E. 932 (1900).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

In General.

A contract incident to sale of a grocery business that the vendor would "not operate any business that will compete in the least with the business sold" held void because unlimited as to space. *Everett v. Boone*, 157 Ga. 372, 121 S. E. 240 (1924). See also *Bonner v. Bailey et al.*, 152 Ga. 629, 110 S. E. 875 (1922); *Seay v. Spratling*, 133 Ga. 27, 65 S. E. 137 (1909); *Floding v. Floding*, 137 Ga. 531, 73 S. E. 729.

These cases seem contra to the earlier case of *Brewer & Co. v. Lamar, Rankin & Lamar*, 69 Ga. 656, 47 A. R. 766 (1882).

Where a contract in connection with sale of a business is otherwise reasonable, it has been upheld in the following cases though unlimited as to time. *Goodman et al. v. Henderson*, 58 Ga. 567 (1876); *Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71 (1896); *McAuliffe v. Vaughn*, 135 Ga. 852, 70 S. E. 322 (1911); *Morris-Forester Oil Co. v. Taylor et al.*, 158 Ga. 201, 122 S. E. 680 (1924); *Hood v. Legg et al.*, 160 Ga. 620, 128 S. E. 891 (1925); and *Holloway v. Brown*, 171 Ga. 481, 155 S. E. 917 (1930). Cf. *Brown v. Williams*, 166 Ga. 804, 144 S. E. 256 (1928).

An agreement to retire from the business of purchasing hides "in the Savannah market" held not too indefinite and enforceable. *Goodman et al. v. Henderson, supra*.

A contract not to enter into the wholesale gasoline and oil business within 20 miles of a city was held enforceable, even though unlimited as to time. The vendor was enjoined from becoming an employee of a competing firm. *Morris-Frester Oil Co. v. Taylor et al., supra*.

A contract by a vendor not to engage in a similar business, if reasonable as to time and space, is enforceable. *Jefferson v. Markert & Co.*, 112 Ga. 498, 37 S. E. 758 (1900).

A covenant not to compete with the vendee of a produce business for a period of 5 years in B County held valid and enforceable. *Bullock v. Johnson*, 110 Ga. 486, 35 S. E. 703 (1900).

In the following cases covenants not to engage in businesses in a single city or town for periods of from 1 to 5 years were upheld. *Jenkins v. Temples*, 39 Ga. 655, 99 Am. Dec. 482 (1869) (grocery business); *Newman v. Wolfson*, 69 Ga. 764 (1882) (saloon); *Bush v. F.*

Wolf & Co., 143 Ga. 18, 84 S. E. 63 (1915) (clothing and tailoring business); and *Strauss v. Phillips*, 180 Ga. 641, 180 S. E. 123 (1935) (retail jewelry business).

A covenant ancillary to the sale of stock in a corporation by the vendor that he will not engage in the same business as a competitor, on his own behalf or as an employee, in a defined territory, for 5 years, is not invalid as in restraint of trade. *Holtman v. Knowles*, 141 Ga. 613, 81 S. E. 852 (1914).

Where a covenant not to compete affords a fair protection to the party benefited and is not injurious to the public, it may extend to all the territory of the business sold. *Legg et al. v. Hood*, 154 Ga. 28, 113 S. E. 642 (1922).

A contract, incident to the sale of a brick plant, not to compete with the vendor within a radius of 300 miles from the plant for 10 years was held enforceable. *Hood v. Legg et al.*, 160 Ga. 620, 128 S. E. 891 (1925).

One selling a business and leasing the building where it was conducted and contracting not to engage in a similar business in the same city while the lease continued, could not legally carry on the business in his wife's name when he was the actual manager. *Jefferson v. Markert & Co.*, *supra*.

A covenant incident to sale of stock in a retail jewelry business that the vendor would not engage in that business in a certain city for 5 years was upheld and the vendor was restrained from serving as a clerk or bookkeeper for a competing firm. *Strauss v. Phillips*, *supra*.

Where A sold his window-cleaning business, agreeing not to reenter the business for 10 years, he did not violate the contract by becoming janitor of a building although window cleaning was one of his duties. *Mitchell v. National Window-Cleaning Co.*, 155 Ga., 215, 116 S. E. 532 (1923).

Where a partnership had the benefit of a covenant not to compete and one partner sold out to the other, the latter could enforce the covenant. *Markert & Co. v. Jefferson*, 122 Ga. 471, 50 S. E. 398 (1905). See also *Manning et al. v. Marchman*, 150 Ga. 309, 103 S. E. 795 (1920).

Where the purchaser of a restaurant discontinued operation for a time but later resumed business, a covenant not to compete was not impaired. *Holloway v. Brown*, *supra*.

Covenants not to compete have been held assignable. *Swanson v. Kirby et al.*, *supra*; *Legg et al. v. Hood*, *supra*.

There must be an actual valuable consideration to support a covenant not to compete, but courts will not inquire into its adequacy. *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735 (1898).

The formation of a medical partnership was sufficient consideration for a promise by one of the partners not to compete with the other after it should be dissolved. *Ibid.*

Statute of Frauds.

Where the sale of a lease was in writing, the Statute of Frauds did not prevent the purchaser from proving a collateral oral agreement that the vendor would not keep a school in competition with the school leased by him. *Spier v. Lambdin*, 45 Ga. 319 (1872).

But it was held otherwise where the agreement for sale of a hotel stated that all the agreements between the parties were included in the contract. *Curtis v. Pierce et al.*, 157 Ga. 717, 122 S. E. 208 (1924).

Damages and Injunctive Relief.

Recovery may be had by the injured party for damages suffered although no damages were stipulated. *Jenkins v. Temples*, *supra*.

A provision for payment of a sum for violation of a covenant was held liquidated damages and not a penalty where damages were unascertainable at the time of the contract. *Newman v. Wolfson*, *supra*.

Damages for a breach and an injunction against future breaches may be obtained in the same suit. *Swanson v. Kirby et al.*, *supra*.

A provision that a vendor would pay a vendee the profits of any business operated in violation of a covenant not to compete did not prevent the vendee from obtaining a restraining order against the vendor where there was evidence that the vendor financially irresponsible would not account for such profits. *Busk v. F. Wolf & Co.*, *supra*.

Where the vendor of a retail meat and grocery business contracted not to engage in that business within six blocks of the store sold, an injunction issued restraining him from soliciting or delivering groceries within the prohibited area. *Smithloff v. Weinman*, 165 Ga. 449, 141 S. E. 205 (1928).

Restrictive Covenants Ancillary to Employment.

A restrictive covenant ancillary to employment must be reasonable. A contract not to compete with an employer in the jewelry or related businesses in the city for 4 years after leaving the employer's service was held enforceable. *Shirk v. Loftis Brothers & Co.*, 148 Ga. 500, 97 S. E. 66 (1918).

Covenant by a map salesman, whose territory covered most of Georgia, not to engage in any business similar to his employer's for 6 months after termination of his contract was held void because unlimited as to territory. *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74

S. E. 772 (1912). See also *Garson v. Sun Life Assurance Co.*, 56 Ga. App. 164, 192 S. E. 241 (1937) (insurance agent).

Covenant by a laundry driver not to work for a competitor of his employer in a certain county within 1 year after termination of his employment was upheld as valid. *National Linen Service Corp. v. Clower et al.*, 179 Ga. 136, 175 S. E. 460 (1934). Such covenants are assignable. *Ibid.* and *Jones v. Primrose Dry Cleaning Co., Inc.*, 181 Ga. 103, 181 S. E. 577 (1935). See also *McCullough Brothers v. Speer*, 175 Ga. 521, 165 S. E. 585 (1932).

A contract by a beverage salesman not to work for a competitor of his employer within 6 months after termination of his employment was enforceable even though the employee was discharged. *Ogle v. Wright*, 187 Ga. 749, 2 S. E. 2d, 72 (1939).

Restrictive Covenants Not Ancillary to Sale of a Business Interest.

A lease containing a covenant that the lessor would not rent other property in the same block for the sale of the goods sold by lessee was valid and enforceable against one who leased the servient premises with notice. *Rosen et al. v. Wolff*, 152 Ga. 578, 110 S. E. 877 (1922).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Park et al., 1936)
Cooperatives

Sections 65-215 and 65-220 provide that an agricultural cooperative association organized under sections 65-201 to 65-226 may enter into marketing contracts with its members requiring them to sell, for any period of time not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, and that such contracts shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

A contract granting a taxicab company the exclusive privilege of (1) entering trains before reaching a city to solicit baggage; (2) access to the passenger station to solicit patronage; (3) using an office in the station to transact business; and (4) checking baggage at the residences of prospective passengers was held valid. *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S. E. 372 (1899). See also *Hart, Attorney General v. Atlanta Terminal Co. et al.*, 128 Ga. 754, 58 S. E. 453 (1907); *Atlanta Terminal Co. et al. v. American Baggage and Transfer Co.*, 125 Ga. 677, 54 S. E. 711 (1906).

A contract granting a telegraph company the exclusive right of establishing telegraph lines along a railroad's right-of-way is invalid as in general restraint of trade. *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Ga. 160 (1880).

A contract granting the exclusive privilege of showing 12 moving pictures in 11 States for a period of 5 years was upheld as valid. *Bromberg Attractions v. Chesterfield Motion Pictures Corp.*, 40 Ga. App. 788, 151 S. E. 567 (1930).

A fair association has the right to grant to one company the exclusive privilege of delivering ice to all concessions within its grounds regardless of a contract by a concessionaire with another ice company. *Frigidice Co. v. Southeastern Fair Association Inc. et al.*, 58 Ga. App. 694, 199 S. E. 760 (1938).

An agreement to grant B a rebate on 1 year's purchases if he continued to purchase all of the merchandise required from S during the succeeding year was held valid, though such contract tended to lessen competition. *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 11 Ga. App. 588, 75 S. E. 918 (1912). Aff'd 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520 (1915).

An agreement in consideration of the sale of a gasoline station lease, that the vendee would purchase all of his gas and oil as required from a certain fuel refining company so long as the vendor was agent for that company was valid and not in restraint of trade. *Smith v. Gulf Refining Co. et al.*, 162 Ga. 191, 134 S. E. 446 (1926); *Gulf Refining Co. v. Smith et al.*, 164 Ga. 811, 139 S. E. 716 (1927).

Evidence of custom was admitted to show that an exhibitor's right to "first run moving pictures" was exclusive. *Wells v. First National Exhibitors' Circuit Inc. et al.*, 149 Ga. 200, 99 S. E. 615 (1919). See also *Wells v. First National Exhibitors' Circuit Inc. et al.*, 151 Ga. 249, 106 S. E. 266 (1921).

IDAHO



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1890), art. XI, Sec. 18. Combinations in restraint of trade prohibited.—That no incorporated company or any association of persons or stock company, in the state of Idaho, shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people; and that the legislature be required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchise.

STATUTORY PROVISIONS

Code Ann. (1932)

Sec. 17-4013. Combinations in restraint of trade.—It shall be unlawful for any incorporated company, association of persons or stock company in this state, directly or indirectly to combine or make any contract with any incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people.

A violation of the provisions of this section shall constitute a misdemeanor and be punished by a fine of not exceeding \$5,000, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If the violation of this section is committed by an association of persons, or by a stock company, all of

the persons forming such association or being members of such stock company shall be equally liable and punishable as herein provided, and if the offense is committed by a corporation, the directors of said corporation shall be held personally liable and punishable as herein provided, and in addition thereto the court may impose against said corporation a fine not exceeding \$5,000, and may declare its franchise forfeited. (Hist. 1909, p. 297, S. B. 127, reenacted C. L., sec. 7129; C. S. sec. 8512.)

Sec. 47-101. Combination in restraint of trade illegal—Penalty.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (Hist. 1911, ch. 215, sec. 1, p. 688, reen. C. L. 107: 1, C. S., sec. 2531.)

Sec. 47-102. Monopolies illegal—Penalty.—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, within this state shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (Hist. 1911, ch. 215, sec. 2, p. 689, reen. C. L. 107: 2; C. S. sec. 2532.)

Sec. 47-103. Forfeiture of property.—Any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in the foregoing sections of this chapter, shall be forfeited to the state. (Hist. 1911, ch. 215, sec. 3, p. 689, reen. C. L. 107: 3; C. S. sec. 2533.)

Sec. 47-104. Unfair competition illegal—Penalty.—Every person, corporation, joint stock company, or other association engaged in business within this state, who shall enter into any contract, combination, or conspiracy, or who shall give any direction or authority to do any act, for the purpose of driving out of business any other person engaged therein, or who for such purpose shall in the course of such business sell any article or product at less than its fair market value, or at a less price than it is accustomed to demand or receive therefor in any other place under like conditions or who shall sell any article upon a condition, contract or understanding that it shall not be sold again by the purchaser, or restrain such sale by the purchaser shall be deemed guilty of a misdemeanor, and on conviction

tion thereof shall be punished by a fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (Hist. 1911, ch. 215, sec. 4, p. 689, reen. C. L. 107: 4; C. S. sec. 2534.)¹

Sec. 47-105. Books subject to inspection.—All the books of record and papers of every corporation, joint stock company, or other association, engaged in business within this state shall be subject to inspection by the Attorney General of this state, or by any agent he may designate for that purpose, and such corporation, joint stock company, or other association shall, at such times as he shall prescribe, make such returns duly verified by an officer of such corporation, joint stock company or association, as shall be by him prescribed either by general regulations or by special direction. (Hist. 1911, ch. 215, sec. 5, p. 689, reen. C. L. 107: 5; C. S. sec. 2535.)

Sec. 47-106. Officers and agents liable.—Any president, director, treasurer, officer, corporator, copartner, associate, or agent of such corporation, joint stock company or other association, who shall in its behalf do anything by this act prohibited to such corporation, joint stock company or other association, or who shall support, vote for, aid and abet, or take part in doing such action by said corporation, joint stock company, or other association, or any instrumentality thereof, shall be liable to the penalties by this chapter provided. (Hist. 1911, ch. 215, sec. 6, p. 689, reenacted C. L. 107: 6, C. S. sec. 2536.)

Sec. 47-107. Prohibition against continuance of business—Procedure for enforcement.—Any corporation, joint stock company, or other association that shall have been twice adjudged to have violated the provisions of this chapter by the final judgment of any court having jurisdiction of the question in any civil suit or proceeding in which said corporation, joint stock company, or other association shall have been a party, who shall thereafter violate this chapter, or who shall fail to make the returns herein required, at the time specified, shall no longer be allowed to engage in business within this state: provided, that such prohibition shall only be enforced after such corporation, joint stock company or other association shall have been enjoined against further engaging in such business, on an information or suit brought in a court of competent jurisdiction by the Attorney General in behalf of this state. It shall be the duty of the Attorney General in such case, unless he shall be satisfied that such corporation, joint stock company or other association has desisted and abstained and will in future desist and abstain from such violation, to enforce the

¹ For further treatment of sec. 47-104 see *State Price Control Legislation: Prohibition of Predatory Price Practices.*

provision by proceeding, either by information or by indictment, as he may in his discretion think best.

Any corporation, joint stock company or other association which shall be charged with violating this chapter, and any president, director, treasurer, officer, or agent thereof may be joined as a party in any proceeding, civil or criminal, to enforce this chapter.

If in the judgment of the Attorney General, such corporation, joint stock company, or other association against which any civil proceeding may be instituted by one on which the public is so depending that the interruption of its business will cause serious public loss or inconvenience, he may, in his discretion, refrain from proceeding to obtain a decree which will absolutely prevent the continuance of such business, and may apply for a limited or conditional decree, or one to take effect at a future day, as the public interests shall seem to require. And if, in the judgment of the court before whom such proceeding may be pending, the interruption of the business of the defendant corporation, joint stock company or other association, will cause such serious public loss or inconvenience, the court may decline to enter an absolute decree enjoining it against proceeding with its business, and may enter a modified or conditional decree, or such decree to take effect at a future time, as justice shall require. The court may also in its discretion enjoin such officers or agents or servants of such corporation, joint stock company or other association from continuing in its service, and enjoin any such corporation, joint stock company, or other association from continuing their employment therein, as the case shall seem to require. (Hist. 1911, ch. 215, sec. 7, p. 690, reen. C. L. 107: 7; C. S.; sec. 2537.)

Sec. 47-108. Penalty for illegally continuing in business.—Any corporation, joint stock company or other association, and any president, director, treasurer, officer, corporation, copartner, associate, or agent thereof, who shall in its behalf, after the first day of January in the year 1912 engage in such business in violation of this chapter, shall for each offense, in addition to such penalty for contempt as the court in case of disobedience to its lawful order may impose, be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (Hist. 1911, ch. 215, sec. 8, p. 691, reen. C. L. 107: 8; C. S. sec. 2538.)

Sec. 47-109. Civil liability of officers and agents.—Every president, treasurer, general manager, agent or other person usually exercising the powers of such officers of any corporation, joint stock company, or other association, who has himself, in its behalf, violated, united to violate, or voted for or consented to the violation of

any of the provisions of this chapter, shall thereafter be personally liable for all the debts and obligations of any such corporation, joint stock company, or other association created while such person holds such office or agency, whether under the same or subsequent elections or appointments. (Hist. 1911, ch. 215, sec. 9, p. 691, reen. C. L. 107: 9; C. S. sec. 2539.)

Sec. 47-110. Rebating unlawful—Penalty.—It shall be unlawful for any person or persons to offer, grant or give, or to solicit, accept or receive any rebate, concession, or service in respect to the transportation of any property within this state by any common carrier, whereby any such property shall, by any device whatever, be transported at a less rate than named in the tariffs published and filed by such carrier, as is required by law, or charged others for like service. Every person who shall offer, grant or give or solicit, accept or receive any such rebate, concession or service shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$5,000. (Hist. 1911, ch. 215, sec. 10, p. 691, reen. C. L. 107: 10; C. S. sec. 2540.)

Sec. 47-111. Transportation after rebating or unfair competition unlawful—Penalty.—If any joint stock company, corporation, or combination or any agent thereof, shall solicit, accept or receive any such rebate, concession, or service as hereinbefore described to be unlawful, it shall be unlawful thereafter to transport within this state any article owned or controlled by such company, corporation, or combination or produced or manufactured by it, by whomsoever the same may be owned or controlled. If any such joint stock company, corporation, or combination shall offer, grant, or give any special prices, inducements, or advantages for the sale of articles produced, manufactured, owned, or controlled by it to purchasers in any particular locality in order to restrict or destroy competition in that locality in the sale of such articles, it shall be unlawful thereafter to transport within this state any article owned or controlled by it or produced or manufactured by it, by whomsoever the same may be owned or controlled: *Provided, however,* That the prohibition imposed under this section shall not apply to any article purchased bona fide before decree made in pursuance hereof against the joint stock company, corporation or combination producing, manufacturing, or theretofore owning or controlling the same: *Provided further,* That even after decree any such article may be relieved from the prohibition imposed under this section, if the owner thereof shall show to the satisfaction of the court having jurisdiction of the matter, hereinafter provided, that such articles were purchased bona fide without notice, and within thirty days after the entry of such decree. Any

transportation company, and any officer, agent or representative thereof, knowingly concerned in the transportation of articles within this state contrary to the prohibitions of this section, shall be punished by a fine of not less than \$5,000. (Hist. 1911, ch. 215, sec. 11, p. 691, reen. C. L. 107: 11; C. S. sec. 2541.)

Sec. 47-112. Jurisdiction of equity courts.—The several courts of record of this state having equity jurisdiction are hereby invested with jurisdiction to prevent and restrain all violations of this chapter, and especially the offering, granting, giving, soliciting, accepting, or receiving any such rebate, concession, or service by any person or persons; and to prevent or restrain any such joint stock company, corporation, or combination, who shall have solicited, accepted, or received any such rebate, concession, or service, or who shall have offered, granted, or given any special prices, inducements, or advantages in order to restrict or destroy competition in particular localities from engaging in commerce within this state. Such proceedings may be by way of petition setting forth the cause of action and praying that the acts hereby made unlawful shall be enjoined or otherwise prohibited. When the parties complained of shall be duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case, and upon such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just. The court may retain jurisdiction of the cause after the decree, for the purpose of such subsequent modification of the same as may be made to appear equitable and just in the premises. (Hist. 1911, c. 215, sec. 12, p. 692, reen. C. L. 107: 12; C. S., sec. 2542.)

Sec. 47-113. Additional parties.—Whenever it shall appear to the court before which any civil proceedings under this chapter shall be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be summoned, whether they reside in the county where the court is held or not, and subpoenas to that end may be served in any county by the sheriff thereof. (Hist. 1911, ch. 215, sec. 13, p. 693, reen. C. L. 107: 13; C. S. sec. 2543.)

Sec. 47-114. Triple damages recoverable.—Any person who shall be injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this chapter may sue therefor in any court of record in this state in the county in which the defendant or defendants reside or are found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. (Hist. 1911, ch. 215, sec. 14, p. 693, reen. C. L. 107: 14; C. S. sec. 2544.)

Sec. 47-115. Person defined.—The word “person” or “persons” as used in the sections of this chapter shall be deemed to include all corporations, associations, combinations, or concerns whatsoever. (Hist. 1911, ch. 215, sec. 15, p. 693, reen. C. L. 107:15; C. S. sec. 2545.)

Sec. 47-116. Precedence in court—Appeal to Supreme Court.—In any suit in equity brought in any court of this state under this chapter wherein the state is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to the judge of the court in which the case is pending. Thereupon such case shall be given precedence over others, and in every way expedited and be assigned for hearing at the earliest practicable day. An appeal from the final decree of the court will lie only to the Supreme Court. (Hist. 1911, ch. 215, sec. 16, p. 693, reen. C. L. 107:16; C. S. sec. 2546.)

Sec. 47-117. Witnesses—Immunity—Penalties.—In all prosecutions, hearings, and proceedings under provisions of this chapter, whether civil or criminal, no person shall be excused from the attending and testifying or from producing books, papers, contracts, agreements, and documents before the courts of this state, or inobedience to the subpoena of the same, on the ground, or for the reason that the testimony or evidence, documentary or otherwise, required by him may tend to incriminate him or subject him to a penalty or forfeiture: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, or any proceedings, suit, or prosecution under of the court, or lawful requirements of the Attorney General, shall be exempt from prosecution or punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to make returns, attend and testify, or answer any lawful requirement hereinbefore provided for, or produce books, papers, contracts, agreements, and documents if in his custody, control, or power to do so, in obedience to the subpoenas of the court, or lawful requirements of the Attorney General, shall be deemed guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine not less than \$500.00, nor more than \$5,000.

Whoever knowingly swears to a return or report required by this chapter that is false in any material particular, or knowingly swears to an answer to any of the requirements of this chapter, that is false, in any material particular, shall be deemed guilty of perjury, and punished as provided by the laws of this state in reference to perjury.

Whoever shall knowingly prepare, or cause to be prepared, a report, return, or answer required by this chapter that is false, as aforesaid, shall be guilty of subornation of perjury and punished as provided by law. (Hist. 1911, ch. 215, secs. 17, 18, pp. 693, 694, compiled and reen. C. L. 107:17; C. S. sec. 2547.)

L. 1929, c. 262
Business Corporation Act

Sec. 49. Monopolies and restraint of trade.—Nothing in this Act shall be interpreted to authorize a corporation to do any act in violation of the common law or the Constitution or Statutes of this State or of the United States with respect to monopolies and illegal restraint of trade.

L. 1937, c. 229
Discriminations

Sections 1 to 7 provide that it shall be unlawful for any person engaged in commerce and the selling of products to discriminate in price between different purchasers of commodities or to discriminate in price between different localities, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Judicial Decisions

Application of Constitutional Provisions.

Const. art. 11, section 18 does not include or intend to prohibit the kind of monopoly evidenced by a public utility corporation governed and controlled by law. The public is not benefited but actually injured by free competition between many utility companies. The court declared that the framers of the constitution contemplated an "unrestricted monopoly, and not a monopoly that is governed and controlled by law, and not permitted to charge more than just and fair rates for serving the people." *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 141 Pac. 1083 (1914).

Application of Statutes.

"Conspiracy" under section 47-101 implies concerted action between individuals or entities maintaining separate and independent interests. Hence there can be no "conspiracy" to injure a competitor, between an owner of a business and his agents. Their acts are his.

It was held that defendant, an owner, together with her employees, were not "conspirators" with respect to their alleged purchase of junk at prices in excess of the market price. *Udelavitz v. Idaho Junk House*, 46 Idaho 441, 268 Pac. 15 (1928).

Peaceful picketing in front of a restaurant does not fall within the purview of Const. art. 11, section 18 and sections 47-101 and 17-4013. The union's purpose is not to fix prices or regulate the production of any article of trade or commerce, but to better the workers' economic condition. Moreover, labor is not a commodity or an article of commerce within the meaning of said laws. *Robison v. Hotel & Restaurant Employees, Local No. 782*, of Boise, 35 Idaho 418, 207 Pac. 132 (1922).

Sections 47-102, 47-104, 47-107, and 47-114 are inapplicable to municipal corporations. *Denman v. City of Idaho Falls*, 51 Idaho 118, 4 Pac. (2d) 361 (1931); *Wilcox v. City of Idaho Falls*, 23 Fed. Supp. 626 (1938).

A complaint alleging that the defendants "entered into a pooling agreement and combination" is insufficient in an action under sections 47-101 et seq. The plaintiff must allege facts showing illegality. *Hurt v. Brandt*, 37 Idaho 186, 215 Pac. 842 (1923).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

L. 1937, c. 240

Resale Price Maintenance

Sections 1 to 10 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers as to sale or resale prices. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

C. SPECIAL ANTITRUST LAWS

I. Special Industry Antitrust Acts

Code Ann. (1932)

Railroads

Section 60-108 provides that a railroad corporation may consolidate with another such corporation not owning a competing line.

Farm Products—Discrimination

Sections 22-1201 to 22-1206 provide that it is unlawful for anyone to discriminate intentionally in the purchase or sale of farm products between persons or localities for the purpose of creating a monopoly

or destroying the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Farm Products

Sections 36-1101 to 36-1110 provide that it shall be unlawful for anyone engaged in the dairy business to do any act with the intention of creating a monopoly or destroying the business of a competitor or stifling competition. Violation of the statute constitutes a misdemeanor. A corporation violating the statute may have its charter or permit to do business forfeited. Any person injured by a violation may sue to enjoin such violation and recover treble damages. Contracts in violation of the statute are void. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

L. 1935, c. 242

Liquor (Beer)

Section 1, amending L. 1939, c. 132, provides that it shall be unlawful for any dealer, brewer, or wholesaler, or any person financially interested, directly or indirectly, in such business to have any financial interest, direct or indirect, in any licensed retailer's business; or to own or control any property upon which a licensed retailer conducts his business, except such property as shall have been so owned or controlled continuously for 1 year prior to the effective date of this act; or directly or indirectly to aid or assist any licensed retailer by gifts, loans of money, property of any description, services of any nature, or by the giving of premiums or rebates; or to furnish, rent, lend, or sell to any such retailer any equipment, fixtures or supplies, except one illuminated sign not to exceed 240 square inches in area or \$20 in cost, and except CO₂ gas when furnished at the going retail price, as a bona fide sale in the regular course of business. Every violation of this subsection in which a licensed retailer has participated shall be a violation by such retailer.

L. 1939, c. 246

Laws 1939, c. 246, amending L. 1935, c. 132, sec. 8 provides that upon conviction for any violation of this act or the liquor laws in general, or if the commissioner shall find upon examination that any licensee has violated any of the provisions of this act, he may in his discretion, in addition to other penalties, revoke the license, or suspend it for a period not to exceed 6 months, or he may refuse renewal.

L. 1935, c. 132

Section 10 provides that any person who violates any of the provisions of this act shall be guilty of a misdemeanor.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

L. 1937, c. 96

Sections 1 to 14 are identical in text with the Colorado statute except that:

(1) in sections 1, 2, and 3 the word "wholesale" precedes the word "distribution" wherever used (cf. Colo., secs. 407, 408, 409); (2) section 9 provides that a violation of the act shall constitute a misdemeanor rather than a felony and lowers the maximum fine from \$5,000 to \$1,000 (cf. Colo., sec. 415). See Colo. Stat. Ann. (Michie, Supp. 1938) c. 16, secs. 407 to 419, set forth in full at pp 72-76.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (1932)

Cooperatives

Section 22-2017 provides that cooperative marketing associations authorized by sections 22-2001 to 22-2028 may enter into marketing contracts with its members requiring the members to sell their agricultural products exclusively to or through the association for a maximum period of ten years. It also provides that the contract may fix liquidated damages for breach of the contract by the members. The association is also given the right to equitable relief. Section 22-2020 provides that any provisions of law which are in conflict with this chapter shall not be construed as applying to the association herein provided for.

Liquor

Laws 1935, c. 132, section 6 (9) provides that it shall be unlawful for any dealer, brewer, or wholesaler, or any person financially interested, directly or indirectly, in such business, to enter into any contract to control the product or products handled by licensed retailers. See *Special Antitrust Laws: Liquor*.

Judicial Decisions

Tying Contracts.

A wholesaler leased a gasoline pump and certain equipment to a dealer, agreeing to pay the dealer \$60 a month in return for his undertaking to sell the wholesaler's gasoline and oil exclusively for 3 years. The contract further provided that the dealer could terminate the agreement at any time prior to the expiration date by purchasing the pump and equipment. The agreement was held valid. *Independent Gas & Oil Co. v. T. B. Smith Co.*, 51 Idaho 710, 10 Pac. (2d) 317 (1932).

Exclusive Dealing Arrangements.

A contract creating an exclusive agency for the sale of a given commodity on commission in a specified territory, binding the agent not to sell goods of any other manufacturer, is not within the condemnation either of the common law or of section 47-104. *Independent Gas & Oil Company v. T. B. Smith Co.*, *supra*. The contract in the above case also contained provisions for the lease of certain advertising facilities by the dealer to a wholesale distributor of gasoline and lubricants for 3 years, at \$30 a month, and provided that the dealer should purchase gasoline and oil exclusively from the wholesaler for a similar period. The court declared it would take judicial notice of the population of a community and of the number of competing concerns, in order to determine the likelihood of monopoly. The court further held that even if the \$30 a month were considered a rebate, that fact in itself would not invalidate the agreement. *Ibid*.

ILLINOIS



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. 1870, art. IV, sec. 22. The general assembly shall not pass local or special laws in any of the following enumerated cases, granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose; granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.

Const. 1870, art. XI, sec. 1. No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal, or reformatory purposes which are to be and remain under the patronage and control of the State, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.

STATUTORY PROVISIONS

Rev. Stat. (Smith-Hurd, 1937)

Sec. 569. Trust, or combination to fix the price, or limit quantity of any article, etc.—If any corporation organized under the laws of this or any other state or county, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced or sold in this state, such corpora-

tion, partnership, or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act. (1891, June 11, Laws 1891, p. 206, sec. 1.)

Sec. 570. Trust certificates and organization of combinations, etc., prohibited.—It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer, or employes, or the directors or stockholders of any corporation, to enter into any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract, or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article. (1891, June 11, Laws 1891, p. 206, sec. 2.)

Sec. 571. Penalty.—If a corporation or a company, firm, or association shall be found guilty of a violation of this act, it shall be punished by a fine in any sum not less than five hundred dollars (\$500), nor more than two thousand dollars (\$2,000), for the first offense; and for the second offense not less than two thousand dollars (\$2,000), nor more than five thousand dollars (\$5,000); and for the third offense not less than five thousand dollars (\$5,000), nor more than ten thousand dollars (\$10,000); and for every subsequent offense and conviction thereof, shall be liable to a fine of fifteen thousand dollars (\$15,000): *Provided*, That in all cases under this act either party shall have the right of trial by jury. (1891, June 11, Laws 1891, p. 206, sec. 3.)

Sec. 572. Officers, etc., violating.—Any president, manager, director or other officer or agent or receiver of any corporation, company, firm, or association, or any member of any company, firm, or association, or any individual, found guilty of a violation of the first section of this act, may be punished by a fine of not less than two hundred dollars (\$200), nor to exceed one thousand dollars (\$1,000), or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had. (1891, June 11, Laws 1891, p. 206, sec. 4.)

Sec. 573. Contracts in violation of act.—Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void. (1891, June 11, Laws 1891, p. 206, sec. 5.)

Sec. 574. Purchasers of commodities produced in violation of act not liable for price.—Any purchaser of any article or commodity

from any individual, company, or corporation transacting business contrary to any provision of the preceding sections of this act¹ shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment. (1891, June 11, Laws 1891, p. 206, sec. 6.)

Sec. 575. Fines.—The fines hereinbefore provided for may be recovered in an appropriate civil action, in the name of the People of the State of Illinois. If, upon the trial of any cause instituted under this act to recover the penalties as provided for in section three,² the jury shall find for the people, and that the defendant has been before convicted of a violation of the provisions of this act, they shall return such finding with their verdict, stating the number of times they find defendant so convicted, and shall assess and return with their verdict, the amount of the fine to be imposed upon the defendant in accordance with said section three: *Provided*, That in all cases under the provisions of this act, a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people. (1891, June 11, Laws 1891, p. 206, sec. 7, as amended by act approved June 28, 1935. L. 1935, p. 718.)

Sec. 576. Duties of officers enforcing act—Informer's compensation—Fines, disposition.—It shall be the duty of the prosecuting attorneys in their respective jurisdiction, and the Attorney General, to enforce the foregoing provisions of this act, and any prosecuting attorney of any county, securing a conviction under the provisions of this act, shall be entitled to such fee or salary as by law he is allowed for such prosecution. When there is a conviction under this act the informer shall be entitled to one-fifth of the fine recovered, which shall be paid him when the same is collected. All fines recovered under the provisions of this act shall be paid into the county treasury of the county in which the suit is tried, by the person collecting the same in the manner now provided by law to be used for county purposes. (1891, June 11, Laws 1891, p. 206, sec. 8.)

Sec. 577. Destroying food to influence price.—Any person who shall willfully destroy or permit to waste any food fit for human or animal consumption, of the original value of twenty-five dollars (\$25) or more, so that such food becomes unfit for such use, with the intent to cause scarcity or to increase, control, maintain, or influence the market price of such food, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars (\$25) or more than five hundred dollars (\$500) or by im-

¹ Sec. 569-573, ante.

² Sec. 571, ante.

prisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment. (1919, June 21, Laws 1919, p. 572, sec. 1.)

Conspiracy Statute

Sec. 139. Conspiracy to do an illegal act—Boycott—Blacklist—Penalty—Marketing associations of farmers, dairymen, and fruit growers not included—Common law conspiracy.—If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or blacklist, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment, or property of another, or to obtain money or other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice, or to prevent competition in the letting of any contract by the State, or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding \$2,000, or both.

Associations, corporate or otherwise, of farmers, gardeners [gardeners] or dairymen, including livestock farmers and fruit growers, engaged in making collective sales or marketing for its members or shareholders of farm, orchard, or dairy products, produced by its members or shareholders are not conspiracies, contracts, agreements, arrangement of [or] combinations made by such associations or the members, officers, or directors thereof in making such collective sales and marketing and prescribing the terms and conditions thereof are not conspiracies and they shall not be construed to be injurious to the public trade. (1874, March 27, R. S. 1874, p. 348, div. 1, sec. 46; Laws 1887, p. 167, sec. 1; 1919, June 30, Laws 1919, p. 425, sec. 1.)

If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-

called boycott or blacklist, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment, or property of another, or to obtain money or other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice or to prevent competition in the letting of any contract by the State, or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be fined not exceeding \$2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary. (1874, March 27, R. S. 1874, p. 348, div. 1, sec. 46; Laws 1887, p. 167, sec. 1; 1919, June 28, Laws 1919, p. 426, sec. 1.)

Judicial Decisions

Application of the Common Law.

Several competing corporations entered an agreement to sell coal at fixed prices. They were indicted on five counts, two of which were for the common law crime of conspiracy to commit an unlawful act. Upon a motion to quash, the court held that the object of the conspiracy was to restrain and lessen competition in a business affected with the public interest, and that since such object was unlawful, the indictment was sufficient. *C. W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770 (1905). See also *Illinois v. Aachen & Co. of Germany*, 126 Ill. App. 636 (1905) (110 fire-insurance companies agreed to maintain uniform rates and to refrain from competing within a certain district).

A corporation became a holding company for practically all of the distilling industry in the country. As such, it controlled production and prices. It was held, in a quo warranto ouster proceeding, that such a monopoly was a conspiracy in restraint of trade in violation of the common law. *Distilling & Cattle Feeding Co. v. People ex rel Moloney*, 156 Ill. 448, 41 N. E. 188 (1895). A charter granting power to the corporation "to engage in the distilling busi-

ness and to acquire property necessarily incident thereto," does not authorize such a combination. *Ibid.*

A gas corporation cannot acquire or hold shares of stock in the four other gas companies in a city, since the effect would be to lessen competition and tend to create a monopoly in a business impressed with a public interest. *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798 (1889). See also *People ex rel. Fitzhenry v. The Union Gas & Electric Company*, 254 Ill. 395, 98 N. E. 768 (1912).

In Civil Actions.

A manufacturer of jellies and preserves transferred his property to a corporation under a trust agreement. He remained in possession of the property, and subsequently withdrew from the trust agreement. The corporation brought an action for replevin, and it was shown that the trust agreement was made in furtherance of a combination to control production and maintain prices of jellies and preserves throughout the United States. The court denied recovery and held that such a combination was injurious to the public interest, and any agreement made in furtherance of its purpose was void. *Bishop v. American Preservers' Co.*, 157 Ill. 284, 41 N. E. 765 (1895).

All grain dealers of a town entered into a contract of partnership, whereby they secretly made provision for fixing the price of grain rates for shipment and storage, and for division of profits. Upon a suit by one of the dealers for an accounting, it was held that such a contract was void because it created a monopoly in an article of necessity to the public. *Craft v. McConoughy*, 79 Ill. 346 (1875).

A combination of grain dealers sought to purchase all the wheat in the market and make contracts for future delivery. Brokers, who had knowledge of the scheme, were employed to assist therein. In a suit by the brokers to recover for advances made, the court held that a combination to restrict the supply and raise the price of an article of such prime necessity was injurious to the public interest, and that no party thereto can obtain the aid of the courts. *Samuel v. Oliver*, 130 Ill. 73, 22 N. E. 499 (1889). See also *Foss v. Cummings*, 149 Ill. 353, 36 N. E. 553 (1894).

A purchaser of sewer pipe, in defense to an action for the purchase price thereof, set up that the seller was a member of a combination in restraint of trade in violation of the common law. The court held that the defense was invalid, since the defendant had purchased under special purchase contracts from the plaintiff, which were entirely collateral to, and in no way connected with the illegal combination. *Connolly v. The Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679 (1902).

A contract entered into between members of an association of stenographers for the purpose of fixing uniform prices for legal reporting in the city of Chicago was held as tending to lessen competition in violation of the common law. *More v. Bennett*, 140 Ill. 69, 29 N. E. 888 (1892).

Six competing corporations, engaged in the manufacture of sugar products, agreed to transfer their stock and property to a holding company. In sustaining a suit by minority stockholders of one of the corporations to prevent the transfer of its property, the court held that the necessary consequence of such a combination was to control prices, limit production and suppress competition in such a manner as to create a monopoly in violation of the common law. *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577 (1899).

A telephone supply manufacturing company bought the controlling stock of a competitor. Upon a suit by a minority stockholder to set aside the sale, the court held that in order to do so, it was not necessary to prove a violation of section 569, since the transaction complained of had an inevitable tendency to lessen competition in a business clothed with a public interest. Such transaction was held void at common law. *Dunbar v. A. T. & T. Co.*, 238 Ill. 456, 87 N. E. 521 (1909).

A stockholder, of a corporation, engaged in the linseed-oil business, sought to dissolve and have a receiver appointed for the corporation on the ground that the corporation had monopolized such business to the injury of the public interest. In dismissing the bill, the court held that even if the facts in the bill were true, no relief would be granted since only the State, in a proper proceeding, may complain of the injury to the public interest. Relief was also denied on the ground that the plaintiff, as a stockholder, had been a party to the alleged illegal acts of which he now complains. *Coquard v. National Linseed Co.*, 171 Ill. 480, 49 N. E. 563 (1898).

For other applications of the Common Law see *Contracts Not to Compete* and *Exclusive Dealing Arrangements*, *infra*.

Application of Constitutional Provisions.

A charter provision giving a gas corporation the power to acquire and hold shares of stock in the other gas companies in a town, thereby permitting the corporation to secure a monopoly of the gas business, is in conflict with Const. 1870, art. 4, sec. 22, and with Const. 1870, art. 11, sec. 1, and is therefore void. *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798 (1889).

Where a telephone supply manufacturing company bought the controlling interest of a competing company, the court held that such a transaction was void as against the public policy of the state as ex-

pressed in Const. 1870, art. 4, section 22. *Dunbar v. A. T. & T. Co.*, *supra*.

After the passage of the Public Utility Act, c. 111 2/3, sec. 27, a suit was brought to prevent the Public Utilities Commission from granting permission to a telephone company to acquire stock and franchises of a competing company. The plaintiff contended that the act was in violation of Const. art. 4, sec. 22, as construed by the court in the *Dunbar case*, *supra*. The court, however, held that Const. art. 4, sec. 22, did not prohibit elimination of competition in all cases, but only where a monopoly injurious to the public interest would be created. Since the legislature, through enactment, expressed itself to the effect that the public interest in the telephone is best served by consolidation under supervision of the Commission, the act was held valid, and the order of the commission sustained. *Public Utilities Commission v. Romberg*, 275 Ill. 432, 114 N. E. 191 (1916).

Constitutionality of Statutes.

In an action for the purchase price of sewer pipes, the defendant disclaimed liability on the ground that the plaintiff company was a combination in violation of the Antitrust Act (L. 1893, p. 182, secs. 1-10), which provided that any contract executed in violation of the act was void and unenforceable. The plaintiff demurred on the ground that the act was unconstitutional. The court, in sustaining the demurrer, held that as the act provided for exceptions of agricultural produce and livestock, the exception not being based upon a reasonable classification of subjects was invalid as a denial of equal protection of the laws in contravention of the Federal Constitution. *Connolly v. The Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679 (1902). See also *People v. The Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349 (1903); *C. W. & V. Coal Co. v. The People*, 214 Ill. 421, 73 N. E. 770 (1905).

Application of Statutes.

As to c. 38, secs. 569-574.

Several competing corporations had made an arrangement whereby prices for coal were to be set by them, and each agreed to sell at the fixed price. They were indicted on five counts, one of which was for a violation of section 569. The court held that it was of no consequence that the indictment did not allege that defendants were incorporated in Illinois, since the offense was complete, irrespective of the place of incorporation. *C. W. & V. Coal Co. v. People*, *supra*. And, it was held that the state could elect as to whether it would proceed criminally under section 569 or in an action for debt under the act of June 20, 1893, p. 89 (subsequently repealed by L. 1919, p. 349, sec. 154).

Six competing corporations engaged in the manufacture of sugar products agreed to transfer their stock and property to one corporation. In sustaining a suit by minority stockholders of one of the corporations to prevent the transfer of its property, the court held that the necessary consequence of such a combination was to control prices, limit production, and suppress competition in such a manner as to create a monopoly in violation of section 569. *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577 (1899).

In a suit for the purchase price of wall paper, the defendant set up that plaintiff, a Wisconsin corporation, controlling 90 percent of the paper products west of the Alleghenies, was organized as an unlawful combination (under sec. 569) to fix prices, and relied upon section 574 as a defense. The court held that since the alleged illegal combination was formed outside of Illinois, the defense could not be sustained, since the Antitrust Act of Illinois (secs. 569 et seq.) has no extraterritorial application. *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491 (C. C. A. 7th, 1906).

A contract whereby defendant agreed to manufacture book matches for plaintiff for five years, and not to sell to plaintiff's customers, except to certain jobbers, was held valid and not in violation of section 569, because its intention and effect was not to destroy competition, but to increase the business of the parties. *Match Corporation of America v. Acme Match Corporation*, 285 Ill. App. 197, 1 N. E. (2d) 867 (1936).

A corporation engaged in the business of manufacturing strawboard, leased its factory and agreed not to engage in the business within a radius of 100 miles of a town during the term of the lease. In an action to recover rent on the lease or for use and occupancy of the premises, it was shown that the officers of the corporation knew that the lease was made in furtherance of a plan of the lessee to stifle competition and enhance the prices of its products, and the court in dismissing the action held that, since such a plan was in violation of section 569, the lease was void and no recovery can be had under section 573. *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502 (1896).

A quarrying company conveyed a parcel of land to one not engaged in the quarrying business. The deed contained a covenant whereby the grantee was restricted from using the land for a quarry. In an action to enforce this covenant, the court held that since the grantee was never in competition with the grantor, and since there was a plentiful supply of stone in the surrounding area, the covenant was not unreasonably restrictive and not violative of section 596. *Natural Products Co. v. Dolese & Shepard Co.*, 309 Ill. 230, 140 N. E. 840 (1923).

An incorporated association of producers and shippers of milk entered into an agreement with each of its members to fix prices, guarantee payment, and sell through the association, or to other members, only. In dismissing an action by the corporation against a retail dealer, not a member, for the purchase price of milk, the court held that the corporation was a combination in violation of section 569, and that section 574 was properly pleaded as a defense. *Ford v. Chicago Milk Shippers' Association*, 155 Ill. 166, 39 N. E. 651 (1895).

In an action to recover the purchase price of wallpaper, the defendant pleaded that plaintiff was a combination organized in violation of section 569, and relied upon section 574 as a defense. This plea failed, however, to allege that the sale in question was in furtherance of such combination or that the goods were sold at an unreasonable price caused such combination. The court held that the demurrer to the plea was properly sustained. *Wiley & Drake v. National Wall Paper Co.*, 70 Ill. App. 543 (1897).

Four corporations engaged in the business of manufacturing pies agreed to convey their respective interests in their businesses to a newly formed corporation for the purpose of preventing destructive practices in the trade. An action was brought by one of the four to cancel this agreement on the ground that it was in violation of section 569 and of the Corporation Act of 1919, section 7 (repealed L. 1933, p. 308, sec. 167), which provided that no corporation shall acquire, directly or indirectly, the whole or any part of the stock of another corporation, where the effect of such acquisition may be substantially to lessen competition. The court held that these two statutes should be construed in "pari materia." The combination is not in violation of these statutes as construed, since it was shown that there was no intent to fix, control or regulate prices, or the supply of raw materials and machinery used in the trade, and that the consolidation in fact did not lessen competition. *Moody & Waters Co. v. Case-Moody Pie Corporation*, 354 Ill. 82, 187 N. E. 813 (1933).

Where a company had agreed to furnish all the necessary raw materials to a steel company, and the latter had agreed to sell the former all of its manufactured products, section 574 was held to be an invalid defense to a suit for the purchase price, since there was no evidence that the agreement was in furtherance of a combination in violation of section 569. *Heimbuecher v. Goff, Horner & Co.*, 119 Ill. App. 373 (1905). See also *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423 (1900).

In an action upon a contract for the purchase of corn sirup, it was held that the defendant could not rely on section 574 as a defense, since the contract was collateral to, and not in furtherance of, the alleged illegal combination. *Corn Products Refining Co. v. The Oriental*

Candy Co., 168 Ill. App. 585 (1912). A violation of section 569, rendering a contract unenforceable, is not established by merely showing that the plaintiff "enjoyed" a monopoly of the manufacture of corn sirup in Illinois. *Ibid.*

Equity will not grant the relief sought by a judgment creditor's bill where the bill is based upon a judgment obtained on a contract which was clearly shown to be in violation of section 569. *Perry v. U. S. School Furniture Co.*, 232 Ill. 101, 83 N. E. 444 (1907).

As to c. 38, Sec. 139.

See *Chicago W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770 (1905). See also *Sanford v. People*, 121 Ill. App. 619 (1905).

As to c. 38, Sec. 328.

Equity will not aid the enforcement of an agreement to combine, when the intention of such an agreement was to hold wheat for sale only on mutual consent of parties, such an agreement being in violation of c. 38, sec. 328. *Lane v. Leiter*, 237 Fed. 149 (C. C. A. 7th, 1916).

In a suit to recover excess amounts paid under a cornering agreement, the defendant cannot be compelled to testify that he was a party to such an agreement in violation of c. 38, sec. 328. *Lawson v. Boyden*, 160 Ill. 613, 43 N. E. 781 (1896).

B. EXCEPTIONS TO THE GENERAL ANTITRUST LAWS

Rev. Stat. (Smith-Hurd, 1939), c. 121½ Resale Price Maintenance

Sections 188 to 191 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal contracts between producers, between wholesalers, or between retailers. Sec. 190. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Rev. Stat. (Smith-Hurd, 1939), c. 38 Associations of Farmers

Section 139 provides that associations of farmers or dairymen engaged in making collective sales for their members of the farm and dairy products of such members are not conspiracies. See *General Antitrust Laws, supra*, for text of sec. 5139.

Rev. Stat. (Smith-Hurd, 1939), c. 32 Cooperatives

Section 468 provides that agricultural cooperative associations organized under sections 440 to 472 or under any other law of this or

any other state as a cooperative association, shall not be deemed a conspiracy or combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperatives.

The defendant was convicted under c. 38, sec. 139, for intimidating the employees of another. On appeal he alleged that c. 38, sec. 139, was in violation of the fourteenth amendment because of the provision which states that cooperative associations were not conspiracies in and of themselves. The court held that the defendant was not denied equal protection of the law by this section, since notwithstanding the provision purporting to exempt cooperatives, if the members of such cooperatives committed any of the acts enumerated in this section, they would be guilty of conspiracy even though the acts were associated with collective marketing. *People v. Mangano*, 354 Ill. 329, 188 N. E. 475 (1933).

Fair Trade Act.

In denying the contention that the Fair Trade Act of 1935 (c. 121½, sec. 188) constituted a discrimination in favor of owners of trade-marks and brand names, the court held that section 569 was never intended to interfere with protection given to the goodwill established by the use of trade-marks or brand names and held the Fair Trade Act valid. *Joseph Triner Corporation v. McNeil*, 363 Ill. 559, 2 N. E. 2d 929 (1936). See Vol. *State Price Control Legislation*.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****CONSTITUTIONAL PROVISIONS****Railroads**

Const. (1870) art XI, sec. 11, provides that no railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line.

STATUTORY PROVISIONS

Rev. Stat. (Smith-Hurd, 1939), c. 114

Railroads

Section 23 provides that no railroad corporation may consolidate its capital stock with another owning a parallel or competing line.

Section 29a provides that no railroad may consolidate its stock, property, or franchises with any other railroad owning a parallel or competing line.

Section 39 provides that when a railroad, located partly within and partly without the State, has been sold under a court order to two or more corporations of different states, such corporations may consolidate, provided no consolidation shall take place with any railroad owning a parallel or competing line.

Section 46 provides that any railroad incorporated under the laws of this State or any adjoining State and operating connecting roads under lease, may purchase or sell the remaining interests of the lessors of such roads, provided that this shall not be construed as permitting such railroad company to purchase any parallel or competing line of railroad.

Section 165 provides that no railroad corporation shall be permitted to purchase any railroad which is a parallel or competing line.

Section 174 provides that a railroad corporation of this State may sell to a railroad corporation of another State, but that this shall not be construed to permit any railroad company to purchase any parallel or competing line of road in this State.

Rev. Stat. (Smith-Hurd, 1939), c. 56½

Cold Storage of Foods

Section 87 provides that the Director of Agriculture may order foods held in cold storage to be removed therefrom before the end of the twelve-month period to which such storage is limited, when the continued storage is for the purpose of fictitiously increasing the price, is in pursuance of a contract to increase price fictitiously, to

create a monopoly, or to prevent competition in the supply or price of such foods.

Rev. Stat. (Smith-Hurd, 1939), c. 38

Grain

Section 328 provides that dealing in grain futures, influencing grain prices by false rumors, and cornering the market, shall be punishable by a fine of not less than \$10 or more than \$1,000, or imprisonment not to exceed one year, or both; all contracts violating the above are void.

Rev. Stat. (Smith-Hurd, 1939) c. 43

Liquor

Section 122 provides that it shall be unlawful for any retail licensee or any agent thereof to accept, receive, or borrow money, or credit other than merchandising credit in the ordinary course of business for a period not to exceed ninety days, or anything else of value, directly or indirectly from any manufacturer or distributor or wholesaler of alcoholic liquor or from any member of their families or from any person connected or in any way representing them, or from any stockholders in any corporation engaged in such alcoholic business. And it shall be unlawful for any manufacturer or distributor or importing distributor to give or lend money or anything of value, or otherwise loan or extend credit directly or indirectly to any such licensee or to the manager, representative, agent, officer or director of such licensee.

Section 123 provides that no manufacturer or distributor or importing distributor, except as otherwise provided in this act, shall, directly or indirectly, sell, supply, furnish, give, or pay for, or loan or lease, any furnishing, fixture, or equipment on the premises of another retail licensee; nor advance, furnish, lend, or give money for the payment thereof; nor purchase or become the owner of any note, mortgage, or other evidence of indebtedness of such licensee or any form of security therefor; nor be interested, directly or indirectly, in the ownership, conduct, or operation of the business of any such retail licensee; nor be interested directly or indirectly, or as owner or as part owner, or as lessee or lessor of any premises upon which alcoholic liquor is sold at retail; nor furnish, give, lend, or rent any interior decorations including signs for inside or outside use costing in the aggregate more than \$100 in any one calendar year, exception being made for existing signs. Any licensee who shall permit or assent or be a party in any way to any violation of the provisions of this section shall be deemed guilty of a violation of this act, and any money loaned contrary to a provision of this act shall not be recovered back, and any note, mortgage, or other evidence of indebted-

ness, or security, or any lease or contract obtained or made contrary to this act shall be unenforceable and void.

Section 183 provides that any person who violates any provision of this act shall for a first offense be fined not less than \$50 nor more than \$500, and for second and subsequent offense shall be defined not less than \$100 nor more than \$1,000 or be imprisoned in the county jail not less than ten days nor more than six months, or both.

Section 185 provides that every act or omission of whatsoever nature constituting a violation of any of the provisions of this act by any officer, director, manager, or other agent or employee of any licensee, if made with the authorization, knowledge, or approval of such licensee, shall make the latter punishable in the same manner as if said act or omission had been done or omitted by him personally.

Section 186 provides that whenever any licensee shall be convicted of any violation of this act his license may, in the discretion of the State or local authority (whichever has jurisdiction), be revoked and all fees paid thereon shall be forfeited including said licensee's bond. Section 187 makes similar provisions concerning any officer director, manager, or other employee of any licensee. See *Tying Contracts and Exclusive Dealing Arrangements*.

2. Public Contract Provisions

Rev. Stat. (Smith-Hurd, 1939), c. 127
General

Section 76 provides that any conspiracy to prevent competition in bids on State contracts shall be punishable by imprisonment for no longer than 3 years. See projected vol. *Governmental Purchasing*.

Rev. Stat. (Smith-Hurd, 1939), c. 38

Section 139 provides that if two or more persons conspire together to prevent competition in the letting of any contracts by the State or the authorities of any county, city, or town, or to induce any person not to enter into such competition, they shall be deemed guilty of a conspiracy. Every person convicted of conspiracy at common law shall be fined not to exceed \$2,000 or imprisoned in the county jail not exceeding one year, or in the penitentiary for not less than one nor more than five years, or both such fine and imprisonment. See *General Antitrust Laws, supra*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Railroads.

Application of Constitutional Provisions.

In sustaining a demurrer to an information in the nature of quo warranto, it was held that the prohibition contained in Const. 1870, art. XI, sec. 11, did not apply to a railroad corporation formed prior to the enactment of the constitutional provision by the consolidation of an Illinois railroad with a railroad of another State. *Ohio & Miss. R. Co. v. The People ex rel Hanna*, 123 Ill. 467, 14 N. E. 874 (1888).

The construction of an additional track parallel to existing lines of a railroad is not within the prohibitions of Const. 1870, art. XI, sec. 11. *Chicago & Milwaukee Electric R. R. Co. v. Chicago & N. W. Ry. Co.*, 211 Ill. 352, 71 N. E. 1017 (1904).

The state courts have no jurisdiction under Const. 1870, art. XI, sec. 11 and c. 114, sec. 23 to enjoin an Illinois railroad from purchasing, leasing or operating a competing railroad or from consolidating the property or franchises of two railroads, where the activity is primarily interstate and permission had been granted them by the Interstate Commerce Commission. *People v. Illinois Central R. R. Co.*, 237 Ill. App. 24 (1925) and *People v. Ill. Central R. R. Co.*, 324 Ill. 591, 155 N. E. 841 (1927).

The city of Chicago, pursuant to a statute, enacted a comprehensive traction ordinance consolidating all of the street railways in the city. In an action to enjoin enforcement of the ordinance, it was held that the statute and the ordinance were not in contravention of Const. 1870, art. XI, sec. 11, since the prohibition of this section was directed at steam railway lines and not at street railways used in local transportation. *People v. City of Chicago*, 349 Ill. 304, 182 N. E. 419 (1932). See also *Venner v. Chicago City Railway Co.*, 258 Ill. 523, 101 N. E. 949 (1913); *People v. City of Chicago*, 270 Ill. 188, 110 N. E. 366 (1915).

Application of Statutes.

In a suit to foreclose bonds issued by a consolidated railroad company, it was held in sustaining a demurrer thereto, that c. 114, sec. 23 is a substantial reenactment of Const. 1870, art. XI, sec. 11 and not a grant of power to consolidate. Since the bonds were issued by an unauthorized consolidation, they were held illegal and void. *American Loan & Trust Co. v. Minn. & N. W. R. R. Co.*, 157 Ill. 641, 42 N. E. 153 (1895).

A corporation may, under c. 114, secs. 23 and 165 be consolidated with another, and the resulting corporation would thereby be estopped from denying the validity of the consolidation in an action for wrongful death which arose before the consolidation. *Chicago, S. F. & Cal. R. Co. v. Ashling*, 160 Ill. 373, 43 N. E. 373 (1895).

The purchase of a railroad line, extending along the Mississippi river within Illinois, by a foreign corporation owning a parallel road extending along the opposite side of the river in another state is contrary to c. 114, sec. 174 and the corporation cannot, under this section, exercise its right of eminent domain. *Illinois State Trust Co. v. St. Louis I. M. & S. Ry. Co.*, 208 Ill. 419, 70 N. E. 357 (1904).

The fact that a distant point outside the State may be reached by railroads running in different directions through joint connections does not bring such railroads within the prohibition contained in c. 114, sec. 174, since they do not run through or serve the same territory and are not competitors. *Chicago, M. & St. P. Ry. Co. v. Franzen*, 287 Ill. 346, 122 N. E. 492 (1919).

In mandamus proceedings to compel a railroad to restore services which were curtailed after consolidation, it was held that the legality of the consolidation of railroad corporations, so long as the corporation thus formed is de facto, can only be questioned by the State. *People ex rel. Schaumleffel v. Illinois Central R. R. Co.*, 241 Ill. 471, 89 N. E. 744 (1909). The same rule was applied in the following cases where defendants in condemnation proceedings sought to question the legality of the consolidation. *Terre Haute & P. R. Co. v. Robbins*, 247 Ill. 376, 93 N. E. 398 (1910); *Chicago & Western Indiana R. R. Co. v. Heidenreich*, 254 Ill. 231, 98 N. E. 567 (1912); *Hudson v. Green Hill Seminary*, 113 Ill. 618 (1885); *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477 (1886).

Telephone Companies.

In an action to prevent the purchase of telephone stock by a competing telephone company, it was held that section 27 of the Public Utilities Act (c. 111 $\frac{2}{3}$, sec. 27) does not contravene the public policy expressed in Const. 1870, art. IV, sec. 22. The interest of the public in the telephone business is best served not by competition but through consolidation and merger regulated under authority of the state. *Public Utilities Commission v. Romberg*, 275 Ill. 432, 114 N. E. 191 (1916).

Gas Companies.

In quo warranto proceedings against several gas companies who had merged into one corporation pursuant to c. 32, secs. 399 et seq., it was held that these sections were not in violation of Const. 1870, art. IV,

sec. 22 in view of the provisions contained in c. 32, sec. 409 which prohibits increase in rates or lessening of quality of product and service after such consolidation. *People ex rel. Fitzhenry v. Union Gas & Electric Co.*, 254 Ill. 395, 98 N. E. 768 (1912). Where a corporation was organized under the General Corporation Law to furnish and sell gas, electricity, etc., but had never actually engaged in the business, it was held in quo warranto proceedings that c. 32, secs. 399-400 and 409 did not authorize such a corporation to acquire franchises and stock of the other two gas companies in town, since the statute applied only to companies actually engaged in business. *Ibid.*

Public Contract Provisions

Where one contractor agreed to withdraw his bid and the other agreed to pay him a certain share of the expectant profits, it was held upon a suit to recover the share of such profit that the agreement was injurious to the public interest and, therefore void. *Roy & Whitney v. Mackin*, 100 Ill. 246 (1881). See also *Conway v. Garden City Paving & Post Co.*, 190 Ill. 89, 60 N. E. 82 (1901).

In refusing to confirm an assessment for public improvements, the court held that an ordinance was void which required the use of a certain kind of asphalt, the supply of which was controlled by a single corporation. Such a requirement manifestly restricted competition in the bidding for such work. *Fishburn v. Chicago*, 171 Ill. 338, 49 N. E. 532 (1898).

In a suit to collect a paving assessment, it was shown by the property owner that the contractor had gained control of the supply of slag in the city and as a result was awarded a contract. The court held, however, that since it was not shown that the amount paid for the work was more than a fair price, nor was it shown that the property owner had taken action to repudiate the bid as soon as he learned the facts, he could not now defend on this ground. *Givins v. The People ex rel. Raymond*, 194 Ill., 150, 62 N. E. 534 (1901).

The Board of Education of Chicago made an agreement with the Trade Union Council that it would provide that all work done on schools should be done by contractors employing only union members. Such an agreement was held to lessen competition in bidding on public contracts to the injury of the public interest, and contracts made pursuant thereto are void. *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314 (1898). See also *Holden v. The City of Alton*, where a similar agreement, made with the printer's union, was held to be void. 179 Ill. 318 (1899).

An ordinance granting the exclusive right to an individual selected by the health commissioner to ship manure from the city was held

to be an unreasonable exercise of the police power, and therefore void. *Landburg v. Chicago*, 237 Ill. 112, 86, N. E. 638 (1908).

The city of Chicago, by ordinance, granted the exclusive right to certain parties for a specified period to have animals slaughtered in one district of the city. In a prosecution for violation, the ordinance was declared void. The power given to the city in its charter to license and regulate slaughter houses did not authorize the city to create a monopoly injurious to the public interest. The ordinance being an unreasonable exercise of the city's police power was therefore declared void. *City of Chicago v. Rumpff*, 45 Ill. 90 (1867).

In an action for recovery on a contract for public printing, it was shown that plaintiffs and others formed a combination for the purpose of preventing competition between them in bidding for the contract. It was, therefore, held that as the contract was secured by means of an unlawful conspiracy under c. 38, sec. 139, no recovery could be had. *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33 (1888).

Where a contract for public improvement would not have been let on a single bid, and several persons entered into a conspiracy with a successful bidder to put in fictitious bids in order to enable him to obtain the contract, all were held guilty under c. 38, sec. 139. *People v. Strauch*, 240 Ill. 60, 88 N. E. 155 (1909).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A partner who sold his interest in a livery and undertaking business, under an agreement not to engage in a similar business in Chicago for 5 years, was not enjoined from breaching his contract, as the restraint was only partial and afforded no more than a fair protection to the buyer. *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735 (1896). See also *Stewart v. Ramsey*, 11 Ill. App. 379 (1882).

Where the seller of an electroplating business, and its good will contracted not to engage in a similar business in Chicago for a period of 3 years, the covenant was upheld as reasonable, and the vendor was enjoined from furnishing information concerning his old customers to his new employer and generally from engaging in the business in Chicago during the term of the contract. *Rugg v. Rohrbach*, 110 Ill. App. 532 (1903).

A seller's contract not to engage in the newspaper business in the same town for five years, was reasonable and was violated even though the patronage and character of the proposed newspaper was not the same. *Andrews v. Kingsbury*, 212 Ill. 97, 72 N. E. 11 (1904).

The covenant of the vendor of a garage business not to enter into a similar business within certain limits (limits not stated in report) was violated upon vendor's becoming the manager of a garage within the prohibited territory. *Worden et al v. Nolan*, 209 Ill. App. 348 (1918).

A covenant by the seller of a milk and ice-cream business not to engage in the business for 5 years in Chicago or within a radius of 50 miles was held reasonable and valid. *Brozham v. Borden's Farm Products Company of Illinois*, 53 Fed. 2d 946 (C. C. A. 7th, 1931).

A contract ancillary to the sale of a strawboard manufacturing company, whereby the vendor agreed not to reengage in a business for 25 years in Illinois, or wherever such activity might interfere with the purchaser's business was held invalid as being unreasonably restrictive. *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 61 N. E. 1038 (1901).

Ancillary to the sale of stock of a manufacturing corporation, a covenant not to manufacture or sell bunghole appliances, or engage in such business as stockholder, employee or otherwise for 16 years in a territory which might conflict with plaintiff's business was held void as a restraint of trade. *Parish v. Schwarts*, 344 Ill. 563, 176 N. E. 757 (1931).

In a contract ancillary to the sale of a paper novelty manufacturing company, the vendor was hired as a salesman by the vendee and agreed not to engage or be in any way connected with such a business in Illinois or Indiana, for a period of 10 years, the court held the restrictions unreasonable in space, and, therefore, void. *Lanzit v. J. W. Sefton Manufacturing Co.*, 184 Ill. 326, 56 N. E. 393 (1900).

One partner, in a drug manufacturing business, sold his interest in a copyrighted label for a drug preparation, and agreed not to manufacture or sell "said liquid extract" (time or space limitation not mentioned). In dismissing the action, the court held that the agreement did not prohibit the seller from making other preparations from the same herb in a different manner. *Garrison v. Nute*, 87 Ill. 215 (1877).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

Ancillary to the sale of a physician's practice, lot, and home, an agreement not to practice medicine within a radius of 6 miles from the residence was held valid. *Linn v. Sigsbee*, 67 Ill. 75 (1873.)

Where a physician sold his interest in a partnership and agreed never to practice within 8 miles of a certain town, so long as the buyer practiced there, the covenant was held reasonable and valid. *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781 (1903).

A covenant by a physician not to engage in the practice of medicine in the city of Chicago, independently of his vendee, was held valid even without limitation as to time. The restraint was reasonably calculated to protect the vendee's interest. *Storer v. Brock*, 351 Ill. 643, 184 N. E. 868 (1933); cf. *Tarr v. Stearman*, 264 Ill. 110, 105 N. E. 957 (1914).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

Competing gas companies entered into an agreement whereby each was to furnish gas to a different section of the city and neither would compete with the other in said section for a period of 100 years. In refusing an injunction for specific performance, the court held that since the furnishing of illuminating gas under charter from the city was a business affected with a public interest, any contract lessening competition in such business was void and unenforceable. *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N. E. 169 (1887).

Two competing street railways agreed, in consideration of the use of each other's tracks, that neither would, without written consent of the other, build tracks crossing those of the other. It was held that such an agreement deprived the public of the benefit of competition in a business impressed with a public interest, and therefore was void and unenforceable by injunction. *South Chicago City Railway Co. v. Calumet Electric Street Railway Co.*, 171 Ill. 391, 49 N. E. 576 (1898).

Restrictive Covenants Ancillary to Employment.

A highly skilled employee in the glucose business, who had learned his employer's trade secrets was given a 5-year contract at a substantial salary, and agreed not to engage in a competitive business within a radius of 1,500 miles. The contract was held reasonable as to time and space, and its breach by the employee was enjoined. *Harrison v. Glucose Sugar Ref. Co.*, 116, Fed. 304 (C. C. A. 7th, 1902).

A contract prohibiting an employee from directly or indirectly divulging information in regard to any part of the employer's phosphate plant or processes, and from doing anything which might injure the employer or its successors was held void as an unreasonable restraint, being unlimited in time and place. *Victor Chemical Works v. Iliff*, 299 Ill. 532, 132 N. E. 806 (1921).

Restrictive Covenants Ancillary to the Lease of Property.

Where a corporation holding leases on two nearby theaters, subleased one and agreed that the other would not be subleased for use as a theatre, the contract was held valid and binding. The fact that subsequent purchasers of stock of the corporation did not know of the restrictive contract did not affect the obligation of the corporation, and the restriction on use of the second building was enforced by injunction. *Meridian Amusement Co. of Illinois v. Home Theatre Co.*, 215 Ill. App. 479 (1919).

Restrictive Covenants Ancillary to the Sale of Real Property.

A covenant in a deed of real property, whereby the vendee agreed not to use the premises as a dram shop so long as the grantor owned and operated his dram shop in certain other premises was held valid and enforceable. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145 (1896).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Stat. (Smith-Hurd, 1939), c. 32
Cooperatives

Sections 457 and 468 provide that an agricultural cooperative association organized under sections 440 to 472 or under any other law of this or any other State as a cooperative association, may execute marketing contracts with its members by which the members agree to sell, for any period of time, any or all of their commodities exclusively to or through such association and that such contracts shall not be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an illegal or improper purpose. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Rev. Stat. (Smith-Hurd, 1939), c. 43
Liquor

Section 138 provides that no manufacturer or distributor or importing distributor shall enter into any contract with any person licensed to sell at retail whereby such licensee agrees not to sell any alcoholic liquors manufactured or distributed by any other manu-

facturer or distributor or importing distributor, and any provision in any contract violative of this section shall render the whole of such contract void and no action shall be brought thereon in any court. See *Special Antitrust Laws: Liquor*.

Judicial Decisions

Exclusive Dealing Arrangements.

The plaintiff contracted to furnish the defendant with sewing machines at a discount and on credit, provided that the defendant purchased such machines only from plaintiff. The plaintiff also agreed that he would not sell to any other dealer in the county. In a suit upon a bond securing the purchase price of the sewing machines, the contract was held valid, being only in partial restraint of trade. *Brown v. Rounsavell*, 78 Ill. 589 (1875).

It was held that an exclusive agency for the sale at fixed resale prices of dress patterns for a period of 5 years, covering a specific territory in Chicago, did not constitute an unlawful restraint of trade. *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67 (1898).

A bylaw of a news-gathering service requiring members not to receive like services from competitors without consent of the board of directors, and enforceable by fines or expulsion from the organization, was held to restrict competition, and create a monopoly in a business affected with a public interest. *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822 (1900).

A majority of brick manufacturers, building contractors and brick layers in a community, agreed to buy, sell and use only each other's products. A brick manufacturer, not a party to the agreement, brought an action for damages to his business as a result of such agreement. In sustaining the action, the court held that it was of no consequence that there were separate agreements with each contractor, and that the members of the union were free to work with such contractors as they chose. Each of these contracts, while in itself lawful, was a part of a series of acts and agreements designed to control the brick industry in violation of the common law. *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47 (1905).

A local telephone company agreed to give all of its business to a particular long-distance telephone company. In an action by the

long-distance company to enforce a lien for services rendered, the court held that the contract was injurious to competition in a business affected with a public interest, and was therefore void at common law. *Union Trust & Savings Bank of East St. Louis v. Kinloch Long-Distance Telephone Co. of Missouri*, 258 Ill. 202, 101 N. E. 535 (1913). See also *St. Louis C. C. Co. v. Postal Tel. of Ill.*, 173 Ill. 508, 51 N. E. 382 (1898).

INDIANA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. Ann. (Burns, 1933)

Sec. 23-101. Contracts to prevent competition.—From and after the passage of this act, all arrangements, contracts, agreements, trusts, or combinations between persons or corporations who control the output of said [any] article of merchandise, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations who control the output of said article of merchandise, designed, or which tend to advance, reduce, or control the price or the cost to the producer or to the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void. (Acts 1897, ch. 104, sec. 1, p. 159.)

Sec. 23-102. Contracts to prevent competition—Violation by corporations—Penalty.—Any corporation chartered under the laws of this state which shall violate any of the provisions of this act shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do, and is prohibited from doing, business in this state. It is hereby made the duty of the Attorney General of the state to enforce this provision by due process of law. (Acts 1897, ch. 104, sec. 2, p. 159.)

Sec. 23-103. Contracts to prevent competition—Violation by persons—Penalty.—Any violation of the provisions of this act shall be deemed, and is hereby declared to be, destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy, or who shall, as principal, manager, director or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders made in furtherance of such conspiracy, shall, on conviction, be punished by a fine of not less than one hundred dollars (\$100) or more than five thousand dollars (\$5,000), and by imprisonment in the penitentiary not less than one (1) year or more than ten (10) years, or, in the judgment of the court, by either such fine or such imprisonment. (Acts 1897, ch. 104, sec. 3, p. 159.)

Sec. 23-104. Contracts to prevent competition—Persons affected by act.—The persons designed by this act to be affected hereby are those who own, control or manufacture the output of any particular article of merchandise mentioned herein: *Provided, however,* That the provisions of this act shall not apply to agricultural products or livestock while in the possession of the producer or raiser. (Acts 1897, ch. 104, sec. 4, p. 159.)

Sec. 23-105. Contracts to prevent competition—Damages recoverable.—Any person or persons or corporations that may be injured or damaged by any such arrangement, contract, agreement, trust, or combination, described in section 1 (sec. 23-101) of this act, may sue for and recover, in any court of competent jurisdiction in this state, of any person, persons or corporation operating such trust or combination the full consideration or sum paid by him or them for any goods, wares, merchandise or articles the sale of which is controlled by such combination or trust. (Acts 1897, ch. 104, sec. 5, p. 159.)

Sec. 23-106. Contracts to prevent competition—Instructions to grand juries.—It shall be the duty of the judges of the circuit courts of this state specially to instruct the grand juries as to the provisions of this act. (Acts 1897, ch. 104, sec. 6, p. 159.)

Sec. 23-107. Sale of supplies to dealers or mechanics—Combinations to prevent prohibited.—Any person, firm, or association of persons who shall make any contract or enter into any agreement or make any combination or enter into any arrangement, directly or indirectly, to induce, procure or prevent any wholesale or retail dealer in or manufacturer of merchandise or of supplies or of material or articles intended for trade or used by any mechanic, artisan or dealer in the prosecution of his business from selling such supplies to any dealer or to any mechanic or artisan; and any dealer in or manufacturer of such supplies or material or article of trade or supplies

or material to be used by any mechanic, artisan or dealer who shall be a party, directly or indirectly, to any such contract, combination or arrangement, or who shall, upon the request of any party to any such contract, combination or arrangement, refuse to sell such articles of trade, supplies or materials or articles sold by any dealer or used by any mechanic or artisan to any such person or persons who may require them in the prosecution of their said business, for the reason that said dealer, mechanic or artisan is not a member of a combination or association of persons, shall be guilty of conspiracy against trade. And all such contracts, agreements, combinations or arrangements shall be void and of no effect whatever in law. (Acts 1899, ch. 148, sec. 1, p. 257.)

Sec. 23-108. Sale of supplies to dealers or mechanics—Penalty.—Any person or persons, firm, or association of individuals, or any individual connected therewith, who shall be responsible for the making of any such contract, agreement, or combination or arrangement, or shall be a party to any such contract, combination or arrangement, or that shall take any part therein, as set out in section 1 (sec. 23-107) of this act, shall, upon conviction thereof in any court of competent jurisdiction, be punished by a fine of not less than fifty dollars (\$50.00) nor more than two thousand dollars (\$2,000), to which may be added imprisonment in the county jail for any period not exceeding one (1) year. (Acts 1899, ch. 148, sec. 2, p. 257.)

Sec. 23-109. Sale of supplies to dealers or mechanics—Forfeiture—Suit.—Each and every person, firm, or association of persons who shall in any manner violate the provisions of this act shall, for each and every day that such violation shall be committed and continued after due notice given by the party interested (or the) Attorney General or prosecuting attorney, forfeit and pay the sum of fifty dollars (\$50.00), which may be recovered in the name of the state on the relation of the party injured or on the relation of the prosecuting attorney in any county where the offense is committed or where the offender or offenders reside. And it shall be the duty of the prosecuting attorney of any county to prosecute any such action, and he shall be entitled to a fee of twenty-five dollars (\$25.00), to be taxed against the defendant, in the event of recovery, as a part of the costs of said action. Any such action may be taken in any circuit or superior court of the county in which the defendant resides or in which he is engaged in business. (Acts 1899, ch. 148, sec. 3, p. 257.)

Sec. 23-110. Sale of supplies to dealers or mechanics—Damages.—Any person who shall, by any such contract or combination as set out in section 1 (sec. 23-107) of this act, be injured or damaged in his business thereby, or by reason of anything forbidden or declared by this act to be unlawful, may maintain a suit therefor

in any court having jurisdiction thereof in the county where the defendant resides or in which he is engaged in business, or in any county where services may be obtained, without respect to the amount in controversy, and the plaintiff in any such action shall be entitled to recover all his costs and a reasonable attorney's fee therein. (Acts 1899, ch. 148, sec. 4, p. 257.)

Sec. 23-111. Sale of supplies to dealers or mechanics—Parties.—Whenever it shall appear to the court before which any proceedings under this act may be pending that the ends of justice require that other parties shall be brought before the court, said court may cause them to be made parties defendant and cause them to be served by the process of court as now required by law in such cases provided, whether they reside in the county where said action is pending or not. (Acts 1899, ch. 148, sec. 5, p. 257.)

Sec. 23-112. Manufacturers—Combinations to compel manufacturers to cease business prohibited.—From and after the passage of this act, all arrangements, agreements, trusts or combinations, or any agreement or arrangements that are made, whereby a party or corporation refuses to furnish any article or articles required to be used in the manufacture of any article or merchandise when the party or corporation can furnish the same, or by charging more than the regular and ordinary price for the same, or doing or refusing to do any act or acts that would cause such party to cease to manufacture such article, or hinder such person or corporation from so doing, and all arrangements, contract, or acts done or performed between any person or corporation made for the purpose of compelling any person or corporation engaged in the business of manufacturing any article of merchandise to cease manufacturing any such article, or compelling the same to close down or go out of business, is hereby declared to be against public policy, unlawful and void. (Acts 1901, ch. 107, sec. 1, p. 178.)

Sec. 23-113. Manufacturers—Penalties for violation by corporation.—Any corporation, chartered under the laws of this state, which shall violate any of the provisions of this act, shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease and terminate. Every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do and is prohibited from doing business in this state.

It is hereby made the duty of the Attorney General of the state to enforce the provisions of this act by due process of law. (Acts 1901, ch. 107, sec. 2, p. 178.)

Sec. 23-114. Manufacturers—Conspiracy—Penalty.—Any violation of the provisions of this act shall be deemed and is hereby declared

to be destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy or who shall, as principal, manager, director or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in furtherance of such conspiracy shall, on conviction, be punished by a fine of not less than one hundred dollars (\$100) or more than five thousand dollars (\$5,000), and by imprisonment in the penitentiary for not less than one (1) year or more than ten (10) years; or, in the judgment of the court, by either such fine or such imprisonment. (Acts 1901, ch. 107, sec. 3, p. 178.)

Sec. 23-115. Manufacturers—Damages recoverable.—Any person or persons or corporations that may be injured or damaged by any such arrangement, contract, agreement, trust or combination, described in section 1 (sec. 23-112) of this act, may sue for and recover, in any court of competent jurisdiction in this state, of any person, persons or corporations operating such trust or combination, the full consideration or sum paid by him or them for any goods, wares or merchandise or article, the sale of which is controlled by such combination or trust. (Acts 1901, ch. 107, sec. 4, p. 178.)

Sec. 23-116. Combinations to restrain trade or prevent competition—Act of 1907.—Every scheme, design, understanding, contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce or to create or carry out restrictions in trade or commerce, or to deny or refuse to any person or persons full participation, on equal terms with others, in any telegraphic service transmitting matter prepared or intended for public use, or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity, natural or artificial, or to prevent competition in manufacturing, within or without this state, is hereby declared to be illegal, but none of the provisions of this act shall be construed to apply to [or] repeal, modify, or limit, or make unlawful, any of the powers, rights, or privileges now existing or conferred by law upon any person, copartnership, association, or corporation. Every person who shall make any such contract or engage in any such combination or conspiracy, or enter into any such scheme, design, or understanding, or do within this state any act in furtherance of any such contract, combination, conspiracy, scheme, design, or understanding, entered into without this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding five thousand dollars (\$5,000), to which may be added imprisonment in the county jail or workhouse for a term not exceeding one (1) year, in the discretion of the court or jury trying

the cause: *Provided, however,* That it shall be a good defense to any action growing out of any violation of the provisions of this act or any other act or common law relating to the subject matter of this act if the defendant shall plead, and by a fair preponderance of the evidence prove, that such violation is not in restraint of trade or commerce or does not restrict trade or commerce or limit or reduce the production or increase or reduce the price of merchandise or any commodity, natural or artificial, or prevent competition in manufacturing. (Acts 1907, ch. 243, sec. 1, p. 490.)

Sec. 23-117. Monopoly—Penalty.—Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding five thousand dollars (\$5,000), to which may be added imprisonment in the county jail or workhouse for a term not exceeding one (1) year, in the discretion of the court or jury trying the cause. (Acts 1907, ch. 243, sec. 2, p. 490.)

Sec. 23-118. Restricting competition—Penalty.—Any and all schemes, designs, understandings, plans, arrangements, contracts, agreements or combinations to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, directly or indirectly, or to in any manner combine or conspire to stifle or restrict free competition for the letting of any contract for private or public work, are hereby declared illegal, and any person who shall, directly or indirectly, engage in any scheme, design, understanding, plan, arrangement, contract, agreement or combination to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, or in any manner combine or conspire to stifle or restrict free competition for the letting of any contract for private or public work, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five thousand dollars (\$5,000), to which may be added imprisonment in the county jail or workhouse for a term of not more than one (1) year, in the discretion of the court or jury trying the cause. (Acts 1907, ch. 243, sec. 3, p. 490.)

Sec. 23-119. Contract—Bidders—Collusion.—If there shall be collusion or fraud of any kind or character among the bidders at the letting of any contract or work as provided in section three (sec. 22-118) of this act, then the principal who lets the contract or work, or for whom the contract was let, shall not be liable for such letting or on account of said contract or work, or any part thereof, to the successful bidder to whom the contract or work was

let, his successors or assigns, if such successful bidder be a party, directly or indirectly, to such collusion or fraud, on such contract or letting, or for any work, materials furnished, or thing done in discharge thereof, or with reference thereto, and if, before notice of such collusion or fraud, payment or partial payment thereon or therefor shall have been made, such principal may, at any time within five (5) years from the date of the last payment made thereon or therefor, in an appropriate action, in any court of competent jurisdiction in this state, recover to the full amount of such payment or payments, with interest to date of judgment thereon, and attorney's fees, against such successful bidder, and such recovery shall not be a bar to any action, either civil or criminal, brought against such bidder on account of any violation of this act, on behalf of the state, by the Attorney General, a prosecuting attorney or otherwise (Acts 1907, ch. 243, sec. 4, p. 490).

Sec. 23-120. Attorney General—Prosecuting attorneys—Duties.—It shall be the duty of the Attorney General and of the prosecuting attorney of each judicial circuit to institute appropriate proceedings to prevent and restrain violations of the provisions of this act or any other act or the common law relating to the subject matter of this act, and to prosecute any person or persons guilty of having violated any of the penal provisions thereof. In all criminal proceedings, the prosecution may be by way of affidavit or indictment the same as in other criminal matters, and the Attorney General shall have concurrent jurisdiction with the prosecuting attorneys in instituting and prosecuting any such actions. All civil proceedings to prevent and restrain violations shall be in the name of the state of Indiana upon relation of the proper party. The Attorney General may file such proceedings, either in term time or in vacation, upon his own relation, or that of any private person, in any circuit or superior court of the state, without applying to such court for leave, when he shall deem it his duty so to do. Such proceedings shall be by information filed by any prosecuting attorney in a circuit or superior court of the proper county, upon his own relation, whenever he shall deem it is duty so to do, or shall be directed by the court or governor or Attorney General, and an information may be filed by any taxpayer on his own relation. If judgment or decree be rendered against any domestic corporation or against any person claiming to be a corporation, the court may cause the costs to be collected by execution against the person claiming to be a corporation, or by attachment against any or all of the directors or officers of the corporation, and may restrain the corporation or any director, agent, employee, or stockholder and appoint a receiver for its property and

effects, and take an accounting and make distribution of its assets among its creditors, and exercise any other power or authority necessary and proper for carrying out the provisions of this act. If judgment or decree be rendered against any corporation incorporated under the laws of the United States, or of any district or territory thereof, or of any state other than this state, or of any foreign country, the court may cause the costs to be collected as heretofore provided, and may render judgment and decree of ouster perpetually excluding such corporation from the privilege of transacting business in the state of Indiana, and forfeiting to the school fund any or all property of such corporation within the state, and shall exercise such power and authority with regard to the property of such corporation as may be exercised with regard to that of domestic corporations. (Acts 1907, ch. 243, sec. 5, p. 490; 1923, ch. 82, sec. 1, p. 252).

Sec. 23-121. Interrogatories—Examinations.—In all proceedings instituted under and pursuant to the foregoing section, the plaintiff may propound interrogatories to the defendant or defendants, to be answered by such defendant or defendants under oath, as is now provided by law in civil actions, and if any defendant to whom interrogatories be propounded as aforesaid be a corporation, then such interrogatories shall be answered by the highest officer of such corporation, or by any other officer, agent or employee of such corporation designated by the plaintiff. The plaintiff in any such action shall be entitled, upon motion, to an order for an examination, under oath, before trial, of any defendant, or all the defendants in such action, and if any defendant in such action be a corporation, then of any officer, agent or employee of any such defendant corporation, concerning any or all of the facts alleged in the information or other pleadings in such cause. The said defendant shall be given five (5) days' notice by the plaintiff of the time and place of the taking of said examination, but such officer, agent, or employee shall not be compelled to attend such examination except in the county where he resides or where the principal office or place of business of such corporation be situate in this state. If such defendant corporation be incorporated under the laws of the United States, or of any district or territory thereof, or of any state other than the state of Indiana, or of any foreign country, and the officer, agent, or employee to be examined be without the jurisdiction of this state, then such defendant shall produce the officer, agent or employee to be examined as aforesaid at some place in the city or town where the principal office or place of business of such defendant be situate, upon five (5) days' notice being served upon the attorneys of such defendant corporation of the time and place fixed for the examination of such officer, agent or employee. In any examination of any defendant, or of any officer,

agent or employee of any defendant corporation, such defendant officer, agent or employee may be compelled, upon notice, to produce for inspection by the plaintiff, and to testify concerning the same, or for use in evidence upon the trial, or both, all books, papers, documents or writings pertaining, or in anywise relating, to the facts, or any of them, stated in the information or other pleadings filed in the cause. In such notice to produce for inspection and testimony or for trial, or both, it shall only be necessary to notify the defendant, or the attorney or attorneys of the defendant, to produce, at the time and place fixed in the notice, all books, papers, documents or writings pertaining or in anywise relating to the facts stated in the information or other pleadings filed, and it shall not be necessary to state in such notice the particular books, papers, documents or writings to be produced at such time and place. Such examinations shall be taken before an officer authorized to take depositions and may be continued from day to day. Upon the failure or refusal of any defendant to comply with any order made as aforesaid to answer interrogatories, or for the examination of the defendant, [or] the officer, agent or employee of any defendant corporation, or upon the failure or refusal of any defendant corporation to produce any officer, agent or employee for examination when notified as aforesaid, or upon the failure or refusal of any defendant to produce books, papers, documents and writings when notified as aforesaid, then all pleadings of such defendant so failing to comply with such order or notice shall be stricken from the files, upon motion supported by affidavit, and the allegations of the information as to such defendant in default shall be taken as confessed and judgment and decree shall be entered accordingly. (Acts 1907, ch. 243, sec. 6, p. 490.)

Sec. 23-122. Private action—Damages—Penalty.—Any person who shall be injured in his business or property by any person or corporation by reason of the doing by any person or persons of anything forbidden or declared to be unlawful by this act may sue therefor in the circuit or superior court of any county in which the defendant or defendants, or any of them, reside or are found, without respect to the amount in controversy, and shall recover a penalty of threefold the damages which may be sustained, together with the costs of suit, including a reasonable attorney's fee. (Acts 1907, ch. 243, sec. 7, p. 490.)

Sec. 23-123. Certificate of importance.—In any proceeding under this act, the attorney general or prosecuting attorney may file with the clerk of the court a certificate that, in his opinion, the case is of general importance, a copy of which shall be immediately furnished by said clerk to the judge or each of the judges of the court

wherein the proceedings may be pending, and the court shall thereupon make the proper orders in the premises. (Acts 1907, ch. 243, sec. 8, p. 490.)

Sec. 23-124. Costs—How paid—Appropriation.—Whenever an information is filed by the attorney general or by any prosecuting attorney, such officer shall not be liable for costs; but when it is filed upon the relation of a private person, he shall be liable for costs unless the same are adjudged against the defendant. In all proceedings instituted under the provisions of this act by the attorney general or by the prosecuting attorney on the order and direction of the court, attorney general, or the governor, all necessary costs and expenses of the prosecution shall be paid out of moneys in the state treasury not otherwise appropriated, if such costs cannot be collected from the defendant or defendants, in case judgment be rendered against such defendant or defendants, and it shall be the duty of the auditor of state, upon receipt from the attorney general of a statement of the costs and expenses of any such prosecution, to draw his warrant upon the treasurer of state for the amount so certified: *Provided, however,* That the attorney general shall not involve the state in any extraordinary expense for experts or other assistants without first obtaining the consent of the governor, and twenty thousand dollars (\$20,000) is hereby appropriated from any funds of the state not otherwise appropriated to defray the expenses of such prosecutions by the attorney general for the next ensuing period of two (2) years after the passage of this act, and twenty thousand dollars (\$20,000) biennially thereafter for the same purposes. Such prosecuting attorney shall also be allowed by the court trying such cause reasonable compensation for his services, and such allowance shall be paid as part of the costs and expenses of such prosecution. (Acts 1907, ch. 243, sec. 9, p. 490.)

Sec. 23-125. "Person" or "persons" defined.—The words "person" or "persons," whenever used in this act, shall be deemed to include corporations and associations, joint stock companies, partnerships, limited or otherwise, existing under or authorized by the laws of the state of Indiana, or of the United States, or of any state, territory or district of the United States, or of any foreign country. (Acts 1907, ch. 243, sec. 10, p. 490.)

Sec. 23-126. Immunity for witnesses.—Any person or officer, agent or employee of a corporation may be examined as a witness or a party as in other cases in any civil action instituted under the provisions of this act, and required to disclose all the facts relevant to the case in his knowledge, as before provided, but the testimony of such witness or party or any answer to any question

propounded to him in such examination shall not be used against such witness or party in any criminal prosecution except in case of perjury committed by him therein; and he shall not be liable to trial by indictment or affidavit or to punishment for any offense inquired about: *Provided, however*, That such exemption shall be personal to such witness, and shall not exempt or render immune the corporation of which such witness shall be an officer, agent or employee, and such corporation shall be as liable for any violation of this act as if such officer, agent or employee had not so testified. (Acts 1907, ch. 243, sec. 11, p. 490; 1923, ch. 82, sec. 2, p. 252.)

Sec. 23-127. Act of 1907 cumulative.—The provisions of this act shall be held cumulative of, or supplemental to, each other, and of all other laws in any way affecting them or any matter which in any manner is the subject of this act in this state, and cumulative of and supplemental to the common law of this state relative thereto, or to any thereof. (Acts 1907, ch. 243, sec. 12, p. 490.)

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of Common Law.

In absence of express legislative authority, a municipal corporation cannot grant to any fuel or gas company an exclusive franchise for the use of its streets. *Citizens' Gas & Mining Co. v. The Town of Elwood*, 114 Ind. 332, 16 N. E. 624 (1888).

An ordinance providing for an exclusive privilege of laying gas mains along certain streets and for taking a certain quantity of gas for a period of 25 years is not monopolistic or illegal. *Vincennes v. Citizens Gaslight Co.*, 132 Ind. 114, 31 N. E. 573 (1892).

A municipality may legally grant a monopoly for the removal of garbage within city limits. *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402 (1890).

Generally neither a State nor a municipal government can grant or create a monopoly. There are, however, exceptions to this rule so that a legislature may grant an exclusive right to lay or operate a street railway for a reasonable and fixed period. *Indianapolis Cable Street Railroad Co. v. Citizens Street Railroad Co.*, 127 Ind. 369, 24 N. E. 1054 (1890).

A combination between common carriers to prevent competition is prima facie illegal. *Cleveland, C., C., & I. Railway Co. v. Closser et al.*, 126 Ind. 348, 26 N. E. 159 (1890).

The burden of proof is on the carrier to remove such presumption. A combination can be legal only when it is affirmatively shown that the object was to prevent ruinous competition and that the rates fixed were reasonable and nondiscriminatory. *Ibid.*

Constitutionality of Statute.

Sections 23-101 through 23-111 do not violate the fourteenth amendment to the Federal Constitution, are not invalid on the ground that the subject embraced is not expressed in the title of the act and do not violate Const. art 1, secs. 1 and 23. The penalties provided for are not so severe as to deter application to the courts for determination of rights of parties against whom they are directed. *Knight & Jillson Co. et al. v. Miller*, 172 Ind. 27, 87 N. E. 823 (1909).

Application of Statute.

In General.

Sections 23-101 through 23-106 operate prospectively only. Where goods were sold and delivered prior to the enactment of the act, subsequent violation by the vendor was no defense to a suit for the contract price. *Sterling Remedy Co. v. Wyckoff, Seamans & Benedict*, 154 Ind. 437, 56 N. E. 911 (1900).

A combination is monopolistic when it attempts to stifle competition, control production and supply, fix prices, or engage in other acts of like character and purpose in unlawful restraint of trade. *City Dairy Co. v. Usero, Inc.*, 101 Ind. App. 375, 199 N. E. 457 (1936). Refusal by a bottle company to allow dairies other than its licensees to use its bottles does not illegally restrain trade. *Ibid.*

An agreement by two gas companies supplying all gas in a certain city, fixing gas rates and providing that neither company should serve customers of the other, was unlawful and constituted a monopoly. *State ex rel. Snyder v. Portland Natural Gas & Oil Co.*, 153 Ind. 483, 53 N. E. 1089 (1899).

Contracts in restraint of trade, however, may be valid where such restraint is only partial, incidental, or minor to the main objective which is for the public good. *Home Telephone Co. v. North Manchester Telephone Co.*, 47 Ind. App. 411, 92 N. E. 558 (1910).

An agreement between two telephone companies to route over each other's lines all calls in the other's territory unless detrimental to public interest is not in restraint of trade and will be specifically enforced. *Ibid.*

Section 54-601 prohibiting licensing of public utilities for duplication of service in absence of a certificate of public necessity therefor does not create a monopoly in the utility first granted the franchise, since it permits a monopoly only so far as public interest does

not require additional service. *Farmers & Merchants Cooperative Telephone Co. v. Boswell Telephone Co.*, 187 Ind. 371, 119 N. E. 518 (1918).

Where A company had a franchise to construct an electric railway from X to Z by way of Y and made a contract with the B company to use its tracks exclusively from X to Y for 35 years and not to do any local business between X and Y for that period, such contract tended to create a monopoly and was unenforceable by the B company. *Evansville Suburban & Newburgh Rwy. Co. v. Evansville & Eastern Electric Rwy. et al.*, 50 Ind. App. 502, 98 N. E. 649 (1912).

Relief in the nature of quo warranto was granted where a railroad corporation tended to destroy all competition when it leased all its property to a competing company in perpetuity, surrendered its franchise, discharged its employees, allowed part of its right-of-way to be dismantled, and permitted its affairs to be managed largely by the lessee company. *Eel River Railroad Co. et al. v. State ex rel. Kistler*, 155 Ind. 433, 57 N. E. 388 (1900).

A contract between two competing railroads whereby the A railroad agreed not to run any track into any quarry connected by switches with the B railroad and further that when shippers over the B railroad required freight to be forwarded over the A railroad, the tariff to B should be not less than 3 cents per 100 pounds was held void as tending to create a monopoly. *Chicago I. & L. Rwy. Co. v. Southern Indiana Rwy. Co.*, 38 Ind. App. 234, 70 N. E. 843 (1904).

Not every scheme or design to injure a business competitor comes within prohibitions of section 23-116. An act coming within purview of this section must (1) restrain trade or commerce; (2) limit or reduce production; or (3) increase or reduce the price of commodities. *Dye et al. v. Carmichael Produce Co.*, 64 Ind. App. 653, 116 N. E. 425 (1917).

A regularly shipped poultry through X. B, a competitor of A's, informed X that B would not ship through X if X continued to carry A's poultry. X then ceased to take A's poultry. B did not violate any of the provisions of sections 23-116, 23-117, and 23-122. *Ibid.*

Proof that a dairy products association held meetings, had officers and committees, collected dues and employed a secretary who collected and disseminated information as to prices did not establish a combination in restraint of trade in violation of the antitrust laws. *State ex rel. Lesh, Attorney General, v. Indiana Manufacturers of Dairy Products et al.*, 198 Ind. 288, 153 N. E. 499 (1926).

Resolution by a cemetery association fixing a charge for the setting

of any vault except those furnished by the association was not void as tending to create a monopoly when the association did not control all cemeteries in the vicinity. *Tatman v. Rochester Lodge, No. 47, I. O. O. F., et al.*, 88 Ind. App. 507, 164 N. E. 718 (1929).

A covenanted with B that if B would purchase the other half of a lot owned by A and join in the erection of a building on the whole lot, neither A nor his assigns would sell or permit the sale of liquor on A's half of the lot. Vendee of A with notice was enjoined from selling liquor. The agreement was not invalid as a restraint on trade. *Sullivan v. Kohlenberg*, 31 Ind. App. 215, 67 N. E. 541 (1903).

The Chain Store Tax Act (L. 1929, c. 207, p. 693) is not in violation of the Fourteenth Amendment to the Federal Constitution. The classification is neither arbitrary nor unreasonable. It is a valid exercise of the State's police power to protect the public interest against the chain store's monopolistic tendencies. "Filling stations" are "stores" and come within meaning of the act. The action was therefore properly instituted by the State Board of Tax Commissioners against defendants, "multiple owners of filling stations." It is not necessary to the exercise of the right to prevent monopolies that the thing declared against will constitute a complete monopoly or that it will immediately restrain trade; it is sufficient if it merely tends towards monopoly or restraint. *Midwestern Petroleum Corp. v. State Board of Tax Commissioners et al.*, 206 Ind. 688, 187 N. E. 882 (1933).

Where a sale is in no way connected with the illegal character of the selling corporation, but is made in the regular course of business, resting upon a valid and independent consideration, it is no defense to an action for the goods sold that the plaintiff is an illegal combination. *Bessire & Co. v. Corn Products Manufacturing Co.*, 47 Ind. App. 298, 94 N. E. 353 (1911).

Sections 23-107 through 23-111 are no broader than the common law. *Knight & Jillson Co. et al., v. Miller*, 172 Ind. 27, 87 N. E. 823 (1909).

At common law, the test in every case is whether the agreement claimed to be in restraint of trade is injurious to the public and all contracts which tend to stifle competition are in this class. Plumbers' supplies are both necessities of life and staple commodities within the meaning of the antitrust statute. Thus members of a plumbers' association violated the antitrust act by refusing to sell to nonmembers who were licensed plumbers, and an injunction was the proper remedy to prevent continuation of such discrimination. *Ibid.*

Inapplicable to Labor Agreements.

The right of members of a labor union to combine with other members and strike or picket peacefully to better their welfare is not limited by the antitrust law, sections 23-116 through 23-127. *Shaughnessy et al. v. Jordan et al.*, 184 Ind. 499, 111 N. E. 622 (1916).

An association of employers to fix maximum wages to be paid their employees does not violate the antitrust laws, since labor may lawfully combine to fix minimum wages. *Androff v. Building Trades Employers' Association*, 83 Ind. App. 294, 148 N. E. 203 (1925).

Collusion on Public Contracts.

Where bidders on a public improvement contract were guilty of collusion in bidding, a taxpayer assessable for the improvement was held entitled under sections 23-118, 23-119, 23-120, and 23-122 to an injunction against payment of the contract price. *Royer et al. v. State ex rel. Brown*, 63 Ind. App. 123, 112 N. E. 122 (1916). See also *Moore v. Barrett Co.*, 75 Ind. App. 352, 130 N. E. 649 (1921).

Pleading and Burden of Proof.

An answer, purporting to show that the contract sued upon constitutes a combination in restraint of trade, must allege that such contract is unlawful. *Bessire & Co. v. Corn Products Manufacturing Co.*, 47 Ind. App. 298, 94 N. E. 353 (1911).

An answer setting up that plaintiff's predecessor was a combination of all glucose manufacturing companies in the United States and that the plaintiff purchased all property, right, interests, etc., of its predecessor sets up no defense where there is no averment that plaintiff was a trust or combination in restraint of trade or that it purchased its predecessor's property for an unlawful purpose. *Ibid.*

An answer, in a suit for purchase price of goods, that at the time the purchases were made plaintiff had a monopoly of the manufacture of goods purchased and defendant could not secure them elsewhere is not sufficient. *Ibid.*

A combination between common carriers to prevent competition being prima facie illegal, the burden is on the carriers to rebut such presumption. *Chicago, I. and L. Rwy. Co., v. Southern Indiana Rwy. Co.*, 38 Ind. App. 234, 70 N. E. 843 (1904).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. Ann. (Burns, Supp. 1939)
Resale Price Maintenance

Sections 66-301 to 66-309 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Stat. Ann. (Burns, Supp. 1939)
Cooperatives

Sections 15-1627 provides that any agricultural cooperative associations organized under sections 15-1602 to 15-1634 or organized under any agricultural cooperative law of any other state of the United States and admitted to do business in Indiana shall not be deemed to be a conspiracy, combination in restraint of trade, an illegal monopoly, or attempt to lessen competition, fix prices arbitrarily, or create a combination or pool in violation of any law of the state. See *Tying Contracts and Exclusive Dealing Arrangements*, *infra*. See also Vol. *Cooperatives* in projected study.

Stat. Ann. (Burns, 1933)
Agricultural Products

Section 23-104 provides that agricultural products and livestock while in the possession of the producer or raiser shall not be subject to the provisions of sections 23-101 to 23-106. See *General Antitrust Laws*, *supra*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Stat. Ann. (Burns, 1933)
Railroads and Street Railways

Section 55-727 provides that railroads may make contracts or operating agreements with street or interurban roads but prohibits any such arrangement between competing lines.

Railroads

Section 55-2406 provides that a railroad may lease or purchase the noncompeting line, continuous with its own, of a railroad in another state.

Section 55-2513 provides that railroads may purchase, lease, and acquire other railroads, but prohibits such acquisition by competing lines.

Milk—Discrimination

Sections 23-128 to 23-133 provide that any person dealing in, purchasing, or manufacturing milk or milk products who shall intentionally, for the purpose of destroying the business of a competitor in any locality and creating and maintaining a monopoly, discriminate between different localities by buying or selling at a lower rate in one than in another shall be guilty of unfair discrimination. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Livestock Buyers

Section 42-921 declares to be in restraint of trade and prohibits combinations or agreements between buyers of livestock to divide territory with the purpose or effect of substantially lessening competition among such buyers in the purchase of livestock, and every such agreement shall be considered in restraint of trade. Violation of any of the provisions of the livestock buyer's act shall be a misdemeanor and punishable by a fine in any amount not exceeding \$200 and for a second offense there may be added in the discretion of the court imprisonment not exceeding 6 months.

Express Companies

Sections 55-4111 to 55-4113 provide that it shall be unlawful for any person engaged in the express business to enter into any contract, conspiracy, or combination in restraint of trade, to obstruct commerce in any article of trade or in the carriage thereof, to hinder any other carrier in the carriage of express matter, to stifle competition, or to create or continue a monopoly in the express business. It shall also be unlawful to do any act in carrying into effect any combination to obstruct the business of any other carrier or to stifle competition in the express business. Violation is subject to fine, and injured persons may recover triple damages.

Stat. Ann. (Burns, Supp. 1939)**Liquor**

Section 12-508 (4) provides that no beer wholesaler's permit shall be granted unless the applicant therefor shall have no interest in any permit to manufacture or to sell at retail alcoholic beverages of any kind, or in any other permit to wholesale alcoholic beverages; and shall have no interest, direct or indirect, through stock ownership or otherwise, in any partnership or corporation holding any such permits.

Section 12-508 provides that no brewer permittee shall hold, take, acquire, possess, own, or control, directly or indirectly, or have any interest, claim, or title in or to any establishment and/or company

or corporation holding or applying for a beer wholesaler's permit or in the business thereof. The transfer, sale, acquisition, assignment, or control of or beneficial interest, directly or indirectly, in or to such permit to sell at wholesale, or in the business thereof, or in the corporate stock thereof, contrary to the foregoing provisions and/or the transfer, assignment, or entry of any transfer or assignment upon the capital stock book or upon a corporate record of a corporation holding a beer wholesaler's permit, of said capital stock or any part thereof, shall be wholly void and not capable of validation. It shall likewise constitute a violation of the foregoing provisions to employ or use the ownership or control of any corporation as a means or subterfuge to enable any nonresident to own or control or acquire any interest in any said wholesaler's permit to sell alcoholic malt beverages in this State. The commission may revoke any such permit on account of noncompliance with or violation of any of the provisions of this section.

Section 12-514 provides that no person holding a manufacturer's or distiller's permit may own, acquire, or possess any permit to wholesale alcoholic spirituous beverages; nor have any interest, direct or indirect, in the business conducted by any permittee of such beverages at wholesale or retail; nor sell alcoholic vinous or malt beverages at wholesale or retail. It shall be unlawful for any executive officer of any manufacturer or distiller permittee, or any agent or other person under their control, to own, acquire, possess, or cause to be transferred to him, any shares of stock of any corporation holding a permit to sell alcoholic spirituous or vinous beverages at retail in the State. Nor shall any manufacturer or distiller permittee own, acquire, or possess any interest in any retailer's permit to sell alcoholic, spirituous, malt or vinous beverages within this State, or own or acquire any interest, directly or indirectly, in the business being conducted thereunder, or in or to any shares of stock in any corporation owning the permit to retail the same. Section 12-515 makes provisions for rectifier permittees similar to the above provisions for manufacturer or distiller permittees.

Section 12-641 provides that no manufacturer or other permittee authorized to sell or deliver alcoholic beverages shall give, supply, furnish, or grant, directly or indirectly, to any holder of a retailer's or dealer's permit, or holders of such permits shall receive or accept, either directly or indirectly from any such manufacturer or other permittee authorized to sell or deliver alcoholic beverages, any sign, poster, or advertisement, for use or intended to be used outside of or on the exterior portion or surface of such dealer's or retailer's establishment, or own any building or buildings situated thereon or

connected therewith, or own any premises adjacent thereto. Whosoever shall violate any of the provisions of this subsection shall be fined not less than \$5 nor more than \$300, and each and every day during any part of which any violation of this subsection shall continue shall be deemed to constitute a separate and distinct offense.

Section 12-907 provides for a complete separation of the ownership and interest of beer or liquor retailer and dealer permits from beer and/or liquor wholesaler, rectifier, distiller, or brewer permits; and forbids the attainment of any financial interest whatsoever in or to any of the last said permits or in or to the business thereof by any means whatsoever including any participating interest, title, or device or trusteeship or otherwise. The above same disabilities are made applicable to beer or liquor wholesaler permittees with reference to beer or liquor retailer or dealer permits or the business conducted thereunder. No person shall directly or indirectly aid, abet, connive at or assist in acting as an instrumentality for, or trustee for, any holder of such wholesaler's permit or retailer's permit or dealer's permit contrary to the last above provision.

Section 12-915 provides that no brewer's permit or beer wholesaler's permit shall be issued to any person holding, or having a direct or indirect financial interest in, any alcoholic spirituous beverage permit of any kind, character, or class as in this act defined; and the holding of or direct or indirect financial interest in, any such alcoholic spirituous beverage permit by any person to whom a brewer's permit or beer wholesaler's permit shall have been issued, either at the time of such issuance, or at any time thereafter, shall be grounds for revocation of such brewer's permit or beer wholesaler's permit, and the same shall forthwith be revoked. Section 12-916 (p) provides similar disabilities for manufacturer, distiller, or rectifier permittees of alcoholic spirituous beverages with respect to any alcoholic malt beverage permits.

Section 12-922 provides that whoever shall violate any of the prohibitions of this act, for which no specific penalty has been provided, shall be guilty of a misdemeanor and, on conviction, shall be fined in any sum not less than \$25 nor more than \$300, to which may be added imprisonment for any period not exceeding sixty days.

2. Public Contract Provisions

Stat. Ann. (Burns, 1933)

Sections 23-118 to 23-127 provide that all schemes, to limit or restrict bidding on contracts for private or public work, or in any manner to combine or conspire to restrict free competition for the

letting of any such contract, are illegal. The principal who lets a contract shall not be liable upon it if the party to whom it was let was a party to collusion or fraud among the bidders. Violation of the act constitutes a misdemeanor and it is the duty of the attorney general to institute proceedings to restrain and prosecute violations. Any person injured in his business or property by such violation may recover triple damages. See *General Antitrust Laws, supra*.

Printing

Section 63-1608 provides that a bidder on a contract for public printing must file an affidavit that he has not entered into any agreement to fix the amount of any bid. See *Government Purchasing* in projected study.

Municipal School Contracts

Section 28-2317 provides that the Board of School Commissioners of a municipality, when it has reason to suspect that there has been collusion among bidders upon contracts for school or library improvements, may reject the bids of all those a party to such collusion. See *Government Purchasing* in projected study.

3. Anticoercive Financing Statutes

Stat. Ann. (Burns, Supp. 1939)

Sec. 58-901. Definitions.—In this act, unless the context or subject-matter otherwise requires:

The term "retail instalment sale," or the plural thereof, means and includes every retail contract to sell specific goods and every retail sale of specific goods to any person:

(a) In which the cash price of the goods is not in excess of fifteen hundred dollars (\$1,500), and may be paid in instalments over a period of time, and,

(b) In which the seller has taken or retained a security interest in the goods.

The term "person" includes a corporation or partnership or [of] two (2) or more persons having a joint or common interest.

The term "goods" includes all chattels personal other than money, things in action, emblements, industrial growing crops, things so affixed to the land as to become a part thereof, or things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The term "specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

The term "retail" means to dispose of specific goods to, or to acquire specific goods by, a person who may consume such goods for his personal use.

The term "buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

The term "retail buyer" means a buyer who is a party to a retail instalment sale, or any legal successor in interest of such person, and includes any person who as surety, indorser or guarantor or otherwise is liable on the obligation created by any retail buyer on any retail instalment contract.

The term "seller" means a person who sells or agrees to sell goods.

The term "retail seller" means a seller who is a party to a retail instalment sale.

The term "cash price" means the price, measured in dollars, agreed upon in good faith by the parties for the specific goods which are the subject-matter of any retail instalment sale.

The term "retail instalment contract" means any written instrument, lawful under this act, which is executed in connection with any retail instalment sale and is required by section two (sec. 58-903) hereof, and the term may include all such instruments executed in connection with any retail instalment sale.

The terms "contract to sell," "sale," and "conditional sale" shall have the same meaning in this act as they are respectively defined in the Uniform Sales Act and Uniform Conditional Sales Act.

The term "conditional sales contract" means any written instrument evidencing a conditional sale.

The term "bank or trust company" means any national banking association formed under the laws of the United States with its principal office located in this state and doing business herein and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company or trust company organized and doing business under the provisions of any law of this state.

The term "department" means "The Department of Financial Institutions."

The term "manufacturer" means a person who is engaged, directly or indirectly, in the manufacture or distribution of specific goods which may become the subject-matter of a retail instalment sale in this state.

The term "finance charge" means any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in instalments over a period of time.

The term "security interest" means a property interest in goods which are the subject-matter of a retail instalment sale, limited in

extent to securing performance of some obligation of the retail buyer or of some third person to the retail seller and includes the interest of a mortgagagee of the goods and title to the goods whether or not expressed to be absolute, whenever such title is, in substance, retained for security only (Acts 1935, ch. 231, sec. 1, p. 1206).

Sections 58-902 to 58-914 provide the formal requirements which retail instalment sales contracts must meet, regulate finance charges, limit the amount of debt and charges, and provide for the licensing of persons engaged in the business of purchasing retail instalment contracts.

Sec. 58-915. Revocation of license.—The department is hereby authorized to revoke or suspend any license issued under this act, if, after hearing, it finds:

(a) That the licensee has refused to permit the department to make any examination authorized hereunder or has failed to pay the cost of any examination made by the department or the annual license fee required hereby or any penalty assessed by the department against the licensee, or

(b) That the licensee has wilfully failed to comply with any rule or regulation of the department lawfully made hereunder, or

(c) That the licensee has wilfully violated any provision of this act, or any rule or regulation of the department lawfully made hereunder, or

(d) That the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail instalment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement, combination, or understanding,¹ express or implied,¹ with any retail seller the effect of which agreement, combination, or understanding may be to avoid or attempt to avoid the operation or effect of this act.

The department shall give any licensee whose license it proposes to revoke ten (10) days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licensee [license]¹ may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operated by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of

¹The commas following the words "understanding" and "implied" and the bracketed word "license" were inserted by the secretary of state.

any license shall impair or affect the obligation of any lawful retail instalment contract theretofore made. (Acts 1935, ch. 231, sec. 15, p. 1206.)

Sections 58-916 to 58-920 provide for reports by licensees hereunder, examination of licensees, surrender of licenses, and recourse to the courts by any person aggrieved by any decision of the department hereunder.

Sec. 58-921. Contracts to prevent competition.—No manufacturer shall sell or contract to sell specific goods which may become the subject-matter of a retail instalment sale in this state, whether patented or unpatented, to any retail seller in this state on the condition or with an agreement or understanding, express or implied, that the retail seller shall sell, assign or transfer any retail instalment contracts, arising from the retail instalment sales of the goods, or any part thereof, only to a designated licensee or class of licensees, when the effect of the condition, agreement, or understanding may be to lessen or eliminate competition, or create, or tend to create, a monopoly in the licensee or class designated. Any such condition, agreement, or understanding with any retail seller in this state is hereby declared to be against the public policy of this state and to be unlawful and void. (Acts 1935, ch. 231, sec. 21, p. 1206.)

Sec. 58-922. Acts tending to prevent competition.—Any threat, express or implied, made directly or indirectly, to any retail seller in this state by any manufacturer that the manufacturer will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell, specific goods which may become the subject-matter of a retail instalment sale in this state, whether patented or unpatented, to the retail seller, unless the retail seller sells, assigns, or transfers the retail instalment contracts arising from his retail instalment sales to any designated licensee or class of licensees, shall be prima facie evidence that the manufacturer has sold or intends to sell such specific goods on the condition or with the agreement or understanding prohibited by section twenty-one (sec. 58-921) hereof. (Acts 1935, ch. 231, sec. 22, p. 1206.)

Sec. 58-923. Further acts tending to prevent competition.—Any threat, express or implied, made directly or indirectly to any retail seller in this state by any licensee hereunder that is affiliated with or controlled by any manufacturer that the manufacturer will terminate his contract with or cease to sell specific goods which may become the subject-matter of a retail instalment sale to the retail seller unless the retail seller sells, assigns, or transfers the retail instalment contracts arising from his retail instalment sales to the licensee making the threat, shall be presumed to be made at the direction of and with the

authority of the manufacturer and shall be prima facie evidence of the fact that the manufacturer has sold or intends to sell the specific goods on the condition or with the agreement or understanding prohibited by section twenty-one (sec. 58-921) hereof. (Acts 1935, ch. 231, sec. 23, p. 1206.)

Sec. 58-924. Subsidy of licensees.—No manufacturer shall pay or give or contract to pay or give any thing or service of value to any licensee in this state, and no licensee in this state shall accept or receive or contract or agree to accept or receive, directly or indirectly, any payment, thing, or service of value from any manufacturer, if the effect of the payment or giving of any such thing or service of value by the manufacturer, or the acceptance or receipt thereof by the licensee, may be to lessen² or eliminate competition or tend to create or create a monopoly in the licensee that accepts or receives the payment, thing, or service of value or contracts or agrees to accept or receive the same. (Acts 1935, ch. 231, sec. 24, p. 1206.)

Sections 58-925 to 58-928 give the Department of Financial Institutions the power to issue rules and regulations, classify retail contracts, and fix maximum finance charges.

Sec. 58-929. Violation of act—Penalty.—Any person who wilfully violates any of the provisions of this act, or the rules and regulations promulgated by the department under the authority hereof or any person who wilfully in any report or account filed in pursuance of any provision of this act or rule or regulation of the department makes any untrue statement of a material fact or omits to state any material fact necessary to give the department the information lawfully required by it, shall upon conviction, be fined not more than one thousand dollars (\$1,000), or imprisoned not more than one (1) year or both. (Acts 1935, ch. 231, sec. 29, p. 1206.)

Sections 58-930 to 58-932 provide for the interpretation of the Act in accord with the Uniform Sales Act and the Uniform Conditional Sales Act and limit its operation to future contracts.

Sec. 58-933. Provisions severable.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable. (Acts 1935, ch. 231, sec. 33, p. 1206.)

Sec. 58-934. Short title.—This act may be cited as the Retail Installment Sales Act. (Acts 1935, ch. 231, sec. 34, p. 1206.)

² "Lessen" has been substituted for "lesson." [Ed.]

Judicial Decisions

Express Companies.

Constitutionality of Statutes.

Sections 55-4111 and 55-4112 do not violate the Fourteenth Amendment or the commerce clause of the Federal Constitution or Const. art. 1, secs. 21 and 23. *American Express Co. v. Southern Indiana Express Co.*, 167 Ind. 292, 78 N. E. 1021 (1906).

Section 55-4112 is not unconstitutional as: (1) a local or special law to punish crimes; (2) a violation of the due process clause of the Federal or State Constitution; or (3) an interference with interstate commerce. *Adams Express Co. v. State*, 161 Ind. 328, 67 N. E. 1033 (1903).

Application of Statutes.

The object of sections 55-4111 through 55-4113 was to prevent unjust discrimination by an express company against any consignor or responsible company engaged in the express business. *Adams Express Co. v. State, supra.*

The law does not require one express company to take goods from another without payment; it only requires that if goods are taken from one company without prepayment, they must be so taken from all. *Ibid.*

Sections 55-4111 through 55-4113 do not deprive a connecting express company of the right to demand carrier charges, but only of the right to demand prepayment of such charges from one express company while not requiring it of another. *American Express Co. v. Southern Indiana Express Co., supra.*

Public Contract Provisions.

Use of Patented Pavement.

Where a city accepted an offer to use a patented asphalt pavement at a reasonable rate per yard and the abutting property holders specified the use of this pavement, such required use is not in restraint of trade where any successful bidder can obtain the patented product at the same cost. *Tousey v. City of Indianapolis et al.*, 175 Ind. 295, 94 N. E. 225 (1911).

Restriction on Bidding.

A contract by contractors disposing of their business and agreeing not to bid on specified public contracts for a period of 5 years in one county was held valid as not in restraint of trade. *Trentman et al v. Wahrenburg et al.*, 30 Ind. App. 304, 65 N. E. 1057 (1908). See also

Royer et al. v. State ex rel. Brown, 63 Ind. App. 123, 112 N. E. 122 (1916); *Moore v. Barrett Co.*, 75 Ind. App. 352, 130 N. E. 649 (1921).

A secret agreement between four persons to the effect that only one of them was to bid on a public contract and that if awarded they would all divide the profits therefrom was illegal. *Hunter v. Pfeiffer et al.*, 108 Ind. 197, 9 N. E. 124 (1886).

II. CONTRACTS NOT TO COMPETE

Stat. Ann. (Burns, Supp. 1939)

See sections 42-921 summarized under *Special Industry Antitrust Acts, supra*.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

In General.

An agreement by a partnership, incident to sale of its stock in trade, not to engage in the agricultural implement business in the city of X, with no limit as to time, held reasonable and valid. *Beard v. Dennis et al.*, 6 Ind. 200, 63 Am. Dec. 380 (1855).

Every restraint of trade larger than is required for the necessary protection of the party with whom the contract is made is void. Where a person carrying on any business sells his stock in trade, or his business and good will, agreeing not to carry on the same business, with a restriction as to time but none as to space, the agreement is wholly void. *Wiley v. Baumgardner et al.*, 97 Ind. 66, 49 Am. Rep. 423 (1884).

An agreement incidental to the sale of a marble shop at Covington, Ind., that the vendors would not, as long as the vendee remained in business, open a marble shop at any point nearer Covington than Lafayette or Terre Haute, nor for the same distance east and west of Covington, was held valid. *Duffy v. Shockey et al.*, 11 Ind. 70, (1858). The vendors could not make a business of selling within the prohibited area from a shop outside it. *Ibid*.

A contract by a vendor of butcher shop fixtures not to engage in that business at the small town of X or within 11 miles of it, while his vendee was in business there was held valid. *Eisel v. Hayes et al.*, 141 Ind. 41, 40 N. E. 119 (1895).

A contract not to compete, reasonable in other respects, is not rendered void because the restriction is indefinite as to duration. *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590 (1895); *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946 (1896).

An agreement by a dealer in building materials to refrain from dealing therein for a period of 5 years in a specified county is valid. *Trentman et al. v. Wahrenburg et al.*, 30 Ind. App. 304, 65 N. E. 1057 (1903).

Where an oil dealer in the city of X sold his business, agreeing not to deal in oil for 5 years in the State of Indiana except in the city of I, the covenant not to compete was held void and not enforceable even in X where the vendee's business was confined to a particular locality. *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048 (1895).

A covenant by A not to go into the undertaking business in the city of X as long as his vendee remained in the business in that city was upheld as valid. *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946 (1896).

An agreement not to compete with vendee of a house-moving business and tools, in the same city as long as the vendee was engaged in such business was held valid. *Van Valkenburgh et al. v. Dean*, 15 Ind. App. 693, 44 N. E. 652 (1896).

A contract not to compete with a vendee of a poultry business does not violate section 23-116 where it appears reasonably restrictive to protect the subject of sale. *Bennett et al. v. Carmichael Produce Co.*, 64 Ind. App. 341, 115 N. E. 793 (1917).

Where a vendor of a poultry business agreed not to compete with his vendee "in the county of Bartholomew or any other county adjoining thereto," the covenant not to compete in Batholomew County was separate and would be enforced. *Ibid.*

Where a contract not to compete forbade the covenantors from "either directly or indirectly" engaging in the poultry business, they were liable for setting up relatives in the business, renting them property to carry it on, lending them money, and giving them advice. *Ibid.*

Whether a restraint in a covenant not to compete is reasonable is a question for the court. *Ibid.*

A contract by a vendor of a business "not to engage in the business of conducting a second-hand store or to buy or sell second-hand goods" in a city does not prevent vendor from becoming a clerk in another second-hand store. *Cool v. McDill*, 38 Ind. App. 621, 78 N. E. 679 (1906).

Partners sold a banking business and agreed with the vendee not to start another bank in the town as long as the vendee owned the bank. One of the vendor partners subsequently subscribed to stock in a new bank in town, became assistant cashier, and was actively engaged in promoting its business. The court held the covenant violated and both vendors liable for its breach. *Merica et al. v. Burget*, 36 Ind. App. 453, 75 N. E. 1083 (1905).

A contract not to sell milk within the town of X is not violated when producer sells milk at his farm outside X but with knowledge that purchaser intends to resell milk in X. *Smith v. Martin*, 80 Ind. 260 (1881).

Assignment of Interest.

The right to recover damages for breach of a covenant not to compete may be assigned with the sale of the business bought from the covenantee, and such assignment may be made before breach of the contract. *Bennett et al. v. Carmichael Produce Co.*, *supra*.

Where A and B covenant not to compete against X in a business, they cannot escape the obligation by taking in C as a partner. *Beard v. Dennis et al.*, *supra*.

Where A, B, and C as partners are obligees of a covenant not to compete and A and B sell to C, the latter can sue for an injunction against the obligors without joining A and B. *Ibid*.

A sold his ice business to B and C agreeing not to engage at any time in the ice business in city of X. C subsequently sold his interest in the business to B. As both B and C each had separate personal covenants from A, an injunction was held to be the proper remedy for violation of this obligation. *Baker v. Pottmeyer et al.*, 75 Ind. 451 (1881).

Assignment of Lease Unnecessary.

Where a livery business was conducted on leased premises and the personal property used in the business was sold, it was not essential to the validity of a covenant not to compete in the business that the lease on the premises be transferred or that the business be continued at the leased premises by the vendees. *Johnson et al. v. Gwinn et al.*, 100 Ind. 466 (1884).

Remedies.

For injunctive relief against obligor on a covenant not to compete, it is not necessary that he be insolvent. *O'Neal v. Hines*, *supra*. See also *Beard v. Dennis et al.*, *supra*; *Pickett v. Green et al.*, *supra*; and *Eisel v. Hayes et al.*, *supra*.

But where the court considers the consideration for a covenant not to compete inadequate, an injunction may be denied though damages be awarded. *Thayer v. Younge*, 86 Ind. 259 (1882).

Where damages for breach of a covenant not to compete are provided in the contract, injunctive relief will be denied. *Martin v. Murphy*, *supra*.

Provisions for payment of specified reasonable sums for violation of covenants not to compete held to be liquidated damages and not penalties. *Miller v. Elliott*, 1 Ind. 484 (1849); *Medica et al. v. Bur-*

get, supra; Duffy v. Shockey, supra; Johnson et al. v. Gwinn et al., supra; Martin v. Murphy, supra; and Bennett et al., v. Carmichael Produce Co., supra. See also *Evans et al. v. Elliott*, 20 Ind. 283, 83 Am. Dec. 319 (1863).

Parole Evidence Rule.

It is not necessary that covenants not to compete be in writing. *O'Neal v. Hines, supra.*

It has been held that a covenant not to compete need not be in writing where there is a written contract governing other matters between the parties. *Welz v. Rhodius*, 87 Ind. 1 (1882). Later decisions, however, seem to limit the doctrine of this case. See *Diven et al. v. Johnson*, 117 Ind. 512, 20 N. E. 428 (1889); *Reynolds et al. v. Louisville, N. A. & C. Rwy. Co. et al.*, 143 Ind. 579, 40 N. E. 410 (1895); *Beard v. Dennis et al.*, *supra*.

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

An agreement by a physician not to practice within 10 miles of the town of X for 15 years is valid and not in restraint of trade. *Pickett v. Green et al.*, 120 Ind. 584, 22 N. E. 737 (1889).

Covenant by a physician not to practice medicine in the city of X within a definite period is valid. *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118 (1891).

Restrictive Covenants Ancillary to Employment.

Contract by which a salesman agreed not to sell teas or other merchandise handled by his employer in territories assigned to him for 18 months after termination of his employment was upheld. *Grand Union Tea Co. v. Walker*, 208 Ind. 245, 195 N. E. 277 (1935).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

A contract not to make, sell, or trade any fanning-mill within 30 miles of a city was held valid even though indefinite in point of time. *Bowser et al. v. Bliss et al.*, 7 Black, 344, 43 Am. Dec. 93 (1845).

A contract not to compete requires valid consideration independent of the principal contract. *Ibid.* See also *Harrison v. Lockhart et al.*, 25 Ind. 112 (1865).

A covenant not to compete not ancillary to the main purpose of a lawful contract, nor necessary to protect the covenantee will not be enforced. *Milgram et al. v. Milgram et al.*, 105 Ind. App. 57, 12 N. E. (2d) 394 (1938).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (Burns, 1933)
Cooperatives

Section 15-1615 provides that any agricultural or horticultural cooperative association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten (10) years, all or any specified part of their agricultural products, or specified commodities, exclusively to or through the association or any facilities to be created by the association.

Stat. Ann. (Burns, Supp. 1939)

Section 15-1627 provides that any association shall be deemed not to be a conspiracy nor a combination in restraint of trade, nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

In General.

A covenant between A and B, in lease of premises, that A will sell beer purchased only from the C Brewing Co., on the leased premises was upheld and injunction granted. *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701 (1900).

An agreement by 16 persons to purchase from named persons all building materials used by them in a specified county for 5 years was held valid and not in restraint of trade. *Trentman et al. v. Wahrenburg et al.*, 30 Ind. App. 304, 65 N. E. 1057 (1903).

A contract granting to automobile dealers exclusive territories and providing penalties for sales by one dealer in another's territory was upheld. *Johnston et al. v. Franklin Kirk Co. et al.*, 83 Ind. App. 519, 148 N. E. 177 (1925).

Cooperatives.

Mutual contracts between tobacco growers and an association of growers that all tobacco grown be sold through the association as agents were in restraint of trade, but not illegal. *Burley Tobacco Society v. Gillaspy*, 51 Ind. App. 583, 100 N. E. 89 (1912).

An exclusive dealing arrangement made with a Kentucky Association is not in restraint of trade in view of the legislative policy expressed in sec. 15-1627 (in force before the 1935 amendment). *Dark Tobacco Growers' Cooperative Association v. Robertson*, 84 Ind. App. 51; 150 N. E. 106 (1926); *Burley Tobacco Growers' Cooperative Association v. Rogers*, 88 Ind. App. 469, 150 N. E. 384 (1926).

The rule of reason must be applied in determining whether or not a contract is in restraint of trade; such contracts are not illegal except when unreasonable in character. Thus, contracts which are incident or ancillary to some lawful purpose and not unreasonable in their scope and operation are not illegal. *Burley Tobacco Growers' Cooperative Association v. Rogers, supra*.

A borrowed money from B to build a gasoline station. In consideration A agreed to buy from B all oil and gas to be sold in the filling station for 5 years. The contract was held valid. *Abshire v. Smith et al.*, 86 Ind. App. 354, 156 N. E. 408 (1927.)

A railroad company's grant of an exclusive privilege to a taxi company to stand hacks upon its grounds and to solicit business was held to be illegal as tending to restrict competition. *Indianapolis Union Rwy. Co. v. Dohn*, 153 Ind. 10, 53 N. E. 937 (1899). See also *Western Union Telegraph Co. et al. v. Baltimore & Ohio Telegraph Co.*, 23 Fed. 12 (1885) (for exclusive telegraph privileges).

IOWA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1857) art. VIII, sec. 12. Amendment or repeal of laws—Exclusive privileges.—Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the * * * granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

STATUTORY PROVISIONS Code (1939)

Sec. 9906. Pools and trusts.—Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership, association, or individual, creating, entering into, or becoming a member of, or a party to, any pool, trust, agreement, contract, combination, confederation, or understanding with any other corporation, partnership, association, or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, shall be guilty of a conspiracy. (C97, sec. 5060; C24, 27, 31, sec. 9906.)

Sec. 9907. Corporation not to enter.—No corporation shall issue or own trust certificates, and no corporation, nor any agent, officer, employee, director, or stockholder of any corporation, shall enter into any combination, contract, or agreement with any person or corporation, or with any stockholder or director thereof, for the purpose of

NOTE.—Art. VIII, secs. 1-11 and the remainder of sec. 12, empower the legislature to enact the general corporation act, limit the state's possible interest in private corporations, specify certain aspects of state banking law.

placing the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with intent to limit or fix the price or lessen the production or sale of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article. (C97, sec. 5061; C24, 27, 31, sec. 9907.)

Sec. 9908. Penalty.—Any corporation, company, firm, or association violating any of the provisions of sections 9906 and 9907 shall be fined not less than five hundred nor more than five thousand dollars, and any president, manager, director, officer, agent, or receiver of any corporation, company, firm, or association, or any member of any corporation, company, firm, or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. (C97, sec. 5062; S13, sec. 5062; C24, 27, 31, sec. 9908.)

Sec. 9909. Contracts void.—All contracts or agreements in violation of any provisions of sections 9906 to 9908, inclusive, shall be void. (C97, sec. 5063; C24, 27, 31, sec. 9909.)

Sec. 9910. Defense.—Any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provisions of sections 9906 to 9909, inclusive, shall not be liable for the price or payment thereof, and may plead such provisions as a defense to any action for such price or payment. (C97, sec. 5064; C24, 27, 31, sec. 9910.)

Sec. 9911. Forfeiture of charter.—Any corporation created or organized by or under the law of this state, which shall violate any provision of sections 9906 to 9910, inclusive, shall thereby forfeit its corporate right and franchise, as provided in section 9912. (C97, sec. 5065; C24, 27, 31, sec. 9911.)

Sec. 9912. Notice by secretary of State.—The secretary of state, upon satisfactory evidence that any company, or association of persons incorporated under the laws of this state has entered into any trust, combination, or association in violation of the provisions of sections 9906 to 9911, inclusive, shall give notice to such corporation that, unless it withdraws from and severs all business connection with said trust, combination, or association, its articles of incorporation will be revoked at the expiration of thirty days from date of such notice. (C97, sec. 5066; C24, 27, 31, sec. 9912.)

Sec. 9913. Enforcement—Inquiry by grand jury.—County attorneys, in their counties, and the attorney general shall enforce the provisions of a public nature in sections 9906 to 9912, inclusive, and

it shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, or combination within their respective counties. (C97, sec. 5067; C24, 27, 31, sec. 9913.)

Sec. 9914. Fees of prosecutors.—Any county attorney or the attorney general securing a conviction under the provisions of sections 9906 to 9912, inclusive, shall be entitled, in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine recovered. When the attorney general and county attorney act in conjunction in the prosecution of any action under such provisions, they shall be entitled to one-fourth of the fine recovered, which they shall divide equally between them, where there is no agreement to the contrary. (C97, sec. 5067; C24, 27, 31, sec. 9914.)

Sec. 9915. Combinations, pools, and trusts—Fixing prices.—It shall be unlawful for any person, company, partnership, association, or corporation owning or operating any business of buying, selling, handling, consigning, or transporting any commodity or any article of commerce:

1. To enter into any agreement, contract, or combination with any other dealer or dealers, partnership, company, corporation, or association of dealers, whether within or without the state, engaged in like business, for the fixing of the price or prices at which any commodity or any article of commerce should be sold by different dealers or sellers.

2. To divide between said dealers the aggregate or net proceeds of the earnings of such dealers and sellers, or any portion thereof.

3. To form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination, or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce.

4. To do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of any commodity or any article of commerce is restrained or prevented. (S13, sec. 5067-a; C24, 27, 31, sec. 9915.)

Sec. 9916. Labor—Unions.—The labor of a human being either mental or physical is not a commodity or article of commerce and it shall not be unlawful for men and women to organize themselves into or carry on unions for the purpose, by lawful means, of lessening the hours of labor or increasing the wages, or bettering the condition of the members of such organizations, or lawfully carrying out their legitimate purposes. (C24, 27, 31, sec. 9916.)

Sec. 9917. Liability.—In case any person, company, partnership, corporation, or association, trust, pool, or combination of whatsoever

name shall do, cause to be done, or permit to be done, any act, matter, or thing in section 9915 prohibited or declared to be unlawful, such person, partnership, company, association, corporation, trust, pool, or combination shall be liable to the person, partnership, company, association, or corporation injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of section 9915. (S13, sec. 5067-b; C24, 27, 31, sec. 9917.)

Sec. 9918. Violation—Penalty.—Any person, partnership, company, association, or corporation subject to the provisions of sections 9915 to 9917, inclusive, or any person, trust, combination, pool, or association, or any director, officer, lessee, receiver, trustee, employee, clerk, agent, or any person acting for or employed by them, who shall violate any of the provisions of section 9915, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined any sum not less than five hundred dollars and not exceeding two thousand dollars or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court. (S13, sec. 5067-c; C24, 27, 31, sec. 9918.)

Sec. 9919. Duty of grand jury.—It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination, or violation of any provision in section 9915, in their respective counties. (S13, sec. 5067-c; C24, 27, 31, sec. 9919.)

**Code (1939)
Conspiracy Statute**

Section 13162 provides in part that it is a crime to conspire to injure the business, property, or rights of another or to do any illegal act injurious to the public trade.

Discriminations

Sections 9885 to 9894 provide that it shall be unlawful for any person selling products or commercial services to discriminate as to price between different localities for the purpose of destroying the business of a competitor or creating a monopoly. Commercial services regulated by cities or town exempted from this act. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Judicial Decisions

Application of the Common Law.

An agreement was entered into between plaintiff, who was about to engage in the butter business, and all the grocers in town, whereby each of the latter, including defendant, agreed not to buy any butter from neighboring farmers (i. e. compete with plaintiff) for 2 years. Plaintiff promised to buy all butter offered by farmers at prices then prevailing in a neighboring town. The contract was held void as tending to monopolize the butter trade and destroy competition. *Chaplin v. Brown*, 83 Iowa 156, 48 N. W. 1074 (1891). However, in *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa 574, 87 N. W. 496 (1901), a contract to pay one who promised to decline a contract to furnish rock for paving a street at 25 cents per cubic yard provided the payee would not sell any crushed rock in Des Moines during the remainder of the year was held valid. The court stated that the contract was not a significant attempt to restrain competition in selling rock since many other competitors could supply the public demand. The contract was limited as to time, place, and commodity. *Chaplin v. Brown, supra*, was distinguished on the ground that all grocers in town entered into the agreement. See *Contracts Not to Compete, infra*.

Constitutionality of Statutes.

A prior statute identical with sections 9885 to 9887 except that it prohibited discrimination in dairy products, poultry, eggs, and grain rather than in all commodities was held constitutional in *State v. Fairmont Creamery Co.*, 153 Iowa 702, 133 N. W. 895 (1911). This case, it seems, would be equally applicable to sections 9885 to 9887.

Application of the Statutes.

Applying section 5454 of McClain's Code which contained similar but narrower language than section 9906, insurance is a commodity and not a service within the meaning of the antitrust laws and an agreement to fix rates is invalid. *Beechley v. Mulville*, 102 Iowa 602, 70 N. W. 107 (1897). (Pet. for rehearing denied 71 N. W. 428.) For more recent antitrust regulation of insurance, see *Special Antitrust Laws, infra*.

Medical service, however, is not a commodity within the meaning of section 9906 and a combination of physicians to fix fees cannot be prosecuted. The court stated: "It is manifest that the statute was not intended to, and did not include labor either skilled or unskilled." *Rohlf v. Kasemeier*, 140 Iowa 182, 118 N. W. 276 (1908).

Section 9916 specifically exempts labor organizations from the operation of the antitrust laws. *Smythe Neon Sign Co. v. Local Union No. 405, etc.*, — Iowa —, 284 N. W. 126 (1939).

An agricultural marketing cooperative requiring members to sell exclusively through it was held illegal, both at common law and under the terms of sections 9915 and 9917 to 9919. *Reeves v. Decorah Farmers' Cooperative Society*, 160 Iowa 194, 140 N. W. 844 (1913). *Ludewese v. Farmers' Mut. Coop. Co.*, 164 Iowa 197, 145 N. W. 475 (1914). However, since the adoption of the Cooperative Marketing Act, 8512.01-.60, cooperatives organized under the act are exempt from the antitrust laws. The exemption was held constitutional in *Clear Lake Co-op. Live Stock Shippers' Ass'n. v. Weir*, 200 Iowa 1293, 206 N. W. 297 (1925).

Under a statute similar to sections 9885 to 9887, except that it applied to petroleum only, price discrimination per se was not illegal. The gist of an offense lies not in the fact that prices charged in one county are higher than in another but in the extent of injury to competitors. *State v. Standard Oil Co. of Indiana*, 150 Iowa 46, 129 N. W. 336 (1911).

An agreement to stifle competition and fix prices is not illegal per se. The burden of proof that the combination is an illegal one is on the defendant when raising this question as a defense in a suit for an accounting between partners. *Willson v. Morse*, 117 Iowa 581, 91 N. W. 823 (1902).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code (1939)

Resale Price Maintenance

Sections 9884.1 to 9884.5 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers as to sale or resale prices. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 8512.11 provides that no association organized under sections 8512.01 to 8512.60 shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly. Any law conflicting with this act shall be construed as not applicable to associations formed thereunder. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Labor Unions

Section 9916 provides that it shall not be unlawful for men and women to organize themselves into unions for the purpose, by lawful means, of lessening the hours of labor or increasing wages. For text of section 9916, see *General Antitrust laws, supra*.

Sales Tax Agreements

Section 6943.079 provides that agreements between competing retailers to provide uniform methods for adding the sales tax to the price of goods and which do not involve price-fixing agreements otherwise unlawful are not in violation of the antitrust laws of the state.

C. SPECIAL ANTITRUST LAWS

I. Special Industry Antitrust Acts

Code (1939)

Carriers

Sections 8050 to 8053 provide that it shall be unlawful for a common carrier to enter into a combination with any other common carrier for the pooling of freight of different and competing railroads, or to divide the proceeds of the earnings of such railroads; or to prevent the through carriage of freight. The common carriers shall be liable for treble damages at the suit of the person injured. Violation of the statute shall be deemed a misdemeanor punishable by fine of not more than \$5,000 nor less than \$500 for each offense.

Hydraulic or Hydroelectric Power

Section 7781 provides that the state may take possession by receivership proceedings of any dam controlled by an unlawful combination or trust, or that forms the subject of an agreement to limit the output of any hydraulic or hydroelectric power derived therefrom for the purpose of price fixing.

Insurance Other Than Life

Sections 9010 to 9015 provide that it shall be unlawful for two or more insurance companies (other than life insurance) to enter any combination or agreement relating to rates to be charged for insurance, commissions to be allowed agents, or manner of transacting the insurance business within this state. Violation shall be a misdemeanor. The Commissioner of Insurance may examine officers, agents, and employees of such companies, and may enforce the act by revocation of the company's authority to transact business in the state. Such decision may be appealed to the district court.

Grain

Sections 9924 to 9927 provide that it shall be unlawful for any person owning or operating a grain elevator, or any grain dealer or transporter, to enter any combination or agreement to fix prices of grain, or to divide net proceeds of earnings, or to participate in any trust, pool, or combination to prevent full and free competition among buyers, sellers, or dealers in grain. Violation of statute shall be a misdemeanor punishable by fine or imprisonment in the county jail for a period not exceeding six months, or both. Any person damaged by violation of statute may recover full amount of damages sustained in consequence thereof.

Pittsburgh Plus Plan

Section 9929 creates a committee to protect the state of Iowa against "the steel trade practice known as Pittsburgh plus and other similar trade practices." See *State Price Control Legislation: Anti-discrimination Legislation*.

Railroad Extensions Beyond the State

Section 7927 provides that any Iowa railroad may acquire, control, or operate any connecting extension, not parallel or competing, in any other state.

Code (1935)**Liquor (Beer)**

Section 1921.097 provides for three classes of permits: "A" permit allows the holder to manufacture and/or sell at wholesale; "B" permit allows the holder to sell at retail beer for consumption on or off the premises; "C" permit allows the holder to sell at retail for consumption off the premises. Section 1921-f101 provides that it shall be unlawful for any person to be either directly or indirectly interested in more than one class of permit.

Section 1921.117 provides that no person engaged in the business of manufacturing, bottling, or wholesaling beer, nor any jobber or agent of such person, shall directly or indirectly supply, furnish, give, or pay for any furnishings, fixtures, or equipment used in the storage, handling, serving, or dispensing of beer or food within the place of business of a retail permittee; nor directly or indirectly pay for any such permit; not directly or indirectly be interested in the ownership, conduct, or operation of the business of another such retail permittee. Any permittee who shall permit or assent or be a party in any way to any such violation or infringement of the provisions of this act shall be deemed guilty of a violation of its provisions.

Section 1921.132 provides that any person who violates any of the provisions of this act shall be punished by a fine of not less than

\$300 nor more than \$1,000, or by imprisonment in the county jail for not less than three months nor more than one year, or both.

2. Public Contract Provisions

Code (1939)

General

Section 9928 provides that every contract between private persons and the state or its subdivisions shall be deemed to have a clause in it stating that there was no collusive bidding nor any agreement tending to lessen free competition involved in obtaining the contract. See projected Vol., *Governmental Purchasing*.

Printing

Section 196 provides that bids on contracts for state printing presented pursuant to a combination to prevent free competition shall be rejected. See projected Vol., *Governmental Purchasing*.

3. Anticoercive Financing Statutes

Code (1939)

Section 5039.01 provides for the administration of this act, which is vested in the Commissioner of Public Safety.

Sec. 5039.02. Definitions.—As used in this act and unless a different meaning appears from the context:

1. "*Person*" includes any individual, firm, corporation, copartnership, joint adventure, or association, and the plural as well as the singular number.
2. "*Department*" means the Department of Public Safety.
3. "*Selling*" includes bartering, exchanging, or otherwise dealing in.
4. "*At retail*" means to dispose of a motor vehicle to a person who may devote it to a consumer use.
5. "*Place of business*" means a designated location wherein people and adequate facilities shall be maintained for displaying either new or used cars.

Sec. 5039.03, subsections 1 to 3 provide for the licensing of retail dealers in motor vehicles. The section proceeds:

4. No person, who is engaged in the business of selling at retail motor vehicles, shall enter into any contract, agreement, or understanding, express or implied, with any manufacturer or distributor of any such motor vehicles that he will sell, assign, or transfer any retail installment contracts arising from the retail installment sale of such motor vehicles or any one or more thereof only to a designated person or class of persons. Any such condition, agreement, or understanding

between any manufacturer or distributor and a motor vehicle dealer in this state is hereby declared to be against the public policy of this state and to be unlawful and void.

5. No manufacturer or distributor of motor vehicles or any agent of such manufacturer or distributor, shall terminate or threaten to terminate any contract, agreement or understanding for the sale of new motor vehicles to any motor vehicle dealer in this state, before the expiration date of such contract, agreement, or understanding, without just, reasonable, and lawful cause therefor or because such motor vehicle dealer failed to sell, assign, or transfer any retail instalment contract arising from the retail sale of such motor vehicles or any one or more of them to a person or a class of persons designated by such manufacturer or distributor.

Secs. 5039.04 and 5039.05 set forth the formal requirements for the application for license.

Sec. 5039.06. Denial of license.—The department shall deny the application of any person for a license as a motor vehicle dealer and refuse to issue a license to him as such, if, after reasonable notice and a hearing, the department determines that such applicant:

1. has made a material false statement in his application for the license; or

2. has not complied with the provisions of this act; or

3. is of bad business repute; or

4. has been guilty of a fraudulent act in connection with selling, bartering, or otherwise dealing in motor vehicles; or

5. is about to engage in any practice in connection with the sale, barter, or otherwise dealing in motor vehicles, which is fraudulent or in violation of the law; or

6. has entered into contract or agreement or is about to enter into a contract or agreement with any manufacturer or distributor of motor vehicles which is contrary to any provision of this act; or

7. has a contract or agreement with any manufacturer or distributor of motor vehicles or is about to enter into a contract or agreement with any manufacturer or distributor of motor vehicles, who without just, reasonable and lawful cause therefor, has terminated within ninety days from the date of application of a contract or agreement with a motor vehicle dealer in any county of the state in which the applicant proposes to engage in business.

Subsections 8 and 9 provide for additional reasons for denying license.

Subsection 9 provides in part:

It shall be sufficient cause for refusal or revocation of a license as a motor vehicle dealer in the case of a partnership or corporation

if any member of the partnership, or any officer or director of the corporation has committed any act or omission which would be cause for refusing or revoking a license to such person as an individual.

In considering whether or not a contract or agreement between a motor-vehicle dealer and a manufacturer or distributor of motor vehicles has been terminated by such manufacturer or distributor without just and reasonable cause therefor, the department shall take into consideration the circumstances existing at the time of such termination, including the amount of business transacted by the motor-vehicle dealer pursuant to the contract or agreement and prior to such termination; the investment necessarily made and the obligation necessarily incurred by the motor-vehicle dealer in the performance of his part of such contract; the permanency of such investment; the reasons for such termination by such manufacturer or distributor and the fact that it is injurious to the public welfare for the business of a motor-vehicle dealer to be disrupted by termination of such contract without just and reasonable cause.

Whenever the department determines to deny the application of any person for a license as a motor-vehicle dealer and refuses to issue a license to him as such, the department shall enter a final order thereof with its findings relating thereto within thirty days from the date of the hearing thereon.

Section 5039.10 grants a right of appeal from orders of the department.

Sec. 5039.09. Revocation of license.—The department is hereby authorized to revoke or suspend the license of any licensee if, after notice and hearing, it finds that such licensee has been guilty of any act which would have been a ground for the denial of a license under section 5039.06 of this act.

Sec. 5039.11. Injunctions.—Whenever the department shall believe from evidence satisfactory to it that any person has or is now violating any provision of this act, the department may, in addition to any other remedy, bring an action in the name and on behalf of the state of Iowa against such person and any other person concerned in or in any way participating in or about to participate in practices or acts in violation of this act, to enjoin such person and said other person from continuing the same. In any such action, the department may apply for and on due showing be entitled to have issued the court's subpoena, requiring forthwith the appearance of any defendant, his agent and employees, and the production of documents, books, and records as may appear necessary for the hearing of such petition to testify and give evidence concerning the acts or conduct or practices or things complained of in such application for injunc-

tion. In said action an order or judgment may be entered, awarding such preliminary or final injunctions as may be proper.

Section 5039.12 provides for the disposal of the fees collected under this act and give the department the power to issue rules and regulations.

Sec. 5039.14. Penalties.—Any person violating any of the provisions of this chapter where a penalty is not specifically provided for shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or thirty days in jail.

1. Any person violating any provision of subsections 1, 2, and 4 of section 5039.03, by a fine in any sum not exceeding one hundred dollars or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

2. For the violation of any provision of subsection 5 of section 5039.03, by a fine in any sum not exceeding five thousand dollars or by imprisonment in the county jail for any determinate period not exceeding one year, or by both such fine and imprisonment. (47 G. A. ch. 135, sec. 14; 48 G. A. ch. 130, sec. 6.)

Sec. 5039.15 provides for liberal construction of the act.

Sec. 5039.16. Short title.—This may be cited as the Motor Vehicle Dealers' Licensing Act.

Judicial Decisions

Cooperatives.

Section 8503, which exempts cooperatives from the antitrust laws, was held constitutional in *Clear Lake Coop. Live Stock Shippers' Assn. v. Weir*, 200 Iowa 1293, 206 N. W. 297 (1925). See *General Antitrust Laws, supra*.

Labor Agreements.

Organized labor is exempted from the general antitrust laws under section 9916. *Smythe Neon Sign Co. v. Local Union No. 405, etc.*, — Iowa —, 284 N. W. 126 (1939). See *General Antitrust Laws, supra*.

Insurance.

A statute similar to sections 9010 to 9011 except that it applied to fire insurance only was held constitutional and not in violation of the fourteenth amendment to the Federal Constitution. *Carroll v. Greenwich Insurance Co. of N. Y.*, 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246 (1905).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenant Ancillary to the Sale of a Business.

It is often stated that contracts not to compete, although in restraint of trade, are valid if reasonably limited in time, place, and subject matter. *Arnold v. Kreutzer*, 67 Iowa 214, 25 N. W. 138 (1885); *Swigert and Howard v. Tilden*, 121 Iowa 650, 97 N. W. 82 (1903); *Sausser v. Kearney*, 147 Iowa 335, 126 N. W. 322 (1910); *Miller v. Eller*, 192 Iowa 147, 183 N. W. 498 (1921); *L. H. Henry and Sons v. Rhinesmith*, 219 Iowa 1088, 260 N. W. 9 (1935). In some cases, however, contracts restricted territorially but not as to time have been upheld. *Jayne and Keve Bros. Lumber Co. v. Turner and Son*, 132 Iowa 7, 109 N. W. 307 (1906) (so long as plaintiff is engaged in business); *Haggin v. Derby*, 209 Iowa 939, 229 N. W. 257 (1930) (neither partner to compete with other so long as he remains in business); *Heichew v. Hamilton*, 3 Greene 596 (1852) (unlimited); *Smalley v. Greene*, 52 Iowa 241, 3 N. W. 78 (1879) (unlimited); *Wilson v. Delaney*, 137 Iowa 636, 113 N. W. 842 (1907) (unlimited).

Contracts not to compete in same town or city have been upheld. *Hedge, Elliott and Co. v. Lowe*, 47 Iowa 137 (1877); *Sausser v. Kearney*, 147 Iowa 335, 126 N. W. 322 (1910); *Sickles v. Lauman*, 185 Iowa 37, 169 N. W. 670 (1918); *Proctor v. Hansel*, 205 Iowa 542, 218 N. W. 255 (1928); *Eyerly v. Smith*, 210 Iowa 1056, 231 N. W. 383 (1930); *L. H. Henry and Sons v. Rhinesmith*, 219 Iowa 1088, 260 N. W. 9 (1935). In same town and surrounding county: *Oates v. Leonard*, 191 Iowa 1004, 183 N. W. 462 (1921); *Rowe v. Toon*, 185 Iowa 848, 169 N. W. 38 (1918). Within 4 miles of the city: *Stafford v. Shortreed*, 62 Iowa 524, 17 N. W. 756 (1883). In the vicinity of: *Wilson v. Delaney*, 137 Iowa 636, 113 N. W. 842 (1907). Within 2 miles: *Arnold v. Kreutzer*, 67 Iowa 214, 25 N. W. 138 (1885).

In *Swigert and Howard v. Tilden*, 121 Iowa 650, 97 N. W. 82 (1903), where the defendant sold plaintiff his shirt-manufacturing business, an agreement not to engage in the shirt business for 10 years within 100 miles of Des Moines was held valid. See also *Arnold v. Kreutzer*, *supra*; *Swigert and Howard v. Tilden*, *supra*; *Sausser v. Kearney*, *supra*; *L. H. Henry and Sons v. Rhinesmith*, *supra*; *Hedge, Elliott & Co. v. Lowe*, 47 Iowa 137 (1877); *Eyerly v. Smith*, 210 Iowa

1056, 231 N. W. 383 (1930). So also in connection with the dissolution of a partnership; *Haggin v. Derby*, 209 Iowa 939, 229 N. W. 257 (1930); *Proctor v. Hansel*, 205 Iowa 542, 218 N. W. 255 (1928); *Stafford v. Shortreed*, 62 Iowa 524, 17 N. W. 756 (1883); *Wilson v. Delaney*, 137 Iowa 636, 113 N. W. 842 (1907). Contracts in connection with the sale of a professional practice have been similarly upheld. *Rowe v. Toon*, 185 Iowa 848, 169 N. W. 38 (1918); *Oates v. Leonard*, 191 Iowa 1004, 183 N. W. 462 (1921); *Miller v. Eller*, 192 Iowa 147, 183 N. W. 498 (1921); *Smalley v. Greene*, 52 Iowa 241, 3 N. W. 78 (1879); *Heinz v. Roberts*, 135 Iowa 748, 110 N. W. 1034 (1907).

Restrictive Covenants Ancillary to Employment.

A contract of employment which provides that, upon termination, the employee shall not engage in the same occupation in competition with the former employer for 2 years was held valid as a legitimate method of protecting the employer's good will. *Sioux City Night Patrol v. Mathwig*, 224 Iowa 748, 277 N. W. 457 (1938).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

In *Heichew v. Hamilton*, 3 Greene 596 (1852), where vendor of certain real estate covenanted not to compete in the tavern business with the vendee within a half mile whenever the vendee set up a tavern on the land sold was upheld. See also *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa 574, 87 N. W. 496 (1901) where the payment of a certain sum of money was predicated upon a promise not to enter into a specified contract and refrain from selling crushed rock in the city for 1 year.

Remedies.

Covenantor breaching contract not to compete may be enjoined. *Swigert and Howard v. Tilden*, 121 Iowa 650, 97 N. W. 82 (1903); *Wilson v. Delaney*, 137 Iowa 636, 113 N. W. 842 (1907); *Rowe v. Toon*, 185 Iowa 848, 169 N. W. 38 (1918); *Miller v. Eller*, 192 Iowa 147, 183 N. W. 498 (1921); *Haggin v. Derby*, 209 Iowa 939, 229 N. W. 257 (1930); *L. H. Henry and Sons v. Rhinesmith*, 219 Iowa 1088, 260 N. W. 9 (1935). The injured party may also recover damages for injuries suffered from such unlawful competition. *Heichew v. Hamilton*, 3 Greene 596 (1852); *Eyerly v. Smith*, 210 Iowa 1056, 231 N. W. 383 (1930). If the contract provides for liquidated damages, plaintiff may waive his claim for such damages and enjoin the breach. *Heinz v. Roberts*, 135 Iowa 748, 110 N. W. 1034 (1907). Cf. *Stafford v. Shortreed*, 62 Iowa 524, 17 N. W. 756 (1883). (Liquidated damages of \$100 was held to provide the sole remedy.)

Assignability.

A contract not to compete, ancillary to the sale of a business, may be assigned by vendee. *Hedge, Elliott and Co. v. Lowe*, 47 Iowa 137 (1877); *Sichles v. Lauman*, 185 Iowa 37, 169 N. W. 670 (1918).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code (1939)
Cooperatives

Section 8512.08 provides that an agricultural cooperative association may contract with any member for his exclusive sale to or through it, of all or any part of his agricultural products or other designated commodities. Such contracts must be for a specified time, not less than one year. Each contract must fix a period of at least ten days during each year after the first within which each party may terminate it without liability. No contract, which complies with the Act, shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen business or fix prices arbitrarily, or to accomplish any improper or illegal purpose. Sec. 8512.11. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

An arrangement whereby a railroad, for a consideration, agreed to permit a grain elevator at Dubuque to handle all through grain at 1 cent a bushel was held valid and not against public policy in *Richmond v. Dubuque and S. C. R. R. Co.*, 26 Iowa 191 (1868), 33 Iowa 422 (1871), aff'd. 86 U. S. 584, 22 L. Ed. 173 (1873).

In *W. T. Rawleigh Medical Co. v. Osborne*, 177 Iowa 208, 158 N. W. 566 (1916), the court upheld the validity of a contract by a debtor-vendee to deal exclusively in the goods of the vendor. See also *Hawbaker v. Laco Gas Burner Co.*, 210 Iowa 544, 231 N. W. 347 (1930) (exclusive agency for sale of gas burners in specified territory) and *Hladik v. Noe*, 214 Iowa 854, 243 N. W. 180 (1932) (gasoline station operator agreed to purchase products of one wholesaler exclusively).

KANSAS

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Gen. Stat. Ann. (Corrick, 1935)

Sec. 50-101. Trust defined and declared unlawful and void.—
A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce, or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or

graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or commodity; or by which they shall agree to pool, combine, or unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful, and void. (L. 1897, ch. 265, sec. 1; March 12; R. S. 1923, secs. 50-101.)

Sec. 50-102. Denial of right to form or be interested in any trust.—All persons, companies, or corporations within this state are hereby denied the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee, or otherwise, in any trust as defined in section one (50-101) of this act. (L. 1897, ch. 265, sec. 2; March 12; R. S. 1923, secs. 50-102.)

Sec. 50-103. Forfeiture of corporate charter and franchise; stockholders, officers, and agents subject to penalties.—Any corporation holding a charter under the laws of the state of Kansas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine; and any stockholder, director, officer, agent, representative, or consignee of any such corporations shall be subject to the penalties herein prescribed. (L. 1897, ch. 265, sec. 3; March 12; R. S. 1923, sec. 50-103.)

Sec. 50-104. Action for dissolution of corporation.—For a violation of any of the provisions of this act by any corporation, or any of its officers or agents mentioned herein, it shall be the duty of the Attorney General of the state, or county attorney of any county in which said violation may occur, or either of them, upon his own motion, to institute an action in any court in this state having jurisdiction thereof for the forfeiture of the charter, rights, and franchise of such corporation, and the dissolution of its corporate existence. (L. 1897, ch. 265, sec. 4; March 12; R. S. 1923, sec. 50-104.)

Sec. 50-105. Denial of right to do business; injunction or other proceedings; penalties and forfeitures.—Every person, company, or corporation within or without this state, their officers, agents, representatives, or consignees, violating any of the provisions of this act within this state, are hereby denied the right and are hereby prohibited from doing any business within this state, and all persons, companies, and corporations, their officers, agents, representatives,

and consignees within this state, are hereby denied the right to handle the goods of or in any manner deal with, directly or indirectly, any such person, company or corporation, their officers, agents, representatives or consignees, and it shall be the duty of the attorney general and the county attorney of any county in the state where any violation of this act be committed, or either of them, to enforce the provisions of this section by injunction or other proceeding; and all persons, companies and corporations, their officers, agents, representatives, or consignees, violating any of the provisions of this section, either directly or indirectly, or of abetting or aiding either directly or indirectly in any violation of any provisions of this section, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than one thousand dollars, and confined in jail not less than thirty days nor more than six months, and shall forfeit not less than one hundred dollars for each and every day such violation may continue, which may be recovered in the name of the state of Kansas in any court of competent jurisdiction. (L. 1897, ch. 265, sec. 5; March 12; R. S. 1923, sec. 50-105.)

Sec. 50-106. Persons liable for violations; penalties and forfeitures; prosecutions.—Each and every person, company, or corporation, their officers, agents, representatives, or consignees, who either directly or indirectly violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned not less than thirty days nor more than six months, and in addition thereto, for each and every day thereafter that such violation shall be committed or continued, forfeit and pay the sum of one hundred dollars, which may be recovered in the name of the state of Kansas in any county where the offense is committed or where either of the offenders reside; and it shall be the duty of the attorney general of the state, or the county attorney of any county in the state, in which said violation shall occur, or either of them, to prosecute and enforce the provisions of this act. (L. 1897, ch. 265, sec. 6; March 12; R. S. 1923, sec. 50-106.)

Sec. 50-107. Contracts void and unenforceable.—Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a viola-

tion of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act. (L. 1897, ch. 265, sec. 7; March 12; R. S. 1923, sec. 50-107.)

Sec. 50-108. Recovery of damages and attorney fee by person injured.—That any person, firm, company, or corporation that may be damaged by any such agreement, trusts, or combinations described in sections one (50-101) and two (50-102) of this act, may sue for and recover in any court of competent jurisdiction in this state, of any person, company, or corporation operating such trust or combination, such damages as they have sustained, together with a reasonable attorney fee. (L. 1897, ch. 265, sec. 8; March 12; R. S. 1923, sec. 50-108.)

Sec. 50-109. Duties of prosecuting attorneys and officials; penalties for failure.—It shall be the duty of the attorney general of the state and the county attorneys in their respective counties to diligently prosecute any and all persons violating any of the provisions of this act; and it shall be the duty of all state and county officials having notice and knowledge of any violation of the provisions of this act to notify the county attorney of their respective counties and the attorney general of the state of the fact of such violation, and to furnish them with the names of any witnesses by whom such violations can be proved. If any such officer or officers shall fail to comply with the provisions of this section he shall upon conviction be fined in any sum not less than one hundred dollars nor more than one thousand dollars, and such conviction shall be a forfeiture of the office held by such person, and the court below whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office. (L. 1897, ch. 265, sec. 9; March 12; R. S. 1923, sec. 50-109.)

Sec. 50-110. Jurisdiction of district courts; witnesses and testimony.—The several district courts of this state and the judges thereof shall have jurisdiction, and it shall be their duty, upon good cause shown and upon written application of the county attorney or the attorney general, to cause to be issued by the clerk of said court subpoenas for such witnesses as may be named in the application of a county attorney or the attorney general, and to cause the same to be served by the sheriff of the county where such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpoenaed and examined shall not be liable to crim-

inal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpoenaed shall be taken down by the reporter of said court, and shall be transcribed and placed in the hands of the county attorney or the attorney general, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpoenaed as provided for in this section shall be compelled to attend from any county in the state. (L. 1897, ch. 265, sec. 10; March 12; R. S. 1923, sec. 50-110.)

Sec. 50-111. Pending proceedings.—Nothing in this chapter shall be held or construed to affect any action or prosecution which is now pending under the provisions of any law now in existence in this state. (L. 1897, ch. 265, sec. 11; March 12; R. S. 1923, sec. 50-111.)

Sec. 50-112. Trusts, combinations, and agreements in restraint of trade and free competition declared unlawful.—That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture, or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, designed or which tend to advance, reduce, or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void. (L. 1889, ch. 257, sec. 1; March 9; R. S. 1923, sec. 50-112.)

Sec. 50-113. Trust certificates; creation of trusts.—It shall not be lawful for any corporation to issue or to own trust certificates, other than the regularly and lawfully authorized stock thereof, or for any corporation, agent, officer, or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption,

or to prevent, restrict, or diminish the manufacture or output of any such article. (L. 1889, ch. 257, sec. 2; March 9; R. S. 1923, sec. 50-113.)

Sec. 50-114. Penalty for entering into or attempting to carry out unlawful arrangement.—That all persons entering into any such arrangement, contract, agreement, trust or combination, or who shall after the passage of this act attempt to carry out or act under any such arrangement, contract, agreement, trust or combination described in sections one (50-112) or two (50-113) of this act, either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars, and to imprisonment not less than thirty days and not more than six months, or to both such fine and imprisonment, in the discretion of the court. (L. 1889, ch. 257, sec. 3; March 9; R. S. 1923, sec. 50-114.)

Sec. 50-115. Recovery of damages by person injured by combination.—That any person or corporation injured or damaged by any such arrangement, contract, agreement, trust or combination, described in sections one (50-112) or two (50-113) of this act, may sue for and recover in any court of competent jurisdiction in this state, of any person or corporation, the full consideration or sum paid by him for any goods, wares, merchandise, and articles included in or advanced or controlled in price by said combination, or the full amount of money so borrowed. (L. 1889, ch. 257, sec. 4; March 9; R. S. 1923, sec. 50-115.)

Sec. 50-116. Pleading in bar or abatement of civil action that plaintiff is member or agent of unlawful combination.—That when an action at law or suit in equity shall be commenced in any court of this state, it shall be lawful in the defense thereof to plead in bar or in abatement that the plaintiff or any other person interested in the prosecution of the case is a member or agent of an unlawful combination as described in section one (50-112) or two (50-113) of this act, or that the cause of action grows out of such combination, or out of some business or transaction thereof. (L. 1889, ch. 257, sec. 5; March 9; R. S. 1923, sec. 50-116.)

Sec. 50-117. Transactions by nonresident.—That the purchase, sale, or manufacture of any goods, wares, merchandise, or other commodities in this state by any person or corporation who has entered into any such arrangements, contracts, agreements, trusts or combinations in any other state or territory, as described in sections one (50-112) or two (50-113) of this act, or the purchase, sale, or manufacture

of any such articles by any agent or attorney for such person, or as an agent, officer, or stockbroker of any such corporation, as a trustee, committee, or in any capacity whatever, shall constitute a violation of this act, and shall subject the offender to the aforesaid liabilities and penalties. (L. 1889, ch. 257, sec. 6; March 9; R. S. 1923, sec. 50-117.)

Sec. 50-118. Duties of county attorneys; penalties for failure; duties of attorney general.—It shall be the duty of the county attorneys to diligently prosecute any and all persons violating any of the provisions of this act in their respective counties. If any county attorney shall fail, neglect, or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than ten days nor more than ninety days; and such conviction shall operate as a forfeiture of his office, and the court before whom such conviction may be had shall order and adjudge such forfeiture of office, in addition to the fine imposed as herein provided. And whenever the county attorney shall be unable or shall neglect or refuse to enforce the provisions of this act in his county, or for any reason whatever the provisions of this act shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify, and file all such complaints, informations, petitions, and papers as the county attorney is authorized to sign, verify, or file, and to do and perform any act that the county attorney might lawfully do or perform; and for such services he or his assistants shall receive the same fees that the county attorney would be entitled to for like services, to be taxed and collected in the same manner. (L. 1889, ch. 257, sec. 7; March 9; R. S. 1923, sec. 50-118.)

Sec. 50-119. Report of violations by peace officers; penalties for failure.—It shall be the duty of all sheriffs, deputy sheriffs, constables, mayors, marshals, police judges, and police officers of any city or town, having notice or knowledge of any violation of the provisions of this act (*"this act," see secs. 50-112 to 50-120.—Ed.*), to notify the county attorney of the fact of such violation, and to furnish him the names of any witnesses within his knowledge by whom such violation can be proven. If any such officer shall fail to comply with the provisions of this section, he shall upon conviction be fined in any sum not less than one hundred dollars nor more than five hundred dollars; and such conviction shall be a forfeiture of the office held by such person, and the court below whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order

and adjudge the forfeiture of his said office. (L. 1889, ch. 257; sec. 8; March 9; R. S. 1923, sec. 50-119.)

Sec. 50-120. Grand jury instructions.—It shall be the duty of the district courts to instruct the grand juries especially as to the provisions of this act. (L. 1889, ch. 257, sec. 9; March 9; R. S. 1923, sec. 50-120.)

Sections 50-121 to 50-130 deal with regulation of "bucket shops."

Sec. 50-131. Agreements or combinations by which shipper is defrauded out of portion of net weight; penalty.—If any person, company, or corporation doing business in Kansas shall make any agreement, expressed or implied, or by any understanding or combination with any person, company, or corporation within or without the state, by which any shipper of seeds, grains, hay, or livestock is defrauded out of any portion of the net weight of any consignment of grain, seeds, hay, or livestock, all such agreements or combinations are hereby declared to be in restraint of trade, and any such person, company, or corporation shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in the sum of not less than one hundred dollars, and not exceeding one thousand dollars, for each offense. (L. 1899, ch. 293, sec. 1; April 4; R. S. 1923, sec. 50-131.)

Sec. 50-132. Conspiring to monopolize line of business or to prevent producer or local buyer from shipping without agency of third person; penalty.—Every person, servant, agent, or employee of any firm or corporation doing business within the state of Kansas that shall conspire or combine with any other persons, firm, or corporation within or without the state for the purpose of monopolizing any line of business, or shall conspire or combine for the purpose of preventing the producer of grain, seeds, or livestock, or hay, or the local buyer thereof, from shipping or marketing the same without the agency of any third person, firm, or corporation, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum not less than one thousand dollars and not to exceed five thousand dollars for each offense. (L. 1899, ch. 293, sec. 2; April 4; R. S. 1923, sec. 50-132.)

Sec. 50-133. Agreements or combinations for shipments under warehouse control; penalty.—Any person who shall, as agent or employee of any person, firm, or corporation, enter into an agreement, expressed or implied, by which it is stipulated that grain, seeds, or hay shall not be shipped by the producer or local buyer unless accompanied with warehouse receipts or that the same shall in any manner be under the control of any warehouseman or agent as a condition precedent to the marketing of said grain, all such agreements shall be deemed, and are hereby declared unlawful and

in restraint of trade, and the person entering into such agreement or combination shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than one thousand dollars and not more than five thousand dollars, or by imprisonment in the county jail not less than ninety days and not to exceed one year, or by both such fine and imprisonment, at the discretion of the court. (L. 1899, ch. 293, sec. 3; April 4; R. S. 1923, sec. 50-133.)

Sec. 50-134. Jurisdiction of courts; duty of attorney general; temporary injunctions.—The several district courts and the supreme court of the state of Kansas are hereby vested with jurisdiction to prevent and restrain violators of this act, and it shall be the duty of the attorney general to enforce the provisions of this act, and such proceedings may be instituted by petition, setting forth the cause of complaint, praying relief, verifying said petition by affidavit, and the court shall grant temporary restraining orders enjoining or prohibiting such violations till the final hearing of the case. Said restraining order shall be granted without bond. (L. 1899, ch. 293, sec. 4; April 4; R. S. 1923, sec. 50-134.)

Sec. 50-135. Injury to business or property; recovery of damages, costs, and attorney's fees.—Any person, firm, or corporation that shall be injured in business or property by any other person, firm, or corporation, by reason of anything declared unlawful, or in restraint of trade by this act, shall have a right of action against the person, firm, or corporation violating the provisions of this act for threefold damages, including costs and reasonable attorney's fees. (L. 1899, ch. 293, sec. 5; April 4; R. S. 1923, sec. 50-135.)

NOTE.—For the purport of sections 50-136 to 50-138, see *Special Antitrust Laws, Special Industry Antitrust Acts, infra.*

Sec. 50-139. Production of documents, and answering interrogatories in actions under sections 50-101 to 50-138; judgment by default upon failure.—That in all civil actions brought in the supreme court or in the district courts of this state for the purpose of enforcing the provisions of Laws 1887, chapter 175 (50-136 to 50-138); Laws 1889, chapter 257 (50-112 to 50-120); Laws 1897, chapter 265 (50-101 to 50-111); Laws 1899, chapter 293 (50-131 to 50-135); Laws 1899, chapter 77 (50-121, 50-122, 50-128, 50-130), as amended by Laws 1909, chapter 121 (50-122 to 50-129), whether such suits are for the purpose of ousting corporations, firms, or associations from transacting business in the state through or in pursuance of unlawful agreements and combinations in restraint of trade or to enjoin such unlawful combinations and agreements, the said court may on motion of either party require the opposing litigant to produce books or writings in his possession or under his power which

may contain evidence pertinent to the issue, and may require the party to answer interrogatories filed in court with said motion for the discovery of facts material to the support or defense of the action; and if either of said parties fail to comply with such order of the court or judge, the court may, on motion, give judgment by default. (L. 1907, ch. 259, sec. 1; March 14; R. S. 1923, sec. 50-139.)

Sec. 50-140. Answers to interrogatories; use of answers or books and papers produced.—That the opposing party to whom the interrogatories are propounded shall answer the said interrogatories explicitly, fully, and without evasion, and such answers shall be under oath: *Provided*, That no answers to such interrogatories shall be used in any criminal prosecution against the party so answering, nor shall the person answering or producing such books or papers be liable to criminal prosecution for any offense about which his answers or books and papers produced would be evidential. (L. 1907, ch. 259, sec. 2; March 14; R. S. 1923, sec. 50-140.)

Sec. 50-141. Motion for production of books and papers or for answers to interrogatories; affidavit.—That the motion of the party asking for the production of such books or papers, or filing such interrogatories, shall be supported by the affidavit of the interrogator or his attorney that he has reason to believe that the party making the application will derive some material benefit in the action from the answers which he seeks if the answers are fairly made; that it is not sought for the purpose of harassment, vexation, or delay; and that he has reason to believe and does believe that the party who is asked to produce such books or writings or to whom said interrogatories are addressed has knowledge of the facts sought to be discovered, and that the discovery of said facts is not as open to the party making the motion or filing said interrogatories as they are to the party addressed or interrogated. (L. 1907, ch. 259, sec. 3; March 14; R. S. 1923, sec. 50-141.)

Sec. 50-142. Granting of motion.—That the court or judge may grant the motion upon notice, and it shall be sufficiently granted or allowed if the court or judge will endorse the motion itself with an entry substantially as follows: "Allowed this ——— day of ———, 19— A. B., *Judge*." (L. 1907, ch. 259, sec. 4; March 14; R. S. 1923, sec. 50-142.)

Sec. 50-143. Notice upon granting or allowance of motion.—That upon the granting or allowance of said motion, notice thereof shall be given to the party addressed or sought to be interrogated, and his acknowledgment of said notice will be sufficient if signed by himself or by his attorney of record. (L. 1907, ch. 259, sec. 5; March 14; R. S. 1923, sec. 50-143.)

Sec. 50-144. Judgment against party by default upon failure to produce books and papers.—That if the party required to produce the books and papers as provided by this act shall fail to produce them at the trial, without sufficient cause, the court may on motion give judgment against him by default. (1907, ch. 259, sec. 6; March 14; R. S. 1923, sec. 50-144.)

Sec. 50-145. Forfeiture in addition to penalties prescribed for violations.—In addition to all other penalties and forfeitures now provided by law, each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of chapter 265 (50-101 to 50-111) of the Laws of 1897, which act relates to unlawful monopolies, trusts, conspiracies and combinations in restraint of trade, shall for each and every day that such violations shall be committed or continued forfeit and pay the sum of one hundred dollars, which may be recovered in the name of the state of Kansas in any county where the offense is committed, or where any or either of the offenders reside, and it shall be the duty of the attorney general to prosecute for the recovery of said penalties. It shall not be necessary to convict any firm, person, corporation, or association of persons before commencing suit to recover the penalties provided for in this section, but said penalties shall apply to any such firm, person, corporation, or association whether they or any of them shall be prosecuted criminally or not: *Provided*, Said penalty shall not accrue during the pendency of any actions under this act. (L. 1909, ch. 261, sec. 1; April 2; R. S. 1923, sec. 50-145.)

Sec. 50-146. Joinder of actions.—Actions to recover said penalties may be joined with actions in quo warranto, injunctions, or actions of any other nature brought for the purpose of ousting firms, corporations, or associations from transacting business in this state because of the violation of any provision of chapter 265 (50-101 to 50-111) of the Laws of 1897, and any court in which said action shall be brought shall have authority in such quo warranto, injunction, or other suit, in addition to the judgments now provided for by law, to render judgment for said penalties as herein provided. (L. 1909, ch. 261, sec. 2; April 2; R. S. 1923, sec. 50-146.)

Sec. 50-147. Rights and remedies cumulative.—The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this state, and shall not affect, change, or repeal any other remedies or rights now existing in this state for the enforcement, payment, or collection of fines, penalties, and forfeitures. (L. 1909, ch. 261, sec. 3; April 2; R. S. 1923, sec. 50-147.)

Sections 50-148 to 50-152 provide that it shall be unlawful for any person purchasing or selling products to discriminate in price between

different localities for the purpose of destroying competition. See Vol. *State Price Control Legislation: Antidiscrimination legislation.*

Sec. 50-153. Investigations and inquiries by attorney general; penalty for disobedience of process or refusal to testify.—Whenever the attorney general or assistant attorney general shall have knowledge of any violation of any of the provisions of any of the laws of the state of Kansas relating to trusts, monopolies, combinations in restraint of trade, unlawful discrimination, unfair trade or the unlawful buying, selling, and dealing in commodities without the intention of delivering the same, he may for the purpose of investigating and inquiring into such violations issue his subpoenas for such persons as he shall believe to have any information or knowledge of any such violation to appear before him at any time and place within the state of Kansas to be designated in the subpoena, then and there to testify concerning any violation of any of the provisions of said laws; or said attorney general or assistant attorney general may file with some justice of the peace or judge of a city court a written statement, signed by said attorney general or assistant attorney general, alleging any violations of any of said laws, and such justice of the peace or judge shall then, at the request of the said attorney general or assistant attorney general, issue his subpoenas for witnesses, commanding such witnesses to be and appear before such justice of the peace or judge at the time designated in such subpoena to testify concerning any violation of the provisions of said laws. Such subpoenas may direct witnesses to bring with them any papers, documents and books that may be considered material, and may be served by any person and shall be served and returned to said attorney general, assistant attorney general or justice of the peace or judge, as the case may be, in the same manner that subpoenas are served and returned when issued by justices of the peace in civil actions; but said subpoenas may be returned by mail to the attorney general or assistant attorney general when served in a county other than that in which the same is returnable. Each witness shall be sworn to make true answers to all questions put to him touching the matters under investigation and the testimony of each witness may be reduced to writing and when reduced to writing shall be signed by the witness. The attorney general or assistant attorney general or justice of the peace or judge shall be empowered to administer oaths and affirmations to such witnesses. Any disobedience to the subpoena of the attorney general or assistant attorney general or any refusal to be sworn as a witness or to sign the testimony given or to answer any proper question propounded by the attorney general or assistant attorney general, in any such inquiry before said attorney general or assistant attorney general, shall be a misdemeanor and shall be pun-

ished by a fine of not more than \$300 or by imprisonment in the county jail for not more than ninety days or by both such fine and imprisonment. Adjournments of any such inquiries may be made from time to time and justices of the peace and such judges may punish any witness for contempt for or on account of any refusal to be sworn or to answer questions as a witness or to sign his testimony; and the attendance of witnesses may be compelled by attachment by such justice of the peace or judge. (L. 1919, ch. 316, sec. 1; Feb. 27; R. S. 1923, sec. 50-153.)

Sec. 50-154. Investigations by county attorney.—The attorney general shall have power to instruct the county attorney of any county to make investigation in his county in the manner provided for by section 1 (50-153) hereof, and it shall then be the duty of said county attorney to make such investigation in the manner as provided in said section 1 (50-153); and, for the purpose thereof, said county attorney shall have all the powers in his county given to the attorney general by said section 1 (50-153). (L. 1919, ch. 316, sec. 2; Feb. 27; R. S. 1923, sec. 50-154.)

Sec. 50-155. Witness fees.—The witness' fees of any witnesses and the cost of serving each witness with subpoena shall be paid by the county in which such witness is subpoenaed. (L. 1919, ch. 316, sec. 3; Feb. 27; R. S. 1923, sec. 50-155.)

Sec. 50-156. Immunity of witness.—No person shall be excused from testifying in any proceeding under this act, or in any action under any of the laws referred to in section 1 (50-153) of this act, on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime under the laws of this state. (L. 1919, ch. 316, sec. 4; Feb. 27; R. S. 1923, sec. 50-156.)

Sec. 50-157. Acts done under certain federal laws, codes, or regulations.—In any civil or criminal action or proceeding for violation of the antitrust, discrimination in restraint of trade or unfair competition laws of this state, proof that the act complained of was done in compliance with the provisions of any code, agreement, license, rule, or regulation in effect under the terms of the national industrial recovery act or the federal agricultural adjustment act, to which the defendant was a party at the time of such act, shall be a complete defense to such action or proceeding. (L. 1933, ch. 78, sec. 1 (Special Session); Nov. 21.)

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of Common Law.

There are no antitrust cases prior to 1889, the date of the first Kansas antitrust law. However, the Kansas Supreme Court stated in a 1915 decision that at common law monopolies or any acts in restraint of trade are against public policy (*Dicta*). In this case an injunction issued to enforce an exclusive right to remove garbage granted by municipal ordinance to the highest bidder as a lawful and proper exercise of the municipality's police power. *O'Neal v. Harrison*, 96 Kans. 339, 150 Pac. 551 (1915). This case overrules *In re Lowe, Petitioner*, 54 Kans. 757, 39 Pac. 710, holding that an ordinance authorizing the restriction of the scavenger business to two persons provides for an unlawful monopoly.

Constitutionality of Statutes.

In a prosecution under the general antitrust act sections 50-112 to 50-120 (act of 1889) involving a contract between a lumber company and a cement company, the defendant moved to quash on the ground that the 1889 law had been superseded by sections 50-101 to 50-111 (act of 1897). The court held, however, that the two statutes have much in common "inasmuch as several subjects mentioned in the first are omitted from the second, the legislature must be deemed to have intended them to stand together." *State v. Glenn Lumber Co.*, 83 Kans. 399, 111 Pac. 484 (1910). The court also stated that a number of actions had been maintained since 1897, under the statute of 1889. *State v. International Harvester Co.*, 79 Kans. 371, 99 Pac. 603 (1909); *Id.*, 81 Kans. 610, 106 Pac. 1053 (1910).

A witness who was subpoenaed to testify under section 50-110 providing for preliminary investigations under the act contended that sections 50-101 to 50-111 violated section 10 of the Bill of Rights in the State constitution, which provides that no person shall be compelled to be a witness against himself. The court held, however, that the witness could not refuse to testify, that the immunity provided in section 50-110 was sufficient, and that the Bill of Rights was not intended to apply in such cases. *State v. Jack*, 69 Kans. 387, 76 Pac. 911 (1904), *aff'd* 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234 (1905); *In re Bell*, 69 Kans. 855, 76 Pac. 1129 (1904).

It was contended that sections 50-112 to 50-120 (act 1889) declaring trusts and combinations in restraint of trade unlawful if interpreted to apply to the insurance business, violated const. art. 2, sec.

16, requiring the title of an act to clearly express its contents. The court held, however, that the business of insurance was properly covered by the title. *In re Pinkney*, 47 Kans. 89, 27 Pac. 179 (1891).

In a prosecution under sections 50-101 to 50-111 involving an agreement entered into by all dealers of a certain market limiting their right to purchase grain, it was contended that the act violated the due process clause of the fourteenth amendment to the Federal Constitution. The court overruled this contention and held the act a valid exercise of legislative power. *State v. Smiley*, 65 Kans. 240, 69 Pac. 199 (1902), aff'd. 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546 (1905).

Section 50-110, providing for preliminary investigation of violations, does not violate the fourteenth amendment to the Federal Constitution when interpreted to mean that a witness subpoenaed to testify is not immune from future prosecutions under the Federal Antitrust Act. The court held the act contemplated that inquiries should be confined to violations of the State law, and the act was a valid exercise of legislative power. *State v. Jack*, 69 Kans. 387, 76 Pac. 911 (1904); aff'd. *Jack v. Kansas*, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234 (1905).

Application of Statutes.

In General.

A foreign corporation, doing business in this State is subject to the State antitrust acts. *State ex rel. Attorney General v. International Harvester Co.*, 81 Kans. 610, 106 Pac. 1053 (1910).

Where Kansas gas distributing companies transferred all of their property to a foreign holding company, authorized to do business in the State, the latter is subject to the State antitrust laws, in the same manner as domestic corporations. The State court had jurisdiction to appoint a receiver for such holding company, in an action growing out of a prosecution for violation of the State Antitrust Act. *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772 (D. C. Kans. 1913). See also *Public Utilities Commission v. Landon*, 249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed., 577 (1919).

Local agents of foreign insurance companies attempting to enforce rates issued by a combination of foreign insurance companies whose object was to control and increase insurance rates are subject to prosecution under sections 50-112 to 50-120 (act 1889). *State v. Phipps*, 50 Kans. 609, 31 Pac. 1097 (1893).

A combination whereby the defendant sought to purchase stock of some seven competing companies for the purpose of controlling the manufacture, production, consumption, and prices of harvesting

machinery in the United States is in violation of sections 50-101 to 50-112. *State v. International Harvester Co. of America*, 79 Kans. 371, 99 Pac. 603 (1909); *id.*, 81 Kans. 610, 106 Pac. 1053 (1910).

In an action for breach of contract, the court overruled plaintiff's demurrer to a plea that the contract was illegal as an unlawful restraint of trade. The contract in question was one of a series of similar contracts whereby control of production and price in the window-glass industry was sought. Plaintiff, being a party of such combination, could not recover on an unlawful agreement. *Patterson v. Imperial Window Glass Co.*, 91 Kans. 201, 137 Pac. 955 (1914). See also *Barton v. Mulvane*, 59 Kans. 313, 317, 52 Pac. 883 (1898).

A contract, whereby all bidders agreed that the successful bidder for a schoolhouse should pay the voluntary association of contractors one-half of 1 percent of the contract price, 50 percent of this amount to be retained by the association and the other 50 percent to be divided among the five next lowest bidders, is void under the antitrust acts. In a suit by the association against the successful bidder, the court held the tendency of such contracts was inevitably to increase the cost of school buildings and was against public policy. The court overruled the association's contention that the contract was justified because of certain services performed by the association to the individual contractors. *Master Builder's Association of Kansas v. Carson*, 132 Kans. 606, 296 Pac. 693 (1931).

An agreement between a lumber company and a cement company to prevent competition in the importation, transportation, and sale of cement, and designed to control the price of cement was held void under the antitrust act. *State v. Glenn Lumber Co.*, 83 Kans. 399, 111 Pac. 484 (1910).

In an arrangement to control prices to be paid by the ultimate consumer, several manufacturers of ice agreed to turn over their delivery machinery and that part of their business to a single company. This scheme of maintaining and controlling prices was held in violation of section 50-101. *State v. Steffen-Bretch Ice & Ice Cream Co.*, *State v. Wichita Ice & Cold Storage Co.*, *State v. Crystal Ice and Fuel Co.*, 112 Kans. 497, 211 Pac. 627 (1923).

An association of some 38 wholesale grocers was organized to engage in a wide range of activities through the distribution of bulletins, letters, speeches, and reports for the purpose of restricting trade, preventing competition, and fixing standards in order to control and increase prices to the public. Each defendant of the combination was found guilty of violating the antitrust act. *State ex rel. Griffith v. Anthony Wholesale Grocery Co.*, 118 Kans. 394, 234 Pac. 992 (1925).

The Coca-Cola Co. sold syrups to the defendant to be bottled and sold under the trade-mark "Coca-Cola." Subsequently, the Coca-Cola Co. established its own agent, under an exclusive sales contract. This suit was brought to enjoin the infringement of the trade-mark used in connection with the syrup theretofore purchased by the defendants. The Federal District Court in Kansas sustained the contention of the defendants that the exclusive contracts employed by the plaintiff were in violation of the Kansas and Federal antitrust laws and that the injunction sought to carry out a monopoly must be denied. *Coca-Cola Co. v. Bennett*, 225 Fed. 429 (1915), rev'd id. 238 Fed. 513 (C. C. A. 8th, 1916). See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

A contract between a film distributor and exhibitor that the latter will not charge less than a stipulated admission fee violates section 50-101 prohibiting price fixing. *United Artists Corp. v. Mills*, 135 Kans. 655, 11 Pac. (2d) 1025 (1932).

An agreement was entered into for the construction of a motion-picture theater to be leased to B, who was to equip and operate it. B assigned the lease to C who owned a number of theaters in the city. Plaintiff contended that B and C unlawfully conspired to control the motion-picture theater business in violation of the antitrust act. The court held that since B retained no interest in the assigned lease and as no other wrongful acts were alleged, the assignment of a lease, in itself, is no basis for the formation of a combination in restraint of trade. *Good v. Dickinson*, 128 Kans. 481, 278 Pac. 730 (1929). Cf. *Southwest Kansas Oil & Gas Co. v. Argus Pipe Line Co.*, 141 Kans. 287, 39 Pac. (2d) 906 (1935).

Defenses.

The defense to an action for the purchase price of two boilers that the plaintiff company is a combination in violation of the antitrust laws is untenable. *Barton v. Mulwane*, 59 Kans. 313, 52 Pac. 888 (1898).

Where work under contract for electrical improvements was accepted by the State fair managers, the State auditor could not refuse to grant a warrant for the payment thereof because plaintiff was combined with others in restraint of trade in contravention of section 50-116. *Cates v. Knapp, State Auditor*, 104 Kans. 184, 178 Pac. 447 (1919). See also *Crystal Ice Co. v. Wylie*, 65 Kans. 104, 68 Pac. 1086 (1902).

In a suit on a note defendant cannot successfully contend that the commission company to whom the note was made payable was engaged in a combination in violation of the antitrust law. The consideration for the contract and note in question was incidental and

collateral to the purposes of the combination. *Boatman's Bank of St. Louis v. Fritzlen et al.*, 175 Fed. 183 (1909), aff'd id. 221 Fed. 154 (C. C. A. 8th, 1915), certiorari denied, id. 238 U. S. 641, 35 Sup. Ct. 941, 59 L. Ed. 1501 (1915). Cf. *State v. Wilson*, 73 Kans. 334, 80 Pac. 639 (1905); rev'd on rehearing, 73 Kans. 334, 84 Pac. 737 (1906).

Procedure and Enforcement.

In an ouster proceeding under section 50-105, the court has jurisdiction to appoint a receiver for purposes of winding up the affairs of an unlawful corporation. *McKinney et al. v. Kansas Natural Gas Co.*, 206 Fed. 772 (D. C. Kans. 1913).

In an information charging an unlawful agreement between a lumber and a cement company in violation of the antitrust laws, it is not necessary for the State to set out in detail the precise nature of the agreement. *State v. Glenn Lumber Co.*, 83 Kans. 399, 111 Pac. 484 (1910); *State v. Monarch Portland Cement Co.*, 83 Kans. 808, 111 Pac. 487 (1910).

The court will refuse aid where it appears that persons seeking aid were parties to the unlawful agreement. *Patterson v. Imperial Window Glass Co.*, *supra*.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Gen. Stat. Ann. (Corrick, Supp. 1939)

Resale Price Maintenance

Sections 50-301 to 50-310 permit contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers. Section 50-307. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 17-1634 exempts cooperatives from the operation of the General Antitrust Laws.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Gen. Stat. Ann. (Corrick, 1935)

Railroads

Section 66-172 provides that it shall be unlawful for any railroad company to divide its freight earnings in any way with any other railroad running in the same general direction.

Insurance

Sections 50-101 and 50-112 provide that any agreement, trust, or combination to control the price or rate of insurance is unlawful. See *General Antitrust laws, supra*.

Gas Companies

Section 66-1210 provides that after August 1, 1931, it shall be unlawful for any person manufacturing gas, heat, water, or electric current, to manufacture any product except those articles which have been owned by such utility company in its distributing service, or those articles which are the direct product of the business manufacturing such service.

Stockyard Operators

Section 47-912 provides that the application for a permit to operate a stockyard must state, among other things, that the applicant is not and will not become a party to any agreement to fix charges for services or the price of livestock, and that he will not violate any laws of the state prohibiting unlawful monopolies, trust, and combinations in restraint of trade.

Grain, Seeds, Livestock, Hay

Sections 50-131 to 50-135 forbid agreements by which any shipper of grain, seeds, livestock, or hay is defrauded out of any portion of the net weight of such commodities; forbid conspiracies to monopolize, or for the purpose of preventing the producer of such commodities from shipping or marketing them without the agency of any third person. Agreements that grain, seeds, or hay shall not be shipped by the producer or local buyer unless accompanied with warehouse receipts, or that the same shall be under the control of any warehouseman or agent as a condition precedent to marketing are declared unlawful. Penalties, civil and criminal, are provided, and the jurisdiction of the courts and duty of the attorney general and county attorneys to enforce the act are set forth. See *General Antitrust Laws, supra*.

Sections 50-136 to 50-138 forbid agreements to pool prices, to divide proceeds, or to fix prices between competing dealers in grain, hogs, cattle, or stock. Recovery of damages and attorney's fees by persons injured by violations of the act and a criminal penalty are provided.

Secs. 50-139 to 50-147, 50-153 to 50-157 set forth in detail the procedure and powers for gathering evidence in the enforcement of secs. 50-131 to 50-135 and 50-136 to 50-138. See *General Antitrust Laws, supra*.

Gen. Stat. Ann. (Corrick, Supp. 1939)

Copyrighted Musical Compositions

Sections 57-201 to 57-212 provide for a license tax for the privilege of selling or licensing the performance rights in copyrighted musical and dramatico-musical compositions; for the furnishing to the secretary of state of a list describing each such musical composition before it may be sold or licensed; and that it shall be unlawful for two or more owners of such compositions to associate or combine together in any manner, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions, unless the user is also given the right, at his option, to perform each composition at a price established for each separate performance. Violation of this act constitutes a misdemeanor.

Gen. Stat. Ann. (Corrick, Supp. 1939)

Liquor

Section 21-2705 provides that no manufacturer, distributor, agent, or wholesaler shall, directly or indirectly, sell, supply, furnish, give, or pay for, or loan or lease any furnishings, fixture, or equipment on the premises of a licensee authorized to sell cereal malt beverages at retail; nor directly or indirectly pay for or in any way assist in the payment for such a license; nor become the owner of any note, mortgage, or other evidence of indebtedness of such licensee, or any form of security therefor; nor be interested directly or indirectly in the ownership, conduct, or operation of the business of any such licensee, nor in any premises where cereal malt beverages are sold at retail; nor in any wise furnish interior decorations other than signs costing in the aggregate more than \$100 per calendar year. Any licensee who shall permit or assent or be a party in any way to any violation or infringement of the provisions of this section, shall be deemed guilty of a violation of this act. Any money loaned contrary to a provision of this act shall not be recovered back, and any note, mortgage, or other evidence of indebtedness, or security, or any lease or contract obtained or made contrary to this act shall be unenforceable and void.

Section 21-2708 provides that any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$500, or by imprisonment in the county jail for not more than one year, or by both.

2. Public Contract Provisions

No statutory provisions.

3. Anticoercive Financing Statutes

Gen. Stat. Ann. (Corrick, Supp. 1939)

Sec. 8-601. Definition of words and phrases.—The following words and phrases when used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in this section:

Person. The term "person" shall mean any individual or individuals, firm, corporation, partnership, association, trustee, receiver or assignee for the benefit of creditors.

Manufacturer. The term "manufacturer" shall mean any person, firm, corporation, partnership or association engaged either directly or indirectly in the manufacture or wholesale distribution of motor vehicles and other specific commodities.

Dealer. The term "dealer" shall mean any person, firm, association or corporation or other organization of any kind, character or nature regularly engaged or intending to engage in the business of selling motor vehicles and other specific commodities at retail within this state.

Financing. The term "financing" shall include the buying, selling, assigning, or dealing in conditional sales contract, chattel mortgages, or leases arising out of the retail sale of motor vehicles and other specific commodities.

Motor vehicle. The term "motor vehicle" shall mean every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

Commodities. The term "commodities" means manufactured articles offered for sale to the general public.

Specific commodities. The term "specific commodities" means commodities identified and agreed upon at the time a contract to sell, or a sale, is made. (L. 1937, ch. sec. 1; June 30.)

Sec. 8-602. Free competition.—It is hereby declared to be the policy of this state that free and unrestricted competition shall prevail in the business of financing the purchase or sale of motor vehicles and other specific commodities. (L. 1937, ch. 166, sec. 2; June 30.)

Sec. 8-603. Certain financing agreements declared void.—It shall be unlawful for any manufacturer to sell or enter into a contract to sell any motor vehicle or vehicles or other specific commodities to any dealer on the condition or under an agreement, either express or implied, that such dealer shall finance the purchase or sale of any such motor vehicle or vehicles or other specific commodities only with or through a designated person, and any such condition, agreement, or understanding hereby is declared to be void and against the public policy of this state. (L. 1937, ch. 166, sec. 3; June 30.)

Sec. 8-604. Same; prima facie evidence of sale prohibited under section 8-603.—Any threat, expressed or implied, made directly or indirectly to any dealer by any manufacturer, or by any person who is engaged in the business of financing the purchase or sale of motor vehicles or other specific commodities and is affiliated with or controlled by any manufacturer, that such manufacturer will cease to sell, or will terminate or refuse to enter into a contract to sell motor vehicles or such other specific commodities to such dealer unless such dealer finances the purchase or sale of such motor vehicle or vehicles or such other specific commodities only with or through a designated person, shall be presumed to be made at the direction of and with the authority of such manufacturer and shall be prima facie evidence of the fact that such manufacturer has sold or intends to sell such motor vehicle or vehicles or other specific commodities on the condition or under the agreement prohibited in section 3 (8-603) of this act. (L. 1937, ch. 166, sec. 4; June 30.)

Sec. 8-605. Duty of attorney general or county attorney.—For a violation of any of the provisions of this act by any corporation or association mentioned herein it shall be the duty of the attorney general or the county attorney of the proper county to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises, or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state. (L. 1937, ch. 166, sec. 5; June 30.)

Sec. 8-606. Violations by foreign corporations and associations; injunction; revocation of license.—Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings by injunction or otherwise. The secretary of state shall be authorized to revoke the license of any such corporation or association heretofore authorized by him to do business in this state, after final judgment. (L. 1937, ch. 166, sec. 6; June 30.)

Sec. 8-607. Penalty for violating sections 8-601 to 8-610.—Any person who shall violate any of the provisions of this act, and any employee, agent, or officer of any such person who shall participate, in any manner, in making, enforcing, or performing, or in aiding or abetting, in the performance of any such contract, condition, agreement, or understanding, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished for each offense by a fine of not

less than one hundred dollars nor more than five thousand dollars or by imprisonment in the penitentiary for not less than one year nor more than five years, or by both such fine and imprisonment. (L. 1937, ch. 166; sec. 7; June 30.)

Sec. 8-608. Damage actions.—In addition to the penalties herein provided, any person who is injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court, having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act are pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not. (L. 1937, ch. 166, sec. 8; June 30.)

Sec. 8-609. Contracts and agreements in violation deemed void.—Any contract or agreement in violation of the provisions of this act shall be absolutely void and shall not be enforceable either in law or equity. (L. 1937, ch. 166, sec. 9; June 30.)

Sec. 8-610. Invalidity of part.—If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. (L. 1937, ch. 166, sec. 10, June 30.)

Judicial Decisions

Cooperatives.

Constitutionality of Cooperative Marketing Act.

In a suit by a cooperative against a member for violation of his marketing agreement with the association, the member contended the Cooperative Marketing Act violates the equal-protection clause of the Federal Constitution, because it permits a monopoly which would otherwise constitute a violation of the State antitrust law and benefits a favored class. The court held that the State Antitrust Act was not intended to apply to cooperative marketing and that enactment of the Cooperative Marketing Act was a proper exercise of the State's legislative power, and reasonably necessary for the protection of those engaged in the business. *Kansas Wheat Growers Ass'n v. Charlet*, 118 Kans. 765, 236 Pac. 657 (1925).

Application of Cooperative Marketing Act.

Associations organized under the Cooperative Marketing Act, sections 17-1601 to 17-1626, do not unreasonably restrain trade and do not tend to create such monopolies as are prohibited under sections 50-101 et seq. *Kansas Wheat Growers v. Schute*, 113 Kans. 672, 216 Pac. 311 (1923); *Same v. Floyd*; *Same v. Robben*, 116 Kans. 522, 227 Pac. 336 (1924); *Same v. Oden*, 124 Kans. 179, 257 Pac. 975 (1927); *Same v. Hetter*, 124 Kans. 76, 257 Pac. 979 (1927); *Same v. Rowan*, 123 Kans. 169, 254 Pac. 326 (1927); *Same v. Charlet*, 118 Kans. 765, 236 Pac. 657 (1925).

Grain.

In a prosecution against an officer of the Kansas State Grain Dealers Association for the violation of the antitrust acts, the court overruled the contention that Act of 1887, directed against combinations by grain dealers, was repealed by the Act of 1897. Even if it be assumed that the earlier act was repealed by implication, the statutes do not conflict and the defendants were not injured by reference to either or both. The agreement in question between the association and members limiting the amount of grain which might be shipped or sold and providing penalties for a breach thereof constituted a violation of the antitrust act. *State v. Smileu*, 65 Kans. 249, 69 Pac. 199 (1902), aff'd 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546 (1905).

An agreement between the only two grain elevators in the vicinity not to compete and to maintain certain stipulated prices for their services was held void under sections 50-101 to 50-120. *Morrison et al. v. Bandt et al.*, 145 Kans. 942, 67 Pac. (2d) 584 (1937.)

Livestock.

A bylaw of an association of the controlling members in the livestock business, forbidding members from buying or selling livestock for others without a commission of at least 50 cents a head, constitutes a restraint of trade and is unlawful under sections 50-101 et seq. *State v. Wilson*, 73 Kans. 334, 84 Pac. 737 (1906), rev'g the prior decision of *State v. Wilson*, 73 Kans. 334, 80 Pac. 639 (1905).

The Kansas City Livestock Exchange promulgated rules designating a fixed commission to be charged by its members for sale of livestock and prohibiting members from dealing with nonmembers or quoting nonmembers' prices. In a suit by members of the exchange to restrain the enforcement of penalties for violation of said rules and to prevent their dismissal from the exchange, the court, while holding the association organized for unlawful objects, denied the injunction since equity cannot aid anyone who is a party to an unlawful act. *Greer v. Payne*, 4 Kans. App. 153, 46 Pac. 190 (1896). See also *State v. Aikins*, 83 Kans. 792, 112 Pac. 605 (1911). Cf. *Downes v. Bennett*, 63 Kans. 653, 66 Pac. 623 (1901).

Insurance.

The insurance business is within the scope of the word "trade" as used in the title in sections 50-112 to 50-120 and therefore meets the requirements of Const. art. 2, sec. 16 of the State constitution requiring the title to express clearly the content of the statute. *In re Pinkney et al.*, 47 Kans. 89, 27 Pac. 179 (1891).

Foreign insurance companies and their agents doing business within the State, combining to control and increase rates on property within the State violate sections 50-112, 50-120. *State v. Phipps et al.*, 50 Kans. 609, 31 Pac. 1097 (1893).

Suit was brought by one group of fire-insurance companies against another to restrain it from monopolizing the insurance business by coercing the "mixed agencies" which had theretofore represented both groups to represent the second group only. The court held the practice a reasonable one in that the defendant employed only lawful means of competition. There was no evidence of malicious coercion, nor of an attempt to restrict competition. *Agricultural Ins. Co. of Watertown v. Aetna Insurance Co.*, 119 Kans. 452, 239 Pac. 974 (1925).

Gas.

Gas distributing companies, engaged in the sale of appliances on liberal terms for the purpose of increasing gas consumption were properly exercising their authority implied from the powers granted in their charters. Sections 66-1210 to 66-1212 prohibiting the sale of gas appliances by those engaged in manufacturing and selling gas are in violation of the equal protection clauses of the Federal Constitution, and therefore void. *Capital Gas & Electric Co. v. Boynton, Attorney General*, 137 Kans. 717, 22 Pac. (2d) 958 (1933).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

A covenant by a specialist selling his interest in certain secret medical formulæ not to divulge the formulæ or reenter in the manufacture or sale of it anywhere in the United States was enforced. The court held that such a contract is not to be judged by the arbitrary measures of extent in time, extent in space, and the like but by its reasonableness, under all the circumstances having regard both for the liberty of a person to make beneficial use of his own efforts and for the public consequences of such use. *Mills et al. v. Ressler, Same v. Cleveland*, 87 Kans. 549, 125 Pac. 58 (1912).

Restrictive Covenants Ancillary to the Sale of a Business.

A contract, upon dissolution of a partnership, not to enter the furniture business in the town of Ottawa was construed by the court to mean the establishment of a new furniture store in the city and was held valid to that extent. *Roller v. Ott*, 14 Kans. 461 (1875).

The seller of a millinery business agreed not to reenter such business in a certain city, and later acted as manager in the millinery department of her husband's store. The contract was held enforceable against the wife, but not against the husband, who did not sign the contract. *Emmert v. Richardson*, 44 Kans. 262, 268, 24 Pac. 478, 480 (1890).

Ancillary to the sale of a house-moving business, the vendor agreed not to enter such business for 10 years. The contract, although unlimited in space, is valid. The court construed the contract to mean that the seller could not reengage in an area within limits of actual competition with the buyer. *Fox v. Barbee*, 94 Kans. 212, 146 Pac. 364 (1915).

An electric utility company manufacturing electricity in Wichita leased certain of its machinery and appliances to a competing company, the lessor agreeing not to reenter business for 10 years. The contract was held invalid as it tended to reduce competition in a field seriously affecting the public interest. *Keene Syndicate v. Wichita Gas, Electric Light & Power Co.*, 69 Kans. 284, 76 Pac. 834 (1904).

An agreement not to compete not incorporated into the written contract cannot be used to alter the terms of the written instrument. *Graber v. Star Hardware Co.*, 122 Kans. 416, 251 Pac. 1116 (1927).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Gen. Stat. Ann. (Corrick, 1935)

In General

Sec. 16-112. Restraint of trade; penalty.—A person, firm, corporation, or association of persons doing business in this state shall not make it a condition of the sale of goods, wares, or merchandise, that the purchaser shall not sell or deal in the goods, wares, or merchandise of any other person, firm, corporation, or association of persons, but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares, or merchandise. Whoever, as principal or agent, violates the provisions of this section shall be punished for the first offense by a fine of not less than fifty nor more than one hundred dollars; and for each succeeding offense by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. (L. 1907, ch. 139, sec. 1; March 6; R. S. 1923, sec. 16-112.)

Cooperatives

Section 17-1616 provides that an agricultural cooperative marketing association organized under sections 17-1601 to 17-1631 may make marketing contracts with its members requiring the members to sell, for any period of time not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. See *Cooperatives* in projected study.

Judicial Decisions

In a suit by one firm of automobile distributors against another for commissions growing out of an exclusive territorial contract, the court held that section 16-112, providing for the appointment of sole agents for the exclusive sale of goods within a specific area,

must be construed together with the general antitrust act, sections 50-101 to 50-112. The act does not violate any constitutional provisions and is valid. *McConkey v. Smith*, 112 Kans. 560, 211 Pac. 631 (1923).

An agent under an exclusive agency contract may recover commissions for sales of agricultural machinery made by other salesmen to the agent's prospective customers within his restricted territory. *Zellner Mercantile Co. v. Parlin & Orendorff Plow Co.*, 98 Kans. 609, 159 Pac. 391 (1916).

The owner of a patent granted X the exclusive right to manufacture and sell a sand reel machine. In a suit for breach of the contract, it cannot be defended on the ground that an exclusive dealing arrangement was in violation of the antitrust act. *Sage v. Oil Country Specialties Manufacturing Co.*, 134 Kans. 215, 5 Pac. (2d), 1091 (1931).

KENTUCKY



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1891) sec. 198. Trusts and combinations to be suppressed.—It shall be the duty of the general assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations, or other organizations, from combining to depreciate below its real value any article or to enhance the cost of any article above its real value.

STATUTORY PROVISIONS

Stat. Ann. (Baldwin's Carroll, 1936)

Discriminations

Sections 4748h-1 to 4748h-14 prohibit sales below cost and local discrimination in the sale of any commodity, product or service with the intent to destroy the competition of any regular established dealer or of any person who intends to become a dealer in such commodity, product, or service. The statute expressly declares that it is for the purpose of safeguarding the public against the creation or perpetuation of monopolies and to encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*. (L. 1922, c. 71 expressly repealed the 1890 and 1920 acts relating to pools, trusts, and conspiracies in restraint of trade. L. 1890, c. 162; L. 1920, c. 50; K. S. secs. 3915 to 3921a-22.)

NOTE—The 1906 Act (Mar. 21, 1906, c. 117, 429 Secs. 8941a-4) provides that it is lawful for any number of persons to combine, unite or pool crops of wheat, tobacco and other farm products raised by them for the purpose of classifying, holding or disposing of such products in order to obtain a higher price for them. This act was declared unconstitutional in *International Harvester Co. v. Commonwealth*, 234 U. S. 634, 34 Sup. Ct. 853, 586 L. Ed. 1484 (1914).

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

Two rival boat operators entered into an agreement providing for the fixing of rates; for a proportionate division of profits derived therefrom; for the giving of notice to the other party if either wished to sell his business; and for a covenant not to reengage in the same business for 1 year, if such business were sold. This contract was held to be a combination the object of which was to destroy or impede free competition under the common law and was declared void in a suit for its enforcement. *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670 (1889).

The bylaws of the Louisville Underwriters' Association regulated the number of solicitors to be employed by its members, the time of and compensation for such employment, and forbade members to employ one who had severed his connection with any other member of the association. The court issued an injunction restraining the enforcement of such bylaws. *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867 (1891).

A demurrer to an action for slander, libel, and criminal conspiracy by a retailer against an association of brewers who had agreed to boycott the retailer until he paid his bill to one of them, was sustained on the ground that the defendants could lawfully combine to protect themselves against dishonest debtors. *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224, 28 S. W. 504 (1894). See also *Brewster v. Miller's Sons Co.*, 101 Ky. 368, 41 S. W. 301 (1897).

An agreement between insurance companies to establish and enforce uniform and adequately reasonable rates was not held invalid at common law as a conspiracy in restraint of trade. The nature of insurance business is such that public interest is best served through a system of uniform rather than competitive rates. *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 51 S. W. 624 (1899).

An arrangement by owners of a theater in a particular city to acquire control through leasing the three remaining theaters in the city for the purpose of keeping these theaters dark at intervals was held void as part of a scheme in restraint of trade. *Love et al. v. Kozy Theater Co.*, 193 Ky. 336, 236 S. W. 243 (1921).

An agreement between merchants of a town to close their places of business at a certain hour for a period of 3 months was held valid since the restraint was only partial and reasonable. *Stovall v. McCutchen*, 107 Ky. 577, 54 S. W. 969 (1900).

Constitutionality of Statutes.

In overruling a demurrer to an indictment under L. 1890, c. 162, p. 143, prohibiting combinations from depreciating or enhancing the value of any article, the court held that the statute was not in conflict with and was not abrogated by Const. 1891, sec. 198, subsequently enacted. *Commonwealth v. Grinstead*, 108 Ky. 59, 55 S. W. 720 (1900). (No facts other than the indictment appear.) On rehearing, the court held that the act should be construed as though it had been enacted subsequent to the constitutional provision. Since there was no subsequent legislation, the legislature must have assumed that the existing legislation was sufficient. *Id.* 108 Ky. 75, 57 S. W. 471 (1900). See also *Commonwealth v. Bavarian Brewing Co.*, 112 Ky. 925, 66 S. W. 1016 (1902); *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703 (1909).

Act 1890, c. 162, p. 143, prohibiting "any" combination to regulate or fix prices and limit production, is not void for uncertainty. *Commonwealth v. Grinstead, supra.*

Overruling a demurrer to an indictment for the violation of L. 1890, c. 162, the court held that this act, the act of 1906 (providing for exemption of agricultural cooperatives from the antitrust laws) and the constitutional provisions contained in Const. 1891, sec. 198, should be construed together, and so construed were not in violation of the "equal protection" or "due process" clauses of the Federal Constitution. The agricultural exemptions contained in the act of 1906 is a reasonable classification, and the "pooling" of crops by growers for the purpose of obtaining a fair price is not inimical to the public interest. *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703 (1909) (Hardin County); *International Harvester Co. v. Commonwealth*, 137 Ky. 668, 126 S. W. 352 (1910) (Logan County); *International Harvester Co. v. Commonwealth*, 147 Ky. 564, 144 S. W. 1064 (1912) (Bullit County); *International Harvester Co. v. Commonwealth*, 147 Ky. 795, 146 S. W. 12 (1912) (Todd County); *International Harvester Co. v. Commonwealth*, 148 Ky. 572, 147 S. W. 1199 (1912) (Grayson County); *International Harvester Co. v. Commonwealth*, 149 Ky. 41, 147 S. W. 760 (1912) (Boyle County); *American Seeding Machine Co. v. Commonwealth*, 152 Ky. 589, 153 S. W. 972 (1913).

In denying a motion to dissolve an injunction to restrain the violation of a tobacco-marketing agreement made pursuant to L. 1906, c. 117, p. 429, the court held that the act was not in conflict with Const. 1891, sec. 198. The act did not authorize members of a pool to enhance the cost of crops above their real market value, but only enabled the grower to secure a fair and reasonable price for his crops.

Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 137, 107 S. W. 710 (1908); *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703 (1909 (Hardin County)). On appeal by the Harvester Co., *International Harvester Co. v. Commonwealth*, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1484 (1914), the court held that the act (1906) as construed was unconstitutional under the Fourteenth amendment on the ground that no sharply defined standard to guide future conduct was established. The fair market value of a product will fluctuate depending on a number of indeterminable elements continually arising and changing with time. Therefore, because of indefiniteness the act was declared void. See also *American Seeding Machine Co. v. Commonwealth*, 236 U. S. 660, 35 Sup. Ct. 456, 59 L. Ed. 773 (1915) rev'g 152 Kv. 589, 153 S. W. 972 (1913); *Collins v. Commonwealth*, 234 U. S. 634, 34 Sup. Ct. 924, 58 L. Ed. 1510 (1914) rev'g *Commonwealth v. Collins*, 141 Ky. 564 (1911) on authority of *International Harvester Co. v. Commonwealth*, *supra*.

Several dealers in bluegrass seed entered into an agreement to control the market and fix the price of seed. In pursuance of such agreements, the dealers through an agent, who did not disclose them as principals, contracted with an independent dealer for a quantity of the seed. It was held (without reference to any statutes) that this agreement was a part of an unlawful scheme in restraint of trade, and no suit against the independent dealer for damages for failure to perform his part of the contract could be maintained. *Brent v. Gay*, 149 Ky. 615, 149 S. W. 915 (1912). On appeal of this case, taken after the decision in the *Harvester Co.* case, 234 U. S. 216 (1914), the court held that the common-law doctrine of restraint of trade was not abrogated by L. 1890, c. 162, p. 143, but was still in force and available as a defense to this action. The court held that the act of 1890 standing alone was not unconstitutional. It is valid even though the amendment to it (act of 1906) was declared unconstitutional in the *International Harvester Co.* case, *supra*. *Gay v. Brent*, 166 Ky. 833, 179 S. W. 1051 (1915).

A demurrer to a petition brought under act of 1916 (similar except for amendments to the act of 1920) for the forfeiture of the corporate charter of a company which had engaged in an allegedly unlawful combination to fix prices and limit production and supply of coal was sustained. The court held that the act was unconstitutional since the exemptions—organizations or associations without capital stock or corporations not engaged in mining, manufacturing or transporting of any commodities—contained in section 20 of the act were not based upon reasonable classifications and therefore were in violation of the Federal Constitution. *Commonwealth v. Hatfield Coal Co.*, 186 Ky. 411, 217 S. W. 125.

Application of Statutes.

In Criminal Prosecutions.

Even though an association of funeral directors, formed for the purpose of fixing prices, could be indicted under the act of 1890, an action for damages against it cannot be maintained by one with whom they refused to deal because he owed certain sums of money to one of the association members for a prior funeral. *Brewster v. Miller's Sons Co.*, 101 Ky. 368, 41 S. W. 301, 303 (1897).

In dismissing a complaint based on common law and not under the act of 1890, against an association of underwriters combined for purposes of maintaining insurance rates, the court stated that such a combination was not in violation of the statute for the reason that the word "property" as used in this statute does not apply to a contract of insurance. (Dicta.) *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 876, 51 S. W. 624 (1899).

A resale price maintenance contract between a manufacturer and a group of dealers coupled with their refusal to sell to persons who would not agree to maintain the minimum price was held valid and not in violation of the act of 1890. *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427 (1901).

An arrangement by 25 brewers whereby all agreed to raise, and did raise, the price of beer to retailers in an amount equal to a "war tax" levied thereon was held to be in violation of the act of 1890. *Commonwealth v. Bavarian Brewing Co.*, 112 Ky. 925, 66 S. W. 1016 (1902).

A corporation employed a general agent, and gave him exclusive right to sell and establish agencies for the sale of agricultural implements manufactured by various companies formerly competing with each other within a specified territory. The general agent established the agencies, each within a certain district, and made contracts with them for the resale of the machines at prices to be fixed by the corporation. The arrangement was held to be in violation of the act of 1890. *International Harvester Co. v. Commonwealth*, 124 Ky. 543, 99 S. W. 637 (1907).

In a penal proceeding under the act of 1890, the Commonwealth must introduce testimony evidencing a sale of some article manufactured or controlled by the defendant within the county of venue of the action. *International Harvester cases, supra.*

In a prosecution of an alleged combination for the purpose of enhancing the price of harvesting machinery in violation of the act of 1890, evidence to the effect that the price of such machinery was enhanced 5 percent since the formation of the combination can be rebutted with testimony to the effect that the price of labor and materials

has increased more than 5 percent. *International Harvester Co. v. Commonwealth*, 137 Ky. 668, 126 S. W. 352 (1910). The State, however, may show that the advance in cost of labor and materials is not sufficient to justify the advance in price, or by other pertinent facts and circumstances may show that the advance was not attributable to market conditions. *International Harvester Co. v. Commonwealth*, 144 Ky. 403, 138 S. W. 248 (1911). See also *American Seeding Machine Co. v. Commonwealth*, 152 Ky. 589, 153 S. W. 972 (1913).

A petition in a penal action under the act of 1906 alleging that defendant became a party to a trust merely to regulate and fix the price of tobacco, and subsequently did so, is demurrable since the gravamen of the offense under the pooling act is the raising or lowering of prices for any commodity above or below its real value. *American Tobacco Co. v. Commonwealth*, 115 S. W. 754 (1909). *Id.*, 116 S. W. 1176 (1909). But such a petition states a good cause of action under the act of 1890. *Commonwealth v. American Tobacco Co.*, 167 Ky. 157, 180 S. W. 58 (1915).

A coal company owning an interest in several other companies issued circulars indicating future prices to be charged by its dealers. Other dealers also obtained these circulars and changed their prices in accordance therewith. It was held that such facts would not justify an inference that the circulars were issued in furtherance of a conspiracy or a combination in restraint of trade in violation of the act of 1890. *Commonwealth v. Hatfield Coal Co.*, 193 Ky. 229, 235 S. W. 722 (1921).

In Civil Actions.

In an action for the damages for the failure to deliver corn, the defense that plaintiff, a member of a combination organized for the purpose of fixing the prices on corn in violation of the act of 1890, was not upheld since there was no allegation that the combination was formed for the purpose of increasing the price above or decreasing it below its real value. *Stahr v. Hickman Grain Co.*, 132 Ky. 496, 116 S. W. 784 (1909). See also *Scobee v. Brent*, 185 Ky. 734, 216 S. W. 76 (1919).

The only two ice-manufacturing companies in a town agreed that one discontinue to manufacture, and buy all of its ice requirements from the other. The agreement also contained provisions for increasing prices. Evidence was introduced to show that the prices charged were several times greater than that charged by either company while competing with one another. In an action for damages for a breach of this contract, the court held the agreement void in violation of the act of 1890. *Arctic Ice Co. v. Franklin Electric & Ice Co.*, 145 Ky. 32, 139 S. W. 1080 (1911).

An agreement between the Tobacco Society and its members for the purpose of pooling their crops in order to obtain reasonable prices was held valid. *Louisville & N. R. R. Co. v. Burley Tobacco Society*, 147 Ky. 22, 143 S. W. 1040 (1912). Even if such agreement were unlawful, such defense to an action for the negligent destruction of the Society's property by the railroad is irrelevant, immaterial and could not be upheld. *Ibid.*

B. EXCEPTIONS TO THE GENERAL ANTITRUST LAWS

Stat. Ann. (Baldwin's Carroll, 1939) Resale Price Maintenance

Sections 4748i-1 to 4748i-5 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. Sec. 4748i-3. See vol. *State Price Control Legislation: Resale Price Maintenance*.

Stat. Ann. (Baldwin's Carroll, 1936) Cooperatives

Section 883f-28 provides that an agricultural cooperative marketing association organized under sections 883f-1 to 883f-41 shall not be deemed to be a conspiracy, a combination in restraint of trade, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperative Marketing Act.

In an action by a cooperative association formed pursuant to the Bingham Cooperative Act, Stat. Ann. 883f-1 to 41 (L. 1922, c. 1), to prevent a tobacco grower from breaching his contract to deliver tobacco to the association, it was held that the act was not in violation of the "equal protection" or "due process" clauses of the Federal Constitution nor of Const. (1891) art. 59. The constitutional provisions prohibit the legislature from discriminating between individuals of the same class, but do not prevent reasonable classifications within proper limits. *Potter v. Dark Tobacco Growers' Cooperative Ass'n* 201 Ky. 441, 257 S. W. 33 (1923); *Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Ass'n*, 208 Ky. 643, 271 S. W. 695 (1925) aff'd 276 U. S. 71, 48 Sup. Ct. 291, 72 L. Ed. 473

(1928); *McFall v. Burley Tobacco Growers' Cooperative Ass'n*, 229 Ky. 537, 17 S. W. (2d) 432 (1929).

The Bingham Cooperative Act is not in conflict with the Sherman antitrust law since the act is applicable in its operation only to products grown, pooled, and sold within the State. *Potter v. Dark Tobacco Growers' Cooperative Ass'n*, *supra*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Common Carriers

Const. (1891) sec. 201 provides that no railroad, telegraph, telephone, bridge, or common carrier company shall consolidate with or otherwise acquire another such company owning a parallel or competing line; nor shall any railroad company or other common carrier enter into a contract with the owners of any vessel or any common carrier according to which contract the earnings of the one doing the carrying will be shared with the other not doing the carrying; provided that a telephone company may acquire a parallel or competing exchange if the railroad commission consents thereto.

STATUTORY PROVISIONS

Stat. Ann. (Baldwin's Carroll, 1936)

Railroads

Section 769 provides that railroads may not purchase the property and franchises of competing or parallel lines.

Rail and Water Carriers

Section 201e-20 makes it unlawful for steamship companies to combine with any railroad company or other common carrier by which combination the earnings of the one doing the carrying are to be shared by the other not doing the carrying. It is further declared unlawful for a carrier by rail to influence the rates of any carrier by water or to own stock in a water carrier and vice versa.

Bridge Companies

Section 849 provides that no bridge company or its stockholders or agents shall in any manner own or control more than one bridge spanning a river forming a boundary line of this commonwealth.

Sections 850 to 852 provide a fine for each violation of section 849 and that every contract or agreement in violation thereof shall be

void. Any violation by a corporation shall be ground for forfeiture of its charter under proper proceedings.

Stat. Ann. (Baldwin's Carroll, Supp. 1939)

Liquor

Section 2554b-128 provides that the various classes of licenses authorized by this act in sections 2554b-114 and 2554b-126 shall be considered inconsistent with each other and any person holding a license of any of the kinds above referred to shall be ineligible to apply for and is hereby prohibited from holding a license of another kind, with a few exceptions specifically listed. However, any person may hold two or more licenses of the same kind. Section 2554b-130 provides that no person shall be permitted to evade the above prohibitions by applying for a second license under the cloak of separate corporate entity. The Administrator is hereby authorized to examine into the ownership and management of corporations which shall apply for licenses or which hold licenses, and shall deny the application for a license to any party substantially interested in another incompatible license.

Section 2554b-156 provides that no brewer, wholesaler, or distributor shall sell any alcoholic beverages except on a cash basis, clubs and voluntary associations exempted. No right of action shall exist to collect any claim for credit extended contrary to the provisions of this clause.

Section 2554b-161 provides that no license shall be pledged, hypothecated, or deposited as collateral security on any loan or upon any condition; and any such pledge, hypothecation, or deposit, and any contract providing therefor shall be void.

Section 2554b-163 provides that payments for licenses and license taxes shall be made only by the party applying therefor and to whom it is issued. In addition to all other penalties provided in this act, a violation of this section shall authorize and require the revocation of the license the tax for which was paid by another, and also the revocation of the license, if any, of the person so paying for the license of another.

Section 2554b-168 provides that no person holding a distiller's or rectifier's or vintner's or wholesaler's license, and no employee, servant, or agent of theirs, shall—

(1) Be interested directly or indirectly in any premises where any distilled spirits or wine are sold at retail; or in any business devoted wholly or partially to such sale by stock ownership, interlocking directorates, mortgage, or lien on any personal or real property, or by any other means;

(2) Make or cause to be made any loan to any person engaged in the manufacture or sale of any distilled spirits or wine at wholesale or retail;

(3) Make any gift or render any kind of service whatsoever, directly or indirectly, to any licensee which in the sound judgment of the board may tend to influence such licensee to purchase their product.

Section 2554b-171 provides that no distiller, rectifier, vintner, or wholesaler shall furnish or cause to be furnished to any licensee any sign whatsoever, except as authorized by the rules and regulations of the board.

Section 2554b-217 provides that no manufacturer or distributor, except as hereinafter provided, shall in any wise be interested either directly or indirectly in the ownership or leasehold of any property or in any mortgage against the same for which a retail license is granted; nor directly or indirectly lend any moneys, credit or the equivalent thereto to any retailer in equipping, fitting out, or maintaining and conducting either in whole or in part an establishment or business operated under a retail license for the sale of malt beverages. However, this section shall not apply to the interest of a licensee in any mortgage or other lien taken by him to secure the payment in whole or in part of any indebtedness due him by any other licensee and incurred prior to the effective date of this act. The provisions of this article shall not prohibit a distributor from owning stock in any brewery.

Section 2554b-141 (3 and 4) provide that transferring, assigning, pledging, depositing, or hypothecating a license, or paying for the license of another or permitting another paying for one's own license shall cause the revocation of the license. Violation of the provisions of sections 2554b-163 and 2554b-168 shall cause a forfeiture of the licenses issued under section 2554b-114 to all parties participating or concerned in the violation.

Section 2554b-196 provides that any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this act other than sections 2554b-205 to 2554b-218, inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and upon conviction thereof be punished by a fine not to exceed \$500 or by imprisonment in the county jail or workhouse for a term not to exceed six months, or by both. For a second and each subsequent violation, whether the section violated be that for which the first conviction was had or not, the offender upon conviction shall be punished by a fine not to exceed \$1,000 or by imprisonment for a term not to exceed one

year, or by both. These penalties shall be in addition to the revocation of the offender's license. If the offender be a corporation, joint stock company, association, or fiduciary, then the principal officer or officers responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 2554b-106 of this act dealing with members and employees employed by the State to administer these provisions.

Section 2554b-219 provides that any person who shall violate any of the provisions of sections 2554b-205 to 2554b-218, inclusive, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not less than \$50 nor more than \$500 for each offense, and said person's license shall be subject to revocation. See *Tying Contracts and Exclusive Dealing Arrangements*.

Tobacco

Sections 4811 to 4814 provide that all sales of leaf tobacco at public auction shall be free and open to all responsible bidders. Warehousemen combining for the purpose of restricting the bidding or organizations prohibiting their members from bidding, at any warehouse, are guilty of a misdemeanor and, in addition to a fine, shall forfeit their corporate rights and privileges.

2. Public Contract Provisions

No statutory provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Railroads.

In sustaining an injunction to prevent a Kentucky railroad corporation which had lines in two States from acquiring parallel lines of a competing company within the State, the court held that Const. 1891, sec. 201 is not in conflict with "interstate commerce" clause of the Federal Constitution. *Louisville & N. R. R. Co. v. Commonwealth*, 97 Ky. 675, 31 S. W. 476 (1895); aff'd 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849 (1896). Nor does section 201 impair the obligation of a contract right by affecting a revocation of the unexecuted provisions of a prior charter, which gave the railroad power to acquire lines of any company. *Ibid*.

Two railroads serving three important points in common, and at an average distance of 8 miles from each other, are parallel and within the prohibitions of Const. (1891), sec. 201. *Commonwealth v. Louisville & N. R. R. Co.*, 144 Ky. 324, 138 S. W. 291 (1911).

Const. (1891) sec. 201 is inapplicable in a penal action against a railroad for owning and operating two bridges across a boundary river more than 200 miles apart, one bridge running east and west and the other north and south, and each serving a population having no community of interest with that served by the other. *Commonwealth v. L. & N. R. R. Co.*, 148 Ky. 94, 146 S. W. 767 (1912).

Const. (1891) sec. 210 does not prevent a railroad from owning a hotel or park operated as a nonprofit venture, used principally for the accommodation of its passengers and employees. *Louisville Property Co. v. Commonwealth*, 146 Ky. 827, 143 S. W. 412 (1912).

Telephone Company.

A contract between a municipality and a telephone company, authorizing the company to consolidate with a competitor and giving the city power to fix rates for a certain period of time was held a valid exercise of the city's authority, and not in violation of Const. (1891) sec. 201. *Southern Bell Telephone & Telegraph Co. v. Louisville*, 265 Ky. 286, 96 S. W. (2d) 695 (1936).

Transfer Companies.

The two competing transfer companies in a city contracted that one engage exclusively as the carrier of passengers and that the other engage exclusively as a carrier of freight. In dismissing an action for specific performance of this contract, the court held that such companies were "common carriers," that their lines were "parallel lines" within the meaning of Const. 1891, sec. 201, and that such a contract was void. *Fields & Son v. Holland & Son*, 158 Ky. 544, 165 S. W. 699 (1914).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A covenant by the seller of a tobacco warehouse and its good will not to engage in the said business for a period of 10 years in the same city was upheld as a reasonable restraint and necessary to protect the interest of the vendee. *Western District Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308 (1895). See also *Royer Wheel Co. v. Miller*, 20 Ky. L. R. 1831, 50 S. W. 62 (1899).

The covenant of a seller of marble and tombstones not to reengage in the business for 3 years at the place of sale was held valid. *Skaggs v. Simpson*, 33 Ky. L. R. 410, 110 S. W. 251 (1908).

The seller of a livery business agreed not to engage in the same business within 50 miles of the place where the business was located, for a period of 10 years. The contract was held to be a reasonable restraint and valid. *Linneman & Moore v. Allison & Yates*, 142 Ky. 309, 134 S. W. 134 (1911).

A contract whereby the seller of a livery business agreed not to reengage in the same business in the same town so long as the buyer was engaged in such business in that town was upheld. *Breeding v. Tandy*, 148 Ky. 345, 146 S. W. 742 (1912).

An undertaker sold his equipment to a member of a competing firm and agreed not to reengage in the business in that county so long as the buyer was engaged therein. The covenant was held valid. *Elkins v. Barclay*, 243 Ky. 144, 47 S. W. (2d) 945 (1932).

A covenant by a seller of a tan-yard not to erect or carry on a tan-yard in the city or county was held valid. *Grundy v. Edwards*, 7 J. J. M. 368 (1832).

That the seller of a buggy business will not sell buggies in a particular county was upheld. *Davis v. Brown*, 98 Ky. 475, 32 S. W. 614 (1895) aff'd on rehearing, 98 Ky. 475, 36 S. W. 534 (1896).

The seller of a grocery business agreed not to reengage in the grocery business in a specified town in competition with the buyer. The covenant was held valid even though unlimited in time. *Long v. O'Bryan*, 28 Ky. L. R. 1062, 91 S. W. 659 (1906).

A covenant by the seller of a grocery business agreed not to reengage in the grocery business in the same city was held reasonable and valid although unlimited as to time. *Gunther Grocery Co. v. Koll*, 153 Ky. 446, 155 S. W. 1145 (1913).

An agreement by the vendor when selling to a competitor certain portions of a laundry machinery business to abandon that line of sales within a prescribed territory was held valid. *Barrone v. Moseley Bros.*, 144 Ky. 698, 139 S. W. 869 (1911).

An agreement that the seller of a stage line will not reengage in that business between points covered by the carrier, and will not compete with the buyer in any manner whatsoever, was held valid. *Nickell v. Johnson*, 162 Ky. 520, 172 S. W. 938 (1915).

An agreement by a vendor not to own or operate a hospital in the same county for a period of 10 years was upheld as reasonable in its operation. The court indicated that it would treat contracts restricting professional services under the same rules as governed tradesmen's contracts. *Johnson v. Stumbo*, 277 Ky. 301, 126 S. W. (2d) 165 (1939).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

A number of ice plants controlling the industry in the city of Louisville were merged into a new corporation. In conveying the property of each of the plants to the new corporation, each owner agreed not to compete with the new company for a period of 10 years. In a suit to enjoin the breach of covenant against one of the members, the court held the contract void in violation of the Antitrust Act of 1890, and therefore unenforceable. *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 128 S. W. 599 (1910).

A stockholder in a produce corporation who has been actively in charge of the business sold his stock, and agreed not to engage in a similar business for 10 years in any of 4 counties. An injunction to restrain a breach of an agreement issued, the court holding that such a covenant was necessary to protect the interest of the purchaser, even though the seller had not sold and could not sell him, the goodwill of the business. *Durham v. Lewis*, 231 Ky. 601, 21 S. W. (2d) 1004 (1929).

A lessor's agreement not to let any of her property adjacent to that occupied by the lessee to anyone who might set up a store thereon in competition with the lessee was held to be an unreasonable restraint. *Vanover v. Justice*, 180 Ky. 632, 203 S. W. 321 (1918).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

CONSTITUTIONAL PROVISIONS

Railroads

Sections 214 and 217 provide that no railway, transfer, belt line, or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association, or corporation, for the receipt, transfer, delivery, transportation, handling, care, or custody of any freight, or for the conduct of any business as a common carrier. Violation subjects the offender to a fine of \$2,000 for the first offense, \$5,000 for the second offense, and for the third offense, shall, ipso facto, forfeit its franchises, privileges, or charter rights.

STATUTORY PROVISIONS

Stat. Ann. (Baldwin's Carroll, 1936) Cooperatives

Sections 883f-17 and 883f-28 provide that an agricultural cooperative marketing association organized under sections 883f-1 to 883f-41 may enter into marketing contracts with its members requiring the members to sell, for any period of time not over ten years, all or any specified part of their products to or through the association and that such contracts shall not be considered to be illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Stat. Ann. (Baldwin's Carroll, Supp. 1939)

Liquor

Section 2554b-168 (4) provides that no person holding a distiller's or rectifier's or vintner's or wholesaler's license and no employee, servant, or agent of such, shall enter into a contract with any holder of a retail license whereby such licensee agrees to confine his sales to distilled spirits or wine manufactured or sold by one or more such distillers, rectifiers, vintners, or wholesalers. Any such contract shall be void.

Section 2554b-212 provides that it shall be unlawful for any person engaged in business as a manufacturer or brewer, distributor, or shipper of malt beverages directly or indirectly or through an affiliate or subsidiary to require by agreement or otherwise, that any retailer

engaged in the sale of malt beverages, purchase any such products from such person to the exclusion in whole or in part of malt beverages sold or offered for sale by other persons.

Section 2554b-213 provides that it shall be unlawful for any manufacturer, brewer, or distributor to induce through any of the following means any retailer engaged in the sale of malt beverages, to purchase any malt beverages from such person to the exclusion in whole or in part of malt beverages sold or offered for sale by other persons, if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in commerce in any such products, if the direct effect of such inducement is to prevent, deter, hinder, or restrain other persons from selling or offering for sale any such products to such retailer (a) by acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (b) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (c) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value, except as the Malt Beverage Administrator, having due regard for the public health, the quantity and value of the articles involved, the prevention of monopoly and the practice of deception, may by regulation otherwise prescribe; or (d) by paying or crediting the retailer for any advertising, display, or distribution service subject to such exceptions as the Director may by regulation prescribe; or (e) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (f) by requiring the retailer to take and dispose of a certain quota of any of such products.

Section 2554b-214 provides that it shall be unlawful for any manufacturer or brewer to induce through any of the following means, any retailer engaged in the sale of malt beverages, to purchase any such products from such person to the exclusion in whole or in part of malt beverages sold or offered for sale by other persons, if such persons engaged in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in any such products, if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer (a) by commercial bribery; (b) by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of such retailer; or (c) by making or allowing any rebates or refunds to any officer, employee, or representative of such retailer. See *Special Antitrust Laws: Liquor*.

Judicial Decisions

Exclusive Dealing Arrangements.

In a suit to enjoin the interference with an exclusive right given by a railroad company to haul freight, baggage, and passengers from one of its stations, the court held that since such a contract was monopolistic in character, and injurious to the public interest, it was unenforceable. *McConnell v. Pedigo et al.*, 92 Ky. 465, 18 S. W. 15 (1892).

An owner of land cannot grant to one company, to the exclusion of all others, the right to construct a gas line through his property. Such contract is an attempt to stifle competition, and therefore invalid. *Calor Oil & Gas Co. v. Franzell et al.*, 128 Ky. 715, 109 S. W. 328 (1908).

A contract by a railroad company granting a transfer company the exclusive right to occupy the sole convenient parking space for the purpose of hauling passengers departing from the depot is void as an attempt to destroy competition. *Palmer Transfer Co. v. Anderson*, 131 Ky. 217, 115 S. W. 182 (1909); Cf. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxi & Transfer Co.*, 15 Fed. (2d) 509 (C. A. A. 6th 1926) (1926), aff'd 276 U. S. 518, 48 Sup. Ct. 404, 72 L. Ed. 681 (1928).

A seller contracted to deliver to the buyer all of the railroad ties that he could manufacture within a certain territory for a period of a year. The buyer agreed to take all such ties and not to purchase such goods from any other persons in that territory. The contract was upheld. There was no unreasonable restraint of trade nor attempt to create a monopoly. The contract was limited both in time and place. *Mitchell Taylor Tie Co. v. Whitaker*, 158 Ky. 651, 166 S. W. 193 (1914). See also *Indian Refining Co. v. Kellar*, 203 Ky. 720, 263 S. W. 9 (1924).

The Louisville Railroad Co. entered into a contract with the X stockyard company agreeing to deliver all livestock shipped over its line destined to Louisville to the X stockyard company, exclusively. Y, a competing stockyard company in Louisville, sought to enjoin the railroad company from continuing to engage in such practices. The court, in issuing the restraining order, declared the contract was void in violation of Const. (1891), sec. 214. *Louisville & N. R. R. Co. v. Central Stock Yards Co.*, 133 Ky. 148, 97 S. W. 778 (1906).

LOUISIANA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1921) art. 13, sec. 5. Laws for creation and regulation of corporations.—The legislature shall enact general laws for the creation and regulation of corporations and for the prohibition of monopolies; and shall provide also for the protection of the public, and of the individual stockholders. (From Const. (1845).)

Const. (1921) art. 19, sec. 14. Combinations and monopolies prohibited.—It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite, or pool their interests for the purpose of forcing up or down the price of any agricultural or manufactured product or article of necessity, for speculative purposes, and all combinations, trusts, or conspiracies in restraint of trade, commerce, or business, as well as all monopolies or combinations to monopolize trade, commerce, or business, are hereby prohibited in the State of Louisiana, and it shall be the duty of the attorney general, of his own motion, or any district attorney of the State, when so directed by the Governor or the attorney general, to enforce this provision, by the injunction or other legal proceedings, in the name of the State of Louisiana, and particularly by suits for the forfeiture of the charters of offending corporations, incorporated under the laws of the State of Louisiana, and for the ouster from the State of foreign corporations: *Provided, however,* That nothing herein contained shall prevent the legislature from providing additional remedies for the enforcement of this section. (From Const. (1898) as amended, acts 1936, No. 318, sec. 1, adopted November 3, 1936.)

STATUTORY PROVISIONS

Gen. Stat. Ann. (Dart, 1939)

Sec. 4905. Illegal contracts in restraint of trade—Penalties.—Every contract, combination in the form of trust or otherwise, or

conspiracy, in restraint of trade or commerce in the State of Louisiana is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars (\$5,000.00), or by imprisonment, with or without hard labor, not exceeding three (3) years, or by both said punishments, all at the discretion of the court. (Acts 1915 (E. S.), No. 11, sec. 1.)

Sec. 4906. Monopoly by person—Penalties.—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce within the State of Louisiana, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars (\$5,000.00), or by imprisonment, with or without hard labor, not exceeding three (3) years or by both said punishments, all at the discretion of the court. (Acts 1915 (E. S.), No. 11, sec. 2.)

Sec. 4907. Violation of act by corporation—Penalties to officers and agents.—Whenever a corporation shall violate any of the penal provisions of this act, such violation shall be deemed to be also that of the individual officers, directors, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such officer, director, or agents he shall be punished by a fine not exceeding five thousand dollars (\$5,000.00), or by imprisonment, with or without hard labor, not exceeding three (3) years, or by both said punishments, all at the discretion of the court. (Acts 1915 (E. S.), No. 11, sec. 3.)

Sec. 4908. Agreements lessening competition or tending to create monopoly.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or sell, or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within this state, or to fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement or understanding that the purchaser or lessee thereof shall not use or deal in the goods, wares, merchandise, machinery or other commodities of a competitor or competitors of the vendor or lessor, where the effect of such sale, or contract for sale, or lease, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (Acts 1915 (E. S.), No. 11, sec. 4.)

Sec. 4909. Acquisition of stock in competing corporations, when prohibited.—No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged in the same line of commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce. No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in the same line of commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies, or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce; provided, however, that nothing in this section contained shall prohibit corporations from purchasing such stock or other share capital solely for investment, and not using same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition; nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation and holding and owning and voting share capital of subsidiary corporations for the purpose of carrying on their immediate lawful business, or the natural and legitimate branches or extensions thereof, when the effect of such formation is not to substantially lessen competition; nor shall anything herein contained be construed to prohibit any common carrier in this state from aiding in the construction of branches or short lines so located as to become feeders to the lines of the company so aiding in such construction, or from acquiring or owning all or any part of the stock of such branch lines; nor to prevent any such common carrier from acquiring or owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or interest therein is so acquired; provided, further, that nothing contained in this section shall be held to affect or impair any right heretofore legally acquired. (Acts 1915 (E. S.), No. 11, sec. 5.)

Sec. 4910. Injunctions against violations—Jurisdiction—Proceedings.—The several district courts of the State are hereby vested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the attorney general or of the several district attorneys in their respective districts under the direction of the attorney general or of the governor, to institute proceedings to prevent and restrain such violations. Such proceedings shall be by way of petition and by citation, setting forth the case and praying that such violations shall be enjoined, or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be, to the hearing and determination of the case; and pending such action, and before the final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which such proceedings shall be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the parish in which the court is held or not, and subpoenas to that end may be served in any parish by the sheriff thereof. (Acts 1915 (E. S.), No. 11, sec. 6.)

Sec. 4911. Venue of suits against corporations—Witnesses.—Any suit, action, or proceeding under this act in the name of the State against a corporation, shall be brought in the parish where it is domiciled, or if it has no domicile in this State, then in any parish in which it may be found or transacts business. In any suit, action, or proceeding brought by or on behalf of the State of Louisiana, under the provisions of this act, subpoenas for witnesses who are required to attend the court of this State in any parish in any case, civil or criminal, under this act, may run into any other parish; provided, that in civil cases no subpoena shall issue for witnesses living out of the parish in which the court is held a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application being had and cause shown. (Acts 1915 (E. S.), No. 11, sec. 7.)

Sec. 4912. Plaintiff in injunction suit—Bond—Preliminary injunction.—Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of this state having jurisdiction over the parties, against threatened loss or damage by a violation of the provisions of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings and under the laws of Louisiana, and upon execution of proper bonds against dam-

ages for an injunction improvidently granted; and upon a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. (Acts 1915 (E. S.), No. 11, sec. 8.)

Sec. 4913. Prima facie evidence of violations—Suspension of prescription.—A final judgment or decree hereafter rendered in any criminal prosecution, or in any civil suit or proceeding, brought by or on behalf of the United States under the antitrust laws of said government, or by or on behalf of this state, under this act, to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any civil suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgment or decree. Whenever any suit or proceeding, civil or criminal, is instituted by the United States, or by this state, to restrain or punish violations of any of the antitrust laws thereof, the running of prescription of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. (Acts 1915 (E. S.), No. 11, sec. 9.)

Sec. 4914. Receivership—Sequestration—Interlocutory appeal.—In any case where because of irreparable injury to the public interest injunction has issued, or should issue, under this act, the court may, if required by the ends of justice, issue such interlocutory orders as it may deem requisite for ex officio sequestration or for receivership over any property utilized in violating this law, and if the business is one to which a public interest has attached by reason of the monopoly, or other act of the defendant, or by other circumstances or if the public welfare would suffer from the suspension of defendant's business and the impounding of his property as provided herein, the court may order the judicial sequestrator or receiver appointed by him, after such officer has been sworn and has given bond in such amount as the court shall have fixed, to carry on the business of such defendant until the termination of the suit with all powers customary and necessary in a receivership proceeding, either side aggrieved by the judgment appointing or refusing to appoint a receiver to have suspensive appeal to the court of competent jurisdiction within five days, without bond, upon the original papers and in the appellate court of competent jurisdiction said cause shall be heard and determined within forty days after the appeal is lodged: *Provided*, should said appeal be lodged during vacation of said court, said period of forty days shall begin immediately after the termination of said vacation. (Act 1915 (E. S.), No. 11, sec. 10.)

Sec. 4915. Forfeiture of charter by judgment of violation of act—Liquidation.—Any judgment against a defendant under this act shall carry with it the forfeiture of the charter of a domestic corporation, and its liquidation in accordance with existing laws, and the ouster from the state of a foreign corporation; and the liquidation of its affairs within the state through a liquidating receiver, to be named in the judgment, under such bond as the court may fix; and the sale, under the orders of the court, of any property utilized in any business declared to have been carried on unlawfully under this act. (Acts 1915 (E. S.), No. 11, sec. 11.)

Sec. 4916. Closing manufacturing plant—Presumption of violation of act—Sale or lease.—Whenever in any suit on behalf of the state it shall be made to appear to the satisfaction of the court, by affidavit or otherwise, either in limine or upon trial, that any manufacturing plant has been closed and is being kept idle for more than one year, it shall be presumed that such manufacturing plant was closed, and is being kept idle for the purpose of violating or in aid of a violation of this act, but it shall be the duty of the court to receive and consider any and all evidence, whether by affidavit or otherwise, which may rebut this presumption; and if the court shall find that the facts do not fairly rebut the presumption herein established, then it shall issue an order to the owner of such plant, requiring that same be sold to bona fide third parties, within a delay to be fixed by the court not to exceed six months from the date of such order, and if, at the expiration of that time, said plant be not sold, the court shall appoint a receiver to take possession of same under such bond as it may fix, and said receiver shall be authorized to make sale or lease, or other disposition of same under the directions of the court, all within twelve months of the order appointing him. In computing said period of one year, any plant shall be treated as idle which has not been operating bona fide. No sale or lease shall be made to any individual who has been connected with the management of said plant, nor to any corporation or firm composed in whole or in part of said individuals; and no corporation shall buy or lease said plant if more than thirty percent of its stock be held by former stockholders of the offending corporation. Provided all sales by receivers under this or other sections of this act shall be made according to the law governing sheriff's sales. (Acts 1915 (E. S.), No. 11, sec. 12.)

Sec. 4917. Procedure before trial—Exceptions—Appeal—Trial.—In all cases under this law the defendant shall file all exceptions in limine litis, if need be in the alternative, after the usual delays, and such additional delays as the court may allow. *Provided, however,* That a plea to the jurisdiction shall not be considered

waived by other pleas or exceptions filed under the reservation thereof. The judge shall take up such exceptions in preference over all other business and shall decide all questions raised therein within ten days after submission, and his ruling shall have the effect of *res judicata*, unless the party cast shall appeal within five days. The appeal shall be returnable to the appellate court within ten days where the case shall be heard and determined within forty days. Should said exceptions be overruled by final judgment of the appellate court, the defendant must file his answer covering all questions of controverted fact within fifteen days thereafter and the case may be set down for trial on the application of either party, in which case the judge shall take up the consideration of the matter in preference over all other business. (Acts 1915 (E. S.), No. 11, sec. 13.)

Sec. 4918. Appeals of interlocutory judgments.—Any and all interlocutory judgments in the cases affected by this act not otherwise provided for herein shall be appealable within five days and shall be heard and determined in the appellate court within twenty days after appeal is lodged, and any interlocutory judgments not appealed, except those rendered during the progress of the trial, shall be final; and shall not be reopened on final appeal. Such appeals shall be on the original papers, on the order of the district judge, if a transcript cannot be prepared in time. (Acts 1915 (E. S.), No. 11, sec. 14.)

Sec. 4919. Fee of prosecuting attorney.—The district attorney, prosecuting any case to favorable judgment for the State under this act, shall be paid such reasonable fee out of the property of the defendant as the court may fix, same to be taxed as costs. (Acts 1915 (E. S.), No. 11, sec. 15.)

Sec. 4920. Damages to injured parties.—Any person who shall be injured in his business or property by any person or corporation by reason of any act or thing forbidden or declared to be unlawful by this act, may sue therefor in any court of competent jurisdiction and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Acts 1915 (E. S.), No. 11, sec. 16.)

Sec. 4921. Documents admissible in evidence.—In any suit under this act, the judge shall give the books, letters, and other documents (or apparent copies thereof) of the defendant, full effect as being what they purport to be and as establishing the facts carried on their face, unless there is sufficient rebuttal or countervailing proof against same; and such books, letters or other documents (or apparent copies thereof) shall be received in evidence without other formality than proof of their having been in the archives or in the possession or

under the control of the defendant, and the judge shall receive in evidence any report by a legislative committee of the State of Louisiana, or of the senate or house of representatives of the United States or of any bureau or department or of any commission organized or acting under the authority either of the State of Louisiana or the United States, pertinent to the issue and likewise it shall receive in evidence any record or parts of the same of any court of any state or of the United States in any suit or legal proceeding to which the same defendant is or has been a party, provided that all of said record must be produced unless the certificate of the custodian thereof shows that all of it is not obtainable, provided further, that the testimony of a witness shall not be received unless the party against whom same is offered has had the opportunity to cross-examine; but the defendant may put such record, or parts of same, in evidence whether the State or other plaintiff has had the right to cross-examine or not and in the absence of denial, or explanation or counter-proof, any such report, or record, or testimony, shall be prima facie evidence of the facts set forth therein. (Acts 1915 (E. S.), No. 11, sec. 17.)

Sec. 4922. Attorney general to institute suits.—All suits for the enforcement of this act shall be instituted in the district courts of competent jurisdiction by the attorney general, on his own motion or by direction of the governor, or by the district attorney, acting under instruction of the governor, or attorney general but when the penalty of imprisonment is demanded the prosecution shall be in accordance with the general statutes regulating criminal procedure. (Acts 1915 (E. S.), No. 11, sec. 18.)

Sec. 4923. Definition of terms.—The term "commerce" as used herein means trade or commerce within the State of Louisiana; and the words "person" or "persons" whenever used in this act shall be deemed to include corporations, firms, partnerships and associations existing under or authorized by the laws of the United States, or the laws of any State or Territory therein or of any foreign country. (Acts 1915 (E. S.), No. 11, sec. 19.)

Sec. 4924. Combinations to restrain trade—Fixing production or price.—After the passage of this act it shall be unlawful for any individual, firm, company, corporation, or association to enter into, continue, or maintain any combination, agreement, or arrangement of any kind, expressed or implied, with any other individual, firm, company, association, or corporation for any of the following purposes: First, to create or carry out restrictions in trade. Second, to limit or reduce the production, or increase or reduce the price of merchandise, produce, or commodities. Third, to prevent competition

in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth, to fix at any standard or figure, whereby its price shall be in any manner controlled or established, any article of merchandise, produce, commodity, or commerce intended for consumption in this state. Fifth, to make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves, or others, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected. (Acts 1892, No. 90, sec. 1.)

Sec. 4925. Violation by domestic corporation—Penalty—Proceedings.—Any corporation holding a charter under the laws of the State of Louisiana, which shall be convicted of a violation of the provisions of this act shall thereby forfeit its rights and franchises, and its corporate existence shall cease and determine, and it shall be the duty of the attorney general of his own motion and without leave or orders of any court or judge, to institute an action in the name of the State of Louisiana for the forfeiture of such rights and franchises and the dissolution of such corporation existence. (Acts 1892, No. 90, sec. 2.)

Sec. 4926. Violation by foreign corporation—Penalty—Proceedings.—Every foreign corporation, or any corporation organized under or pursuant to the laws of any State, who shall be convicted of a violation of the provisions of this act is hereby denied the right and prohibited from doing any business within the State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the name of the State of Louisiana. (Acts 1892, No. 90, sec. 3.)

Sec. 4927. Conspiracy against trade—Penalty—Fee to district attorney.—Any violation of either or all the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director or agent, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or

in pursuance thereof, shall be punished by fine not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the penitentiary not less than six months nor more than one year or by either such fine or imprisonment in the discretion of the court. It shall be the duty of the district attorneys in their respective jurisdictions and the attorney general to enforce this provision and any district attorney of any parish securing a conviction under this provision shall be entitled to such fee or salary as by law he is allowed for such prosecution. (Acts 1892, No. 90, sec. 4.)

Sec. 4928. Sufficiency of indictment.—In any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created, provided, that no contract or agreement or arrangement which does not include, or which cannot be held to include a stipulation between the parties to share in the profits of any such contract, agreement, or arrangement, or which contract, agreement, or arrangement does not provide for or does not contemplate a profit or pool to be divided between the parties to such contract, agreement, or arrangement, shall be held or construed to be in violation of the provisions of this act. (Acts 1892, No. 90, sec. 5.)

Sec. 4929. Proof in prosecutions.—In prosecutions under this act, it shall not be necessary to prove who constitute all the members belonging to the trust or combination. (Acts 1892, No. 90, sec. 6.)

Sec. 4930. Contracts violating act are void.—Any contract or agreement in violation of the provisions of this act, shall be absolutely void. (Acts 1892, No. 90, sec. 7.)

Sec. 4931. Construction of act—Agricultural products, labor unions.—The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser; nor be so construed as to effect any combination or confederation of laborers for the purpose of procuring an increase of their wages or redress of grievances. (Acts 1892, No. 90, sec. 8.)

Sections 4932 to 4939 provide that it shall be unlawful for any person engaged in the production, manufacture, or distribution of any commodity in general use to discriminate as to price between different localities in the selling of their product with the intention or purpose of injuring or destroying the business of a competitor. See Vol. *State Price Control Legislation: Antidiscrimination Legislation.*

Sec. 4940. Obtaining orders to answer material questions.—Whenever the attorney general or district attorney acting under him, or the governor, deems it advisable before beginning any action or

proceeding against any pool, trust, conspiracy, or combination made, arranged, agreed upon, or entered into whereby a monopoly in the manufacture, production, or sale in this State of any article or commodity is, or may be, sought to be created, established, or maintained, or whereby competition in this State in the supply or price of any article or commodity is or may be restrained or prevented, he may present to any court of competent jurisdiction an application, in writing, for an order directing any such persons, as the attorney general or district attorney may require, to appear before any judge, clerk of court, or notary public designated in said order and answer such relevant and material questions as may be put to them concerning any illegal contract, arrangement, agreement, or combination in violation of the laws of this State against pools, trusts, agreements, combinations, and conspiracies in restraint of trade, or to regulate, fix, or maintain the price of any commodity or to create any monopoly therein, and if it appears to the satisfaction of the court to whom the application for the order is made that such an order is necessary or expedient, then such order shall be granted. Such order shall be granted without notice, unless notice is required to be given by the court to whom the application is made, in which event an order to show cause why such application shall not be granted shall be made containing such preliminary injunction or stay as may appear to said court to be proper or expedient, and shall specify the time when and the place where the witnesses are required to appear. (Acts 1915 (E. S.), No. 12, sec. 1.)

Sec. 4941. Procedure for and terms of order.—The order for such examination must be signed by the judge making it, and the service of a copy thereof, with an indorsement signed by the attorney general or district attorney, to the effect that the person named therein is required to appear and be examined at the time and place and before the officer specified in such indorsement, shall be sufficient notice for the attendance of witnesses. Such indorsement may contain a clause requiring such person to produce on such examination all books, papers, and documents in his possession or under his control, relating to the subject of such examination; provided, however, that the production of books and papers for inspection shall always be subject to the order of the judge who has ordered such examination, and either party may, by a petition, ask that the said judge pass on the questions as to whether or not said books or papers should be produced and examined and introduced in evidence. The order to appear as a witness may be served and return of service shall be made in the same manner and by the same officer by whom a subpoena may now be served. The place fixed for the examina-

tion shall be that most convenient to the person or concern being investigated, but need not be fixed in the parish of his or its domicil. Any appeal from any order granted under this act shall be within 5 days and shall be heard and determined in the appellate court within 40 days from the time same is lodged, or, if the court is in vacation, within 40 days after the assembling thereof. (Acts 1915 (E. S.), No. 12, sec. 2.)

Sec. 4942. Testimony of witnesses.—The testimony of each witness must be subscribed by him, and all testimony taken by such officer must be certified and delivered by him to the attorney general or district attorney, after the close of the examination. The officer shall cause said testimony to be taken down by competent stenographers; provided, that no witness shall be permitted to refuse to produce books or papers in accordance with an order made under the provisions of this article, or to answer any questions in reference to the subject-matter of such litigation upon the ground that to produce such books and papers or to answer such questions would tend to incriminate him or subject him to a penalty or a forfeiture; but no such witness shall be liable to prosecution, or subject to any action or penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce books or papers. The said officer may adjourn such examination from time to time, and witnesses must attend accordingly. (Acts 1915 (E. S.), No. 12, sec. 3.)

Sec. 4943. Testimony not to be made public—Exceptions.—No testimony taken under this act shall be made public, unless by order of the governor, for the use in proper judicial proceedings; and any person giving unlawful publicity to said testimony shall be in contempt of the court issuing the original order, and subject to a fine of not less than fifty dollars (\$50.00) nor more than two thousand dollars (\$2,000.00) or to imprisonment of not less than five days nor more than six months or to both in the discretion of the court. Any and all testimony taken under this act shall be heard in the presence of the interested parties and their attorneys only but same may be introduced in evidence in subsequent proceedings by the state against the person, firm or corporation investigated, unless, in the discretion of the trial court, the defense would be unfairly affected thereby. The attorney general or district attorney, by whom the testimony is received from the officer taking same, shall seal the same and forward it to the governor who shall be the custodian thereof. (Acts 1915 (E. S.), No. 12, sec. 4.)

Sec. 4944. Failure of witnesses to appear—Contempt—Penalty.—If any witness or witnesses be properly served, as herein provided, with notice to appear and testify, and fails to obey said notice,

or appearing, refuses to testify, or to produce books or papers, the attorney general or district attorney may file a statement with the judge, setting out such facts, and said judge may, if he deems it proper, issue a citation to said parties causing them to forthwith appear and show cause why he or they should not be fined or imprisoned, or both, for contempt. And in such contempt proceedings, the judge shall have full power to either fine in any amount not exceeding two thousand dollars (\$2,000.00) or to imprison for not longer than six months, or both, as the punishment for either failing to appear and testify or appearing, failing to testify, or to produce books and papers when so ordered to do. (Acts 1915 (E. S.), No. 12, sec. 5.)

Sec. 4945. Costs.—The judge may make such order as may be just concerning the taxation and payment of costs in the proceedings herein provided for against the person examined, or any corporation, copartnership, joint-stock company or combination of persons interested in or connected in any way with the subject of such examination. Costs taxed shall be collected in the ordinary way costs are now collected in the district courts, and an itemized statement thereof shall be filed with the clerk of the district court to whom all costs must be paid. (Acts 1915 (E. S.), No. 12, sec. 6.)

Sec. 4946. Taking testimony before judge or special commissioner in action.—Whenever any action is commenced by the attorney general, or by any district attorney, acting under his direction, or that of the governor, to enforce the provisions of any law of the state respecting monopolies, or combinations or conspiracies in restraint of trade, commerce, or business and said officer representing the state either upon the trial of the case or in preparation for the trial thereof, desires to take the testimony of any officer, director, agent, or employee of any foreign or domestic corporation, or joint-stock association proceeded against, or in case of any copartnership, any member thereof, or in case of any individual or individuals, either of them, and the person or persons whose testimony is desired, resides either within or without the State of Louisiana, the said officer shall file in said court where the action is brought, either in term time or in vacation, or with any special commissioner who may be appointed by the court to take testimony, as provided for in this act, a statement in writing setting forth what the state expects to prove, and the name or names and residences of the person or persons whose testimony he desires to take, and shall designate specifically any and all books, papers, or documents he desires produced, and the time when and place where, either within or without this state, he desires such person to appear and testify, or to produce books, papers, and documents, if any are desired; and thereupon the judge of said court, or the commissioner, as the case may be, before whom said testimony is

being or shall be taken, shall immediately issue a notice in writing, directing to the attorney or attorneys of record, in said cause, or an officer or the attorney in fact of any corporation, or joint-stock association, or directed to the attorney or attorneys of record of any copartnership, individual, or individuals or to any member of such copartnership, or to any individual or individuals who are defendant or defendants in said action, notifying said attorney or attorneys of record, or such officer, or agent, aforesaid, or member or members of any copartnership, or individual as herein provided, that the testimony of the person or persons, named in said notice, is desired, and requiring said attorney or attorneys of record, or such officer, or agent, aforesaid, or member of such copartnership, or any individual to whom said notice is delivered, or upon whom the same is served, to notify and have said witness or witnesses whose testimony or evidence it is desired to take, at the place named in said notice, at the time fixed herein, before the court or special commissioner named, then and there to testify, and then and there to have and produce such books, papers and documents as are called for, and for any of the purposes herein provided; *Provided*, That if the taking of such evidence be not concluded on the day and date specified in said notice, the court or the commissioner, as the case may be, may continue the taking of same from day to day, or adjourn from day to day, at the same place, until the taking of such evidence has been concluded. (Acts 1914, No. 288, sec. 1.)

Sec. 4947. Foreign corporations—When facts taken as confessed.—Whenever any officer, director, or agent of any foreign or domestic corporation or joint-stock company, authorized to do business in this State, or any member of any copartnership or any individual, against whom suit has been filed, or the attorney or attorneys of record of any such corporation, joint-stock association, copartnership or individual, shall be notified in accordance with the provisions of this act, that any of the books, papers, or documents belonging to such corporation, joint-stock association, copartnership, or individual, are wanted before the court, or special commissioner, as provided in this act, and of what the state expects to prove thereby it shall be the duty of such defendant corporation, joint-stock association, copartnership, or individual, as the case may be, to produce and present, or to cause to be produced and presented, as required in said notice, all such books, papers, and documents belonging to any such defendant or under such defendant's control as may be specified in said notice, in court or before said special commissioner, at the time and place so specified, and in the event of the failure or refusal of any such corporation, joint-stock association, copartnership or individual to comply with any of the provisions of this section, it shall be the

duty of the court, upon the motion of the officer representing the state, to order that the facts contained in the statement of what the state expects to prove, be taken as confessed. (Acts 1914, No. 288, sec. 2.)

Sec. 4948. Duties of attorneys of record to produce persons or evidence.—Whenever any attorney or attorneys of record, or officer, or agent of any corporation or joint-stock association proceeded against, as herein provided, shall be notified that any officer, director, agent or employee of any such corporation or joint-stock association is wanted before said court, or any special commissioner, as provided herein, to give his testimony or to produce any such books, papers or documents of said corporation or joint-stock association, as the case may be, for the purpose of enabling the State to prove such facts as may be stated by the representative of the State or if any attorney or attorneys of record of any copartnership or individual shall be notified that any member or members of said copartnership, or any individuals, who are defendants in any such action are desired as witnesses, or to produce books, papers or documents, before any court or before any special commissioner appointed to take testimony in said proceedings, as herein provided for the purpose aforesaid; it shall be the duty of such attorney or attorneys of record, or any such officers, director, or agent to immediately notify any such person of the time and place where he shall attend and give his testimony, or produce any such books, papers or documents if any are desired; provided, however, that if the testimony of any witness who resides without the State, or any books, papers or documents actually within the State, be desired, such witness shall be ordered to appear and such books, papers, and documents to be produced before the commissioner at a place outside of the State convenient to said witness and to the location of such books, papers, and documents, and if the person or persons whose testimony is desired, as herein provided, shall fail to appear, or appearing shall refuse to testify or shall fail to produce whatever books, papers or documents he or they may be ordered to produce as before provided, then it shall be the duty of the court, upon motion of the attorney general, or district attorney, on proof of such refusal, failure or dereliction to order that the facts contained in the statement of what the State expects to prove to be taken as confessed against said delinquent defendant, who has himself, or being a corporation or joint-stock association, whose officer, agent, director or employee, as herein provided, has refused or failed to attend and testify, or to produce all books, papers or documents demanded, which were in the custody or subject to the control of such witness or witnesses, or corporation or joint-stock association; provided however, that if any such defendant shall file a sworn denial in writing, in said court, setting forth that such failure or

refusal did not arise by reason of any fault or procurement of defendant, the court shall hear evidence upon that issue, and if the defendant shows to the satisfaction of the court that any witness who failed to attend did not do so at the instance or procurement of said defendant, or that the books, papers or documents demanded were not in its possession or control and could not be produced, and that such defendant has complied with all the provisions of this act, within such defendant's power to perform, then in that event the order taking pro confassis because of the failure of the witnesses to attend, who could not be so procured, or because of the failure to produce the books, papers or documents not in the possession or under the control of such defendant shall be revoked; but the court shall have the power to enter such further orders in respect to the matter in controversy as it may deem necessary for the proper administration of justice; provided further, that in any proceeding had before a special commissioner, as herein provided, the certificate of the special commissioner showing the failure or refusal of any such witness or witnesses to appear and testify, or to produce any books, papers or documents desired, shall be sufficient prima facie evidence of such failure, refusal or dereliction on the part of any such defendant, when same is filed in court. Any witness attending any proceeding herein provided for in compliance with any notice or subpoena issued by authority of this act, shall receive as compensation one dollar (\$1.00) per day for each day of his attendance, and four cents (4c.) per mile traveled computed upon the shortest practicable route; any claim for fees and mileage shall be filed with the court, or special commissioners, and sworn to by said witness, and shall be taxed as costs and collected as other costs in civil cases. (Acts 1914, No. 288, sec. 3.)

Sec. 4949. Commissioner to take testimony.—Any court, or presiding judge thereof, in which any proceeding as herein provided is pending, in term time or in vacation, upon application therefor, made by the attorney general, or district attorney, acting under his direction, shall appoint some well qualified disinterested person as special commissioner, to take testimony, or in any such case, at any point either within or without the state, as designated in such application, or where requested by either party to said cause of action, upon the issues joined in said cause, such special commissioner shall have full power and authority to issue notices necessary for the enforcement of this act, and to issue subpoenas for witnesses, compelling the attendance of such witnesses, the production of books, papers or documents, to issue attachments, to punish for contempt to the same extent as provided by law for said court; to administer oaths to witnesses; to have all

witnesses examined orally, which testimony shall be reduced to writing and may be taken down by a competent stenographer and transcribed, and shall be signed and sworn to by said witness. The person appointed as special commissioner in any case shall qualify by taking oath prescribed for notaries public, and shall, with all convenient speed, certify and return the testimony taken by him to the court appointing him; and said commissioner shall note all objections to testimony, and shall not exclude any testimony, and all questions as to the materiality or admissibility of same shall be reserved for the court trying the case, and such testimony so taken may be read in evidence upon the trial of the suit in which same was taken, subject to all legal objections which might be made to same. The compensation of such commissioner shall be his actual expenses in traveling and such fees as are allowed a notary public in taking depositions, to be taxed up as costs and collected in the same manner as now provided by law for district clerks in civil cases. (Acts 1914, No. 288, sec. 4.)

Sec. 4950. Notice to witness to produce documents.—When any notice is issued and served as provided for in this act, ten full days exclusive of the day of service shall elapse before any witness so requested shall be compelled to appear and testify, or produce any books, papers or documents called for, provided, however, that additional time beyond the ten days fixed herein shall be granted upon it being shown that a witness or books, papers or documents called for can not be produced within such time; provided, further, that the commissioner may make orders extending the time for the production of particular books, papers and documents; and if the taking of testimony shall not be concluded on the date named in said notice, the witness or witnesses shall remain in attendance from day to day until the same is completed or said witness is finally discharged by the court, or commissioner, as the case may be; service of said notice and the return thereon may be made by any sheriff or constable of this State, or by any disinterested person competent to make oath of the fact, and shall be made by said person executing the same, by delivering to the person or persons, attorney or attorneys to be served a true copy of such notice, and return of such service shall be indorsed on or attached to the original notice; it shall state when the same was served and the manner of service, and upon whom served, and shall be signed, and if served by any person other than any officer, shall be sworn to by the party making the service before some officer authorized by law to take affidavits, and such affidavit shall be certified under the hand and official seal of such officer. (Acts 1914, No. 288, sec. 5.)

Sec. 4951. Facts declared to be evidence tending to establish monopoly.—The fact that any corporation doing business in this

State and in other states and engaged in this State and in other states in buying the products of such states in any market thereof, is systematically and without serious and substantial reasons therefor, paying a smaller price for the products of Louisiana than for the similar products of such other states, shall be considered as evidence in any proceeding to enforce the antitrust laws of this State against such corporation, tending to establish the charge of monopoly or restraint of trade or commerce or business; and likewise, proof that such defendant likewise discriminates against the product made or grown in Louisiana in favor of the similar product made or grown in foreign countries and imported into Louisiana, shall have and be entitled to the same effect. (Acts 1914, No. 288, sec. 6.)

Sec. 4952. Preliminary injunction without bond.—Where a case is presented under the foregoing section, the judge before whom the action is pending, may on proper showing by rule, issue an injunction, without bond, restraining the defendant from continuing such practices until the termination of the suit, or from destroying or concealing its books or records, but this remedy shall not be exclusive of such other remedies as may flow from existing laws. (Acts 1914, No. 288, sec. 7)

Sec. 4953. Order for production of books.—In any proceeding brought under this act, the judge, if it be shown upon a summary trial by rule that there is grave danger that the defendant will conceal or destroy its books and records, may without exacting bond, issue an order to the sheriff directing him to seize and deliver into the custody of the court all such books and papers; provided, however, that all such books and papers shall remain in the exclusive custody of the court and shall be available to the defendant for the preparation of its defense and the conduct of its business. (Acts 1914, No. 288, sec. 8.)

Sec. 4954. Decree as evidence in other cases.—Where a decree shall have been entered against a defendant in any proceeding under this act, such decree and any and all evidence of facts found by the court in support of the decree shall be admissible in evidence against the same defendant in any state court in any suit which shall be filed when such facts are again in issue. (Acts 1914, No. 288, sec. 9.)

Sec. 4955. Repeal of laws.—All laws or parts of laws in conflict herewith are repealed, but otherwise the provisions of this act shall be cumulative of all laws of this State, and shall not be construed as repealing any other consistent law relating to the taking of testimony or evidence; but shall be construed as providing an additional means of securing evidence for the enforcement of the laws as herein provided. (Acts 1914, No. 288, sec. 10.)

Corporations

Section 1150 provides that nothing contained in the Business Corporation Act, sections 1080 to 1154, shall be interpreted to authorize a corporation to do any act in violation of the State or Federal antitrust statutes.

Foreign Corporations

Sections 1254 and 1255 provide that it shall be unlawful for foreign corporations to enter into a combination to prevent their legally authorized representatives in Louisiana from accepting a higher compensation than that paid by corporations, parties to the combination. Any violation of this act shall be punished by revocation of the license of any or all participating corporations for the remainder of year in which the license was granted, and the succeeding year.

Discriminations

Sections 4931 to 4939 provides that local discrimination for the purpose of injuring or destroying the business of a competitor is unlawful. See Vol. *State Price Control Legislation: Administration Legislation*.

Judicial Decisions

GENERAL ANTITRUST LAWS**Application of Statutes.**

The operation of a laundry business in the city of New Orleans held not within the words "trade and commerce" as used in sections 4906 and 4908. *State v. McClellan*, 155 La. 37, 98 So. 748 (1923). The manufacture and retail sale of ice comes within the terms "trade and commerce" as used in sections 4905 and 4906. *Tooke & Reynolds v. Batstrop Ice & Storage Co.*, 172 La. 781, 135 So. 239 (1931). The producing and marketing of natural gas is not interstate commerce under the Sherman Act nor does it come within the terms "trade and commerce" under the State act, sections 4905 and 4906. *Thomason v. United Gas Public Service Co.*, 20 Fed. Supp. 598 (1937) aff'd. *Thomason v. United Gas Public Service Co.*, 98 Fed. 2d 526 (C. C. A. 5th, 1938) without mention of the State statute.

While there may be doubt whether a corporate entity once legally formed can thereafter become an unlawful trust by reason of the conceptual impossibility of combining with itself, it has clearly been

laid down that individuals controlling it may combine with it to create such a trust. Where a parent corporation controls six corporations engaged in the manufacture and sale of ice in one area, and the stock of such corporations is owned by practically the same persons, concerted action by the managers of such corporations in reducing prices to eliminate competition, constitutes an unlawful monopoly. *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, *supra*. Selling an article below cost in order to eliminate competition in a given territory constitutes an attempt to create a monopoly. *Ibid*.

A lumber exchange organized by the principal lumber dealers in a given locality which requires, under heavy penalties, that prices posted on the exchange's black board be maintained and that copies of all invoices be mailed to the exchange is an illegal combination in restraint of trade. *Wolf & Co. v. Orleans Lumber Co.*, 149 So. 322 (La. App., 1933).

Coercing employees to patronize the employer exclusively constitutes no violation of sections 4905 and 4906. *Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1926). See *Tying Clauses and Exclusive Dealing Arrangements*, *infra*, p. 275.

Preliminary investigations authorized under sections 4940 to 4945 to determine violations under sections 4910, 4911, and 4922 must be instituted in the parish where the defendant corporation is domiciled or, if it has no domicile within the State, then in the parish in which it may be found or transacts business. *State v. United Gas Public Service Co.*, 178 La. 71, 150 So. 835 (1933).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Gen. Stat. Ann. (Dart, 1939) Resale Price Maintenance

Sections 9809.1 to 9809.6 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers. Sec. 9809.3. See vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 239 provides that cooperative marketing associations organized under sections 214 to 243 shall not be deemed to be in violation of the antitrust statutes of the State. See *Tying Contracts and Exclusive Dealing Arrangements*, *infra*. See also *Cooperatives* in projected study.

Section 243.13 provides that agricultural cooperative associations organized under sections 243.1 to 243.19 shall not be deemed to be in violation of the antitrust laws of the State. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Section 3120.26 provides that cooperative marketing associations for sea-food products organized under sections 3120.1 to 3120.30 shall not be deemed to be in violation of the antitrust laws of the State. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Agriculture, Livestock; Laborers

Section 4931 provides that the provisions of the Antitrust Act of 1892, sections 4924 to 4930, shall not apply to agricultural products or livestock while in the hands of the producer or raiser; nor to any combination of laborers formed for the purpose of procuring wage increases or redress of grievances. See *General Antitrust Laws, supra*.

Sea Food

Sections 3041.1 to 3041.3 provide that no contract designed to promote the welfare of sea-food industries shall be held illegal as a contract in restraint of trade, provided such contract has been approved in writing by the Commissioner of Conservation.

Judicial Decisions

Cooperatives.

Cooperative associations organized under sections 214 to 243 (see *Exceptions to General Antitrust Laws, supra*) are not illegal under Const. art. 19, sec. 14, as such associations are for the purpose of stabilizing prices in order that they may be uniform throughout the year. To successfully attack the constitutionality of such associations it is necessary to show that an illegal monopoly has been created and that trade has been restrained thereby. *Louisiana Farm Bureau Cotton Growers Co-op. Ass'n v. Clark*, 160 La. 294, 107 So. 115 (1926).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Gen. Stat. Ann. (Dart, 1939)

Railroads

Sections 8028, 8037, and 8040 provide that no railroad corporation may consolidate its stock, property, or franchises with, sell or hypothecate its bonds, stocks, earnings, revenues, income rights, and credits to, or guarantee the bonds or contracts of any other railroad corporation owning a parallel and competing line. See also *General Antitrust Laws*, sec. 4909, *supra*.

Products of the Soil

Sections 4957.1 to 4957.5 provide that any person who shall combine with any other person to fix a definite price for dealing in, buying, or selling products of the soil for the purpose of controlling the market, or to prevent legitimate competition, shall be deemed guilty of a conspiracy in restraint of trade. Any violation of this provision shall be punished by fine and/or imprisonment. Any person guilty of a violation of this act, who shall report the facts under oath within six months after committing such offense, shall be granted full immunity from prosecution under this act in respect of the particular offense reported. The act shall not apply to farmers and growers whose right to organize for their mutual welfare in the growing, sale, and distribution of the products of the soil is expressly recognized. See *Cooperatives* in projected study; *Exceptions to General Antitrust Laws*, *supra*.

Commission Merchants

Sections 4956 and 4957 provide that it shall be unlawful for any persons engaged in selling on commission products of any farm, forest, lake, gulf, ocean, or stream to enter into any combination to keep the market on such products below their proper limit indicated by the supply and demand thereof, or to charge excessive commission rates, or to defraud in any way the consignor of any shipment. Any person violating this provision shall be imprisoned for not less than six months nor more than twelve months.

Fire Insurance

Sections 4173 to 4176 provide that it shall be unlawful for fire insurance companies to combine for the purpose of controlling the rates charged for insurance. An affidavit must be filed annually to the effect that the company has not in the preceding year entered

into any such combination. If the Secretary of State has good reason to believe that a company has violated this act, he shall examine the books of the company and place any officer thereof under oath as to such violations. A company violating this act shall forfeit the right to do business in the state for a period prescribed by the statute.

Judicial Decisions

An agreement between competing railroad lines to pool traffic between certain points of their systems is contrary to public policy since the inevitable result of such agreement is to stifle competition. *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970, 6 So. 888 (1889).

2. Public Contract Provisions

Gen. Stat. Ann. (Dart, 1939) Construction Materials

Section 3591 provides that it shall be unlawful for contractors, material dealers, corporations, or individuals to enter into an understanding to raise prices either in construction work or in supplying materials for any State highway work. Any person violating this act shall be subject to fine or imprisonment or both, for not more than twelve months. See projected vol. *Governmental Purchasing*.

Patented Articles—Lake Charles

Section 6117 provides that the Commission Council of the City of Lake Charles upon its own motion or upon petition of the property owners may invite and receive bids and make contracts for the use of patented or proprietary articles in any case of paving or repairing of streets, provided the owners of such patented or proprietary articles, shall prior to the adoption of the ordinance directing the preparation of plans and specifications, file with the Commission Council a written agreement to sell their patent or proprietary rights to any and all persons for a fixed royalty, on equal terms and conditions satisfactory to the Commission Council. See projected vol. *Governmental Purchasing*.

Patented Articles—City of New Orleans

Section 6219 provides that the Commission Council of the City of New Orleans may by ordinance provide for the paving, repaving,

unfacing, or resurfacing of any street or streets and further provides that bids shall not be invited or received and contracts shall not be made for the use of patented or proprietary materials in any such case. See projected vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

Gen. Stat. Ann. (Dart, 1939)

Sec. 5332.1. Policy of state declared.—It shall be unlawful for any manufacturer or wholesale distributor of motor vehicles to sell or contract for the sale of motor vehicles to any motor vehicle dealer on the condition, or with the agreement, expressed or implied, that such dealer shall finance the purchase or sale of motor vehicles only through a designated finance company or finance agency. Any such condition or agreement, having the effect of eliminating competition in the business of financing the sale of motor vehicles is hereby declared to be against the public policy of the state, and such condition or agreement shall be unlawful, void, and unenforceable. (Acts 1936, No. 168, sec. 1.)

Sec. 5332.2. Prima facie evidence of violation of policy.—If any threat, expressed or implied, is made to any motor-vehicle dealer, by any manufacturer, or wholesale distributor on authority of any such manufacturer, to the effect that such manufacturer or wholesale distributor will discontinue to sell, or will terminate a contract to sell motor vehicles to such dealer unless such dealer finances the purchase or sale of motor vehicles only through a designated finance company or finance agency, such threat so made shall be prima facie evidence of the fact that such manufacturer or wholesale distributor has sold, or intends to sell motor vehicles, on the condition or with the agreement prohibited in section 1 of this act (sec. 5322.1). (Acts 1936, No. 168, sec. 2.)

Sec. 5332.3. Subsidies and discrimination.—It shall be unlawful for any manufacturer or wholesale distributor to pay or give a subsidy to any finance company or finance agency, or to discriminate against or in favor of any finance company or finance agency. It shall be unlawful for any finance company or finance agency to accept any such subsidy or the benefit of any such discrimination. (Acts 1936, No. 168, sec. 3.)

Sec. 5332.4. Injunction restraining violations.—The district courts of the state shall have jurisdiction to grant injunctions restraining violations of this act upon proceedings brought by the attorney general, the district attorney or any party in interest. The procedure shall be by petition and citation as in other causes and the court shall have the power to issue such temporary restraining orders as may be

just in the premises. Where necessary, the court may subpoena parties residing out of the parish in order properly to dispose of the case. For repeated violations of this act, the court may enjoin a finance company or finance agency from thereafter engaging in the business of financing the purchase or sale of motor vehicles in this state. Where the violator is a corporation, domestic or foreign, the charter rights, franchises or privileges of such corporation or the privilege of doing business in this state may be revoked in a quo warranta proceedings brought by the attorney general or the district attorney for the proper district. In such proceedings, the court shall enter such order or decree as it deems reasonable and proper to carry into effect the provisions of this act and to prevent unfair competition and prohibit monopolies. (Acts 1936, No. 168, sec. 4.)

Sec. 5332.5. Penalty for violation.—Any person violating the provisions of this act, or any employee, agent or officer or any person who shall violate the provisions of this act, shall be deemed guilty of misdemeanor, and, upon conviction, shall be punished by a fine not exceeding five hundred (\$500.00) dollars, or be imprisoned in a parish jail for not exceeding six (6) months, or both, such fine and imprisonment, at the discretion of the court. (Acts 1936, No. 168, sec. 5.)

Sec. 5332.6. Action for damages.—In addition to the other penalties herein provided, any person who shall be injured in his business or property by any violation of this act, may proceed against such violation by suit to recover the damages so sustained and the costs of such suit. (Acts 1936, No. 168, sec. 6.)

Sec. 5332.7. Definitions.—(a) The term “persons” as used in this act, means any individual, firm, corporation, partnership, association, trustee, receiver, or assignee for the benefit of creditors.

(b) The terms “sell,” “sold,” “buy,” and “purchased,” as used in this act, include exchange, barter, gift, and offer to contract to sell or buy.

(c) The term “manufacturer” shall mean any person who is engaged, either directly or indirectly, in the manufacture of motor vehicles.

(d) The term “wholesale distributor” shall mean any person engaged, directly or indirectly, in the sale or distribution of motor vehicles to agents or to dealers.

(e) The term “dealer” shall mean any person who is engaged in, or who intends to engage in the business of selling motor vehicles at retail in this State. The term “dealer” shall also include “retail agent.”

(f) “Finance company or finance agency” shall mean any person engaged in the business of financing the sale of motor vehicles, or engaged in the business of purchasing or acquiring promissory notes,

either secured by vendor's lien or chattel mortgage, arising from the sale of motor vehicles in this State. (Acts 1936, No. 168, sec. 7.)

Sec. 5332.8. Act cumulative—Constitutionality, provisions severable.—The provisions hereof shall be cumulative of each other and of all other laws in any way affecting the subject matter of this act now in force in this State. If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. (Acts 1936, No. 168, sec. 7 (8).)

II. CONTRACTS NOT TO COMPETE

Gen. Stat. Ann. (Dart, 1939)

Sec. 4963.1. Employees contracting not to engage in competing business prohibited.—It is hereby declared to be the public policy of this State that employers shall not require or direct their employees or any one of them to enter into any contract, written or verbal, with such employers, whereby and whereunder the employee agrees and contracts not to engage in any competing business for themselves or as the employee of another upon the termination of their contract with such employer. (Acts 1934, No. 133, sec. 1.)

Sec. 4963.2. Noncompeting contracts of employee null and void.—If any contract as above set forth contains any such provisions as above provided, same shall be null and void as to those provisions. (Acts 1934, No. 133, sec. 2.)

Sec. 4963.3. Enforcement of contracts by injunction prohibited.—The courts of this state are hereby prohibited from issuing any restraining orders or temporary or permanent injunctions to enforce any such contract containing any of the prohibited provisions. (Acts 1934, No. 133, sec. 3.)

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A sellers' agreement not to engage in a competing publishing business for a period of 10 years is not an unreasonable restraint of trade under the circumstances. *Hickman v. Branan*, 151 So. 113 (La. App. 1933).

A condition in the sale of an insurance business prohibiting the seller from entering into a business in competition with that of the

buyer, is not necessarily contrary to public policy, even though the restriction be state wide. *Moorman & Givens v. Parkerson*, 131 La. 204, 59 So. 122 (1912).

When an individual owns all the stock of a corporation, and the corporate name includes his name, a contract executed by the corporation and by him for the sale of the corporate assets including good will, on the promise that neither he nor the corporation will engage in the same business in a limited territory is valid. *Lindstrom v. Sauer*, 166 So. 636 (La. App. 1933).

Under similar circumstances the vendor's accepting employment as general manager with competing firm was held not a breach of the condition. *Railway Audit & Inspection Co. v. Pendleton*, 175 La. 4, 142 So. 781 (1932). But cf. *Hickman v. Branam*, 151 So. 113 (La. App. 1933) where employment by competing publisher was held a breach of the condition.

An agreement not to engage in a garage business in a particular village ancillary to sale of such business was held not violated by vendor's accepting employment with a competing firm. *May v. Johnson*, 13 App. 521, 128 So. 540 (1930).

Restrictive Covenants Ancillary to Employment.

A contract of employment entitling the employer to give 30 days' notice and wherein the employee stipulates not to engage in a competing business within the entire local business district is invalid because there is no consideration for the promise. *Blanchard v. Haber*, 166 La. 1014, 118 So. 117 (1928).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Gen. Stat. Ann. (Dart, 1939) Cooperatives

Section 229 provides that a cooperative marketing association and its members may make and execute marketing contracts, requiring the members to sell all or any specified part of their products to or through the association for any period of time, not over ten years. The statute provides further that such marketing agreements shall not be considered illegal or in restraint of trade. Sec. 239. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Section 243.13 provides that marketing contracts between agricultural cooperative associations and their members shall not be consid-

ered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Section 3120.16 provides that a cooperative marketing association for sea food products may make and execute marketing contracts with its members requiring the members to sell all or any specified part of their products to or through the association for any period of time, not over ten years. The statute further provides that the marketing agreements shall not be considered illegal or in restraint of trade. Sec. 3120.26. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Rebate Certificates

Sec. 4958. Rebate certificates illegal.—It shall be illegal for any corporation or corporations, firms or individuals to issue certificates to be known as rebate certificates or any evidence of indebtedness, the contract upon which said certificates are based, being to control the business of the party or parties thereto. (Acts 1894, No. 176, sec. 1.)

Sec. 4959. Illegal conditions.—It shall be and is hereby declared illegal to impose as a condition that said certificates or evidences of indebtedness shall be binding only in the event said original party to whom same were issued, shall make all purchases from the firm or firms, corporation or corporations, individual or individuals, issuing same or connected in any manner with the firm or firms, corporations or individuals issuing same. (Acts 1894, No. 176, sec. 2.)

Sec. 4960. Prohibited defense.—Said firm or firms, corporation or corporations, cannot urge as a defense to any certificates issued, that their liabilities thereon are based upon the exclusive trade of the party to the contract. (Acts 1894, No. 176, sec. 3.)

Coercion of Employees

Sec. 4961. Coercion of employees as to place of making purchases.—It shall hereafter be unlawful for any person, individual, firm, or corporation acting either for themselves, or as agents or otherwise to coerce or require any of their employees to deal with or purchase any article of food, clothing, or merchandise of any kind whatsoever from any individual, person, firm, or corporation. (Acts 1916, No. 188, sec. 1.)

Sec. 4962. Discharge or blacklisting of employees prohibited—Purchase of uniforms excepted from act.—It shall be unlawful for any individual, person, firm, or corporation, or employer of labor to exclude from work or to punish or blacklist any of said employees for failure to deal with another or to purchase any article of food, clothing, or merchandise whatsoever from another or at any place

whatsoever; provided, however, that this act shall not apply to the sale and purchase of uniforms. (Acts 1916, No. 188, sec. 2.)

Sec. 4963. Penalty for violating act.—Any violation of this act shall be a misdemeanor and punishable by a fine of not less than \$50.00 or more than \$100.00, or imprisonment for at least 30 days or not more than 90 days, or both, at the discretion of the court. (Acts 1916, No. 188, sec. 3.)

Gen. Stat. Ann. (Dart, 1939)

For discounts on conditional purchases, a lessee shall not deal with goods of competitor, see sec. 4908 set forth under *General Antitrust Laws, supra*.

Judicial Decisions

At common law an employer without making himself civilly liable to a competitor may coerce his employees to patronize him exclusively. *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658, 46 So. 685 (1908). Sec. 4961 etf., which makes it a misdemeanor to coerce employees to buy from a particular person, is punitive in nature and gives no civil right of action against the wrongdoer. See *Deon v. Kirby Lumber Co.*, *supra*, p. 268.

MAINE



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provision.

STATUTORY PROVISIONS

Rev. Stat. (1930), c. 56

Sec. 60. Formation of trusts forbidden.—It shall be unlawful for any firm or incorporated company, or any number of firms or incorporated companies, or any unincorporated company, or association of persons or stockholders, organized for the purpose of manufacturing, producing, refining or mining any article or product which enters into general use and consumption by the people, to form or organize any trust, or to enter into any combination of firms, incorporated or unincorporated companies, or association of stockholders, or to delegate to any one or more board or boards of trustees or directors the power to conduct and direct the business of the whole number of firms, corporations, companies, or associations which may have formed, or which may propose to form a trust, combination, or association inconsistent with the provisions of this section and contrary to public policy. No association or corporation organized for the sole purpose of marketing fish, shellfish, or any of the fish products or agricultural products of this state, the members of, or stockholders in which are actually engaged in the production of such products, or in the selling, canning or otherwise preserving of the same, shall be deemed to be a conspiracy or a combination in restraint of trade or an attempt to lessen competition or to fix prices arbitrarily; nor shall the marketing contracts and agreements between such association or corporation and its members or stockholders be considered illegal as such or in unlawful restraint of trade or as part

of a conspiracy or combination to accomplish an improper or illegal purpose. (R. S. c. 51, sec. 57. 1923, c. 187.)

Sec. 61. Evidence of interest in any trust not to have legal recognition.—No certificate of stock, or other evidence of interest, in any trust, combination, or association, as named in the preceding section, shall have legal recognition in any court in this state, and any deed of real estate given by any person, firm or corporation, for the purpose of becoming interested in such trust, combination, or association, or any mortgage given by the latter to the seller, as well as all certificates growing out of such transaction, shall be void. (R. S. c. 51, sec. 58.)

Sec. 62. Penalty for being connected with any trust.—Any firm, incorporated or unincorporated company, or association of persons or stockholders, who shall enter into or become interested in such trust, combination, or association, shall be punished by a fine of not less than five thousand dollars, nor more than ten thousand dollars. (R. S. c. 51, sec. 59.)

Rev. Stat. (1930) c. 138

Sec. 28. Contracts in restraint of trade declared illegal; penalty.—Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce in this state is hereby declared to be illegal. Whoever shall make any such contract or engage in any such combination or conspiracy shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment. (R. S. c. 128, sec. 26.)

Sec. 29. Conspiring to monopolize trade; penalty.—Whoever shall monopolize or attempt to monopolize any part of the trade or commerce of this state shall be punished upon conviction thereof by a fine of not more than one thousand dollars or by imprisonment for not more than six months or by both such fine and imprisonment. (R. S. c. 128, sec. 27.)

Sec. 30. Persons injured by violation may recover damages.—Whoever shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the two preceding sections may sue therefor in an action on the case and shall recover three times the damages by him sustained. (R. S. c. 128, sec. 28.)

Sec. 31. Penalty prescribed for profiteering in the necessities of life; term "necessities of life" defined.—Any dealer, trader, manufacturer, or warehouseman who with intent to enhance the price or restrict the supply of necessities of life willfully destroys or per-

mits preventable waste in the production, manufacture, storage, or distribution of the same, or, with such intent, prevents, limits, lessens, or restricts the manufacture, production, supply, or distribution of said necessities or hoards said necessities, or enters into any contract, combination, or conspiracy in restraint of trade or commerce, or exacts or demands any unjust or unreasonable profit in the sale, exchange, or handling of the said necessities, or unreasonably discriminates against any person in the sale of such necessities, or in any way aids or abets the doing of any act hereinbefore mentioned, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than three years, or by both such fine and imprisonment.

The term "necessities of life" shall include food for human consumption, food for domestic animals, wearing apparel, shoes, building materials, gas and electricity for light, heat, and power, ice, fuel of all kinds, fertilizer and fertilizer ingredients, together with tools, utensils, implements, machinery, and equipment required for the actual production or manufacture of the same. (1919, c. 256, sec. 1. 1921, c. 76, sec. 1.)

Sec. 32. Profiteering in rents; penalty.—Whoever demands or collects an unreasonable or unjust rent or charge, taking into due consideration the actual market value of the property at the time, with a fair return thereon, or imposes an unreasonable or unjust term or condition, for the occupancy of any building or any part thereof, rented or hired for dwelling purposes, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than eleven months, or by both such fine and imprisonment. (1919, c. 256, sec. 2.)

Sec. 33. Attorney general to investigate.—The attorney general upon his own initiative or upon petition of fifty or more citizens of this state shall investigate all seeming violations of sections thirty-one to thirty-three inclusive, all contracts, combinations, or conspiracies in restraint of trade or commerce and all monopolies, and may require, by summons, the attendance and testimony of witnesses and the production of books and papers before him relating to any such matter under investigation. Such summons shall be served in the same manner as summons for witnesses in criminal cases, and all provisions of law relating thereto shall apply to summonses issued under this section so far as they are applicable. All investigations or hearings thereunder or connected therewith to which witnesses are summoned or called upon to testify or to produce books, records, or correspondence, shall be public and shall be held in the county wherein the act to be investigated is alleged to have been committed,

or if the investigation is on petition it shall be held in the county where the petitioners reside. The expense of such investigation shall be paid from the appropriation provided by section eighty-seven of chapter ninety-one.

If upon investigation, it appears to the attorney general that the laws of this state, including the provisions of sections thirty-one to thirty-three, inclusive, have been violated in any respect, he shall forthwith prosecute the guilty parties, and present all available information bearing upon such apparent violation to the proper prosecuting officer of the United States.

Any justice of the superior court may by order, upon application of the attorney general, compel the attendance of witnesses, the production of books and papers, including correspondence, and the giving of testimony, before the attorney general in the same manner and to the same extent as before said courts; and any failure to obey such order may be punished by such court as a contempt thereof. 1919, c. 256, sec. 3. 1921, c. 76, sec. 2.

L. 1937, c. 12
Conspiracy Statute

This act provides in part that it is illegal to conspire to injure the business or property of another or to commit any act injurious to trade or commerce.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Rev. Stat. (1930) c. 56
Cooperatives

Section 60 provides that no association or corporation organized for the sole purpose of marketing fish or agricultural products of this state, the members or stockholders of which are actually engaged in the production of such products, shall be deemed to be a conspiracy or a combination in restraint of trade or an attempt to lessen competition or to fix prices arbitrarily. See *General Antitrust Laws, supra*; *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Rev. Stat. (1930) c. 59

Section 28 provides that cooperative agricultural marketing associations organized under this chapter shall be exempt from the operations of antitrust laws. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

L. 1933, c. 268

Liquor

Section 12-G, as amended by L. 1937, c. 235, sec. 8, provides that no person shall be issued a license or renewal if in any manner indebted for liquor, malt liquor, wine, or spirits; that it shall be unlawful for any licensee, or applicant, directly or indirectly to receive any money, credit, thing of value, endorsement of commercial paper, guarantee of credit or financial assistance of any sort from any person within or without the State if such person shall be engaged directly or indirectly in the manufacture, distribution, sale, storage, or transportation of liquors, malt liquors, wines, or spirits, or of any commodities, equipment, materials, or advertisements used in connection therewith; and that no license shall be issued for any premises in which any interest whatsoever is owned or controlled, directly or indirectly, by any person within or without the State engaged or interested directly or indirectly in the manufacture, distribution, sale, or transportation of liquor, malt liquors, wines, or spirits. This section does not prohibit any wholesaler from receiving normal credits for purchase of malt liquors from manufacturers thereof.

L. 1937, c. 235

Section 1, as amended by L. 1939, c. 107, provides that all applications for a license shall disclose the complete and entire ownership in the establishment for which a license is requested. Untruthful answers shall constitute the crime of perjury.

L. 1933, c. 268

Section 24 provides that whoever violates any of the provisions of this act shall be punished by a fine of not more than \$500 or by imprisonment for a term of not more than eleven months, or both.

L. 1937, c. 140

This provides that no officer, director, or stockholder of a corporation holding a manufacturer's certificate of approval, shall in any way be interested, either directly or indirectly, as a director, officer, or stockholder in any other corporation holding a wholesaler's license for the sale of malt liquors; nor lend any money, credit, or equivalent thereof to any wholesaler in equipping, fitting out, maintaining, or conducting, either in whole or in part, an estab-

ishment of business where malt liquors are sold, excepting only the usual and customary commercial credit of malt liquor sold and delivered.

L. 1937, c. 237

Section 15 provides that licenses may be revoked at the discretion of the commission for violation of any law or of any rule or regulation issued by the commission.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Application of Common Law.

After an award of a competitive bid to carry mail, defendant subsequently agreed to pay plaintiff certain sums and save him harmless from action by the Post Office Department, if plaintiff repudiated the contract. Thereafter defendant sought and was awarded the mail contract at a higher rate. In an action to recover the promised sum, plaintiff was nonsuited. Contracts made for illegal purposes are void, and to prevent fair competition in bidding is an illegal purpose. This contract not only had a tendency to prevent competition, but was entirely destructive of it and to the interests of government. *Weld v. Lancaster*, 56 Me. 453 (1868).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to Sale of Business.

Contracts not to compete, ancillary to the sale of a business and its goodwill, are valid if the restraints are reasonable. *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167 (1896) (photographic business); *Flaherty v. Libby*, 108 Me. 377, 81 Atl. 166 (1911) (trucking business); *Whitney v. Slayton*, 40 Me. 224 (1855) (iron foundry); *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496, 57 Atl. 845 (1904) (laundry business).

There is no restriction as to the limitation of time that may be specified in contracts not to compete, other than that they be reasonably necessary for the protection of the obligee. Thus, a contract for an unlimited time has been upheld. *Emery v. Bradley, supra*. Contracts of definite duration have been upheld in the following cases: *Flaherty v. Libby, supra* (5 years); *Whitney v. Slayton, supra* (10 years); *Augusta Steam Laundry v. Debow, supra* (5 years).

The area covered by contracts not to compete must be reasonable under the circumstances of each case. Contracts restricting activity within city limits have been held valid in *Emery v. Bradley, supra*; *Flaherty v. Libby, supra*; *Augusta Steam Laundry Co. v. Debow, supra*.

A defendant who sold his photographic business together with the goodwill and agreed never to resume the business in the same city was restrained from engaging in the business as the agent of another person. The contract was held to envisage indirect as well as direct violations. *Emery v. Bradley, supra*. In an action for damages on a bond "not to engage in the business" of iron casting, defendant was held to have violated his agreement where he became a stockholder in an iron foundry corporation, and was employed by it as foreman. *Whitney v. Slayton, supra*.

A receipt for the sale of a soap manufacturing business was the only written evidence of the contract. It contained the phrase "all my trade and customers." In a suit for damages, because the vendor entered into a similar business in the same territory, the phrase was interpreted to mean that the vendor would not interfere with the

plaintiff within "the circuit of his usual custom." Such an agreement is not against public policy. *Warren v. Jones*, 51 Me. 146 (1862).

Where a contract not to compete provides for liquidated damages for breach, the vendee has the option of proceeding in equity for an injunction or at law for damages. *Augusta Steam Laundry v. Debow*, *supra*.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Stat. (1930) c. 59 Cooperatives

Sections 17 and 28 provide that agricultural marketing cooperatives may make marketing contracts with their members requiring the members to sell, for any period not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association, and that such marketing contracts shall not be deemed illegal or in unlawful restraint of trade or part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Rev. Stat. (1930) c. 56

Section 60 provides that no marketing contract between an association and its members organized for the sole purpose of marketing fish or agricultural products shall be considered illegal or in unlawful restraint of trade. See *General Antitrust Laws, supra*; *Exceptions to General Antitrust Laws, infra*.

MARYLAND

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. 41 declares that monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.

STATUTORY PROVISIONS

No provisions.

Judicial Decisions

Application of Common Law.

A combination between wholesale druggists and an association of retail druggists to maintain a maximum schedule of prices for drug supplies constitutes criminal conspiracy at common law. *Klingels Pharmacy v. Sharp & Dohme*, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976 (1906). Where such a combination refused to sell to a retailer unless he agreed to maintain the schedule of prices, and by means of threats to blacklist and boycott other wholesalers kept such wholesalers from selling to the retailer, the retailer may maintain an action for damages. *Ibid.*

Application of Constitutional Provisions.

A statute (act of 1935, c. 593 amending art. 16 sec. 665, Code of Pub. Local Laws (Flack, 1930)) which created a monopoly in certain newspapers for publication of official notices, was held to be in violation of Const. art. 41. *Raney v. County Commissioners of Montgomery County*, 170 Md. 183, 183 Atl. 548 (1936). A statute (art. 27, secs. 88 to 91) forbidding the sale of oleomargarine, was declared valid as not creating a monopoly under Const. art. 41. *Wright v. State*, 88 Md. 436, 41 Atl. 795 (1898).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**L. 1937, c. 239****Resale Price Maintenance**

Sections 105 to 114¹ validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to agreements between producers, between wholesalers, or between retailers as to sale or resale prices. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Ann. Code (Bagby, 1924)**Cooperatives**

ART. 23. Section 445 provides that no association organized under art. 23, sections 419 to 446, shall be deemed a conspiracy or combination in restraint of trade. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also Vol. *Cooperatives* in projected study.

Labor

ART. 27, section 43. Combinations in furtherance of a trade dispute are not a conspiracy if the acts done would not be illegal if committed by one person.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****Ann. Code (Bagby, 1924)****Railroads**

ART. 23. Sections 218, 235, and 236 provide that any railroad may purchase, lease, or consolidate with any other railroad within or without the State, if the same shall connect with or form a continuous line, either directly or by means of an intervening line, with the railroad so acquired. Consolidation by competing or parallel roads is prohibited without special consent of the General Assembly. Any sale, lease, or consolidation must be sanctioned by a two-thirds vote of the stockholders in special meeting called for that purpose, and the agreement must be filed in the office of the Secretary of State.

Ann. Code (Flack, Supp. 1935)

ART. 23. Section 379 provides that no stock corporation other than a railroad corporation shall acquire more than 10 percent of the total capital stock issued by any railroad or other common carrier

¹L. 1937, c. 239, sec. 1, repealed secs. 105 to 110 of Ann. Code (Flack, Supp. 1935) art. 83, and added 10 new sections, secs. 105 to 114.

organized under the laws of the State. Nor shall any railroad lease, convey, assign, or acquire any franchise or right to operate without having first obtained the consent of the Public Service Commission.

Liquors

ART. 2B. Section 28 provides that it shall be unlawful for any distiller, manufacturer, rectifier, blender, or other producer of alcoholic beverages to have any financial interest in any retail dispensary of such beverages. The giving or lending of money or anything of value is likewise prohibited, except in the case of advertising or display material the cost of which does not exceed five dollars. Violation is punishable by fine or imprisonment or both. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Ann. Code (Bagby, 1924)

Food

ART. 27. Section 151 provides that the storing of any food for the purpose of cornering the market or increasing the price above the market price or limiting the supply to the public is punishable by imprisonment for not less than six months and not more than three years.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A contract not to compete has been held not to be in restraint of trade when such contract involves the sale of a business, together with the goodwill of the business. *Guerand v. Dandeleit*, 32 Md. 561,

3 Am. Rep. 164 (1870); *Anderson v. Truitt*, 158 Md. (1938), 148 Atl. 223, (1930); *Warfield v. Booth*, 33 Md. 63, (1871); *Brown v. Benzinger*, 118 Md. 29, 84 Atl. 79, (1912); *Kaliopulus v. Lumm*, 155 Md. 30, 141 Atl. 440, (1928).

After the sale of a business by a receiver, a former partner was restrained from soliciting customers even in the absence of any express agreement. *Burnham v. Burnham*, 153 Md. 147, 137 Atl. 860, (1927).

Contracts not to compete have been declared not in restraint of trade when they prohibit competition for a short period of time. In *Duerling v. City Baking Co.*, *supra*, a contract was upheld which prohibited competition for three months; in *Tolman Laundry v. Walker*, *supra*, a contract prohibiting competition for a period of one year was declared valid; and in *Anderson v. Truitt*, *supra*, a contract not to compete for a period of 25 years when applied to one community was upheld.

Contracts not to compete are held not in restraint of trade when they prevent competition in one particular community. *Duerling v. City Baking Co.*, *supra*; *Fulton Laundry Co. v. Johnson*, *supra*; *Tolman Laundry v. Walker*, *supra*; *Guerand v. Dondilot*, *supra*; *Burnham v. Burnham*, *supra*; *Anderson v. Truitt*, *supra*; *Warfield v. Booth*, *supra*; *Brown v. Benzinger*, *supra*; *Kaliopulus v. Lumm*, *supra*; *Griffin v. Gay*, 172 Md. 510, 192 Atl. 359, (1937).

Restrictive Covenants Ancillary to Employment.

Contracts which restrict employees from competing with their employers have been held not in restraint of trade. *Tolman Laundry v. Walker*, 171 Md. 7, 187 Atl. 836, (1936); *Fulton Grand Laundry Co. v. Johnson*, 140 Md. 359, 117 Atl. 753, (1922); *Duerling v. City Baking Co.*, 155 Md. 280, 141 Atl. 542, (1928).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Ann. Code (Flack, Supp. 1935), art. 2B
Liquor

Section 33 provides that no holder of a manufacturer's or wholesaler's license, and no distiller, brewer, rectifier, blender, or bottler of alcoholic beverages or the owner of any interest in any of such plants shall be permitted to enter into any agreement with any retail dealer, the effect or purpose of which is to limit the purchases or sales of any such retail dealer to the products of any one or more of such producers; it being the intent and purpose of this act that every retail dealer shall at all times be and remain free to purchase alcoholic beverages from any holder of a manufacturer's or wholesaler's license.

L. 1939, c. 775

Section 53A provides that any persons violating the provisions of this article for which no penalty, other than suspension or revocation of a license, is provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than \$1,000 or to imprisonment for not more than two years in the house of correction or jail, or both. See *Special Antitrust Laws: Liquor*.

Ann. Code (Bagby, 1924)
Cooperatives

Art. 23. Section 433 provides that contracts whereby members of cooperative associations agree to sell all or a specified part of their products to or through the association are lawful. Such contracts may contain a self-renewing clause for periods not exceeding five years, unless notice of desire not to renew is given within sixty days prior to the date of expiration of such contract. The statute further provides (art. 23 sec. 445) that these marketing agreements shall not be deemed illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

MASSACHUSETTS

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Ann. Laws (1933) c. 93

Section 1 prohibits the sale of goods on condition that the purchaser shall not deal in the goods of any other person, firm, association or corporation, but expressly provides that this does not prohibit the appointment of exclusive agents or the making of contracts for the exclusive sale of goods. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Sec. 2. Monopolies and discriminations in the sale of articles, etc., in common use prohibited.—Every contract, agreement, arrangement, combination, or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void. (1908, 454, sec. 1; 1911, 503, sec. 1.)

Sec. 3. Action by attorney general, etc.—The attorney general, or, by his direction, a district attorney, may bring an action in the

name of the commonwealth against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, to restrain the doing in the commonwealth of any act forbidden or declared to be illegal by the preceding section, or any act in, toward or for the making or consummation of any contract, agreement, arrangement, combination or practice prohibited by said section, wherever the same may have been made. The superior court shall have jurisdiction to restrain and enjoin any act forbidden or declared to be illegal by said section. (1908, 454, sec. 2.)

Sec. 4. Proceedings on complaint of other persons; hearing; master; report.—Upon written complaint on oath of the complainant filed in the supreme judicial or superior court, alleging that any person, copartnership, or corporation has, in the county where such complaint is filed, entered into any contract, agreement, arrangement, combination, or practice declared illegal and void under section two, the court shall hear on oath the complainant and any witnesses produced by him. If it appears to the court that such contract, agreement, arrangement, combination, or practice exists, the court shall issue an order of notice to the respondents to appear and show cause why the court should not appoint a master to hear and make report on said complaint; and thereafter, if such cause be not shown, the court shall appoint a master who shall, in accordance with the established practice and rules in equity, hear the complainant and the respondents and their evidence upon the allegations of said complaint; and upon motion of the complainant, other persons, copartnership or corporations within the jurisdiction of the court and appearing to the court to be necessary parties to the full examination of the allegations of said complaint, may upon proper notice be cited to appear as parties respondent. After such hearing the master shall make and file his report, and said parties may present their objections and exceptions thereto and prosecute the same in accordance with the rules of procedure in equity. Said report of the master shall be filed by him within thirty days after the close of the hearings, unless further time is allowed by order of the court. (1911, 503, sec. 1.)

Sec. 5. Findings, recommendations, etc.; report sent to attorney general, when; further proceedings.—A master may append to such report such recommendations to the parties as may be pertinent to, and warranted by, his findings of fact or rulings of law, and as may tend to remove restraint or to prevent any ground of complaint alleged in said complaint and found by him to be proved; but such recommendations may, upon motion of any party, and upon order of the court, be disaffirmed and expunged from the records of

the case. The report, if affirmed by the court, shall be transmitted by the clerk to the attorney general, who shall forthwith cause such further proceedings, either civil or criminal, to be instituted as such report may warrant. (1911, 503, sec. 2.)

Sec. 6. Powers of masters, fees, places for hearing, etc.—Masters appointed under section four shall have all the powers conferred upon masters in equity procedure. Their fees shall be fixed by the court and paid by the commonwealth. Upon request of such master rooms for hearings shall be provided in the state house, if the cause is pending in Suffolk, Middlesex, or Norfolk county; if elsewhere, in some county court house within the county where the cause is pending. Upon approval by the court, such masters may employ suitable clerical or stenographic assistants to report the evidence taken and the findings. Such assistants shall be paid by the commonwealth. (1911, 503, sec. 3.)

Sec. 7. Witnesses required to answer questions, etc.; immunity, when granted; examination of documents regulated.—In any action under section three or at any hearing under section four, no person shall be excused from answering any questions put to him in such action or material to the proof of the allegations of the complaint at such hearing, or from producing any books, papers, or documents which are material to such proof, on the ground that the testimony or evidence, documentary or otherwise, so required of him, tends to incriminate him; but no person shall be prosecuted in any criminal proceeding, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any such action or hearing. Upon objection of a party at such hearing, no book, paper, or document, or part thereof, produced by him at the request of any other party, shall be examined by the party making the request or his attorney, or offered in evidence, unless it is so ordered by the master, after examination thereof and a hearing thereon, and a ruling by the master that such evidence is material and competent. (1908, 454, sec. 3; 1911, 503, sec. 4.)

Sec. 8. Discrimination in sale of commodities prohibited.—No person, firm, association, or corporation doing business in the commonwealth and engaged in the production, manufacture, or distribution of any commodity in general use, shall maliciously, or for the purpose of destroying the business of a competitor and of creating a monopoly in any locality, discriminate between different sections, communities, towns, or cities of the commonwealth, or between purchasers by selling such commodity at a lower rate for such purpose in one section, community, town, or city than is charged for such

commodity by the vendor in another section, community, town, or city in the commonwealth, after making due allowance for the difference, if any, in the grade or quality and in the cost of transportation, and such acts are hereby declared to be unfair discrimination, and all contracts or agreements made in violation of any provision of this or either of the two following sections shall be void. (1912, 651, secs. 1, 5.)¹

Sec. 9. Certain combinations unlawful; penalty.—No person, firm, association, or corporation shall combine with any other person, firm, association, or corporation for the purpose of destroying the trade or business of any person, firm, association, or corporation engaged in selling goods or commodities and of creating a monopoly within the commonwealth. Violation of any provision of this or the preceding section shall, if the offender is an individual, be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not less than one month nor more than one year, or both; or, if the offender is a corporation, by a fine as aforesaid. (1912, 651, secs. 2, 3.)

Sec. 10. Evasion of sections 8 and 9 by individual penalized.—Whoever, in his individual capacity, or acting in behalf of any firm, association or corporation for the purpose of evading any provision of sections eight and nine, shall appoint agents, secure or hold the control of corporate stock, or by agreement with any other person, firm, association, or corporation, cause any of the commodities mentioned in section eight to be sold for the purpose of such evasion or attempts to evade, shall be punished by imprisonment in the state prison for not more than five years, or in a jail or house of correction for not less than six months nor more than two and one-half years; and if any of the acts specified in this section are done by a corporation, the directors, stockholders, or agents authorizing such evasion or discrimination shall each be punished as provided therein. (1912, 651, sec. 4; 1921, 486, sec. 21.)

Sec. 11. Forfeiture of privileges, rights, etc., of corporation upon conviction.—If any corporation, foreign or domestic, authorized to do business in this commonwealth is convicted of violation of any provision of section eight, nine, or ten, such conviction shall cause a forfeiture of all the privileges and rights conferred upon the corporation by general or special law of this commonwealth and shall bar its right to do business in this commonwealth, and if it shall continue or attempt to do business in this commonwealth, the attorney general shall by a proper action in the name of the commonwealth oust such

¹For further treatment of sec. 8, see *THE MARKETING LAWS SURVEY* vol. *State Price Control Legislation: Antidiscrimination Legislation.*

corporation from all business of every kind and character in this commonwealth. (1912, 651, secs. 8, 9.)

Sec. 12. Duties of attorney general and district attorneys.—The attorney general and district attorneys, in their districts, shall enforce sections eight to ten, inclusive, by appropriate actions in courts of competent jurisdiction, but nothing herein shall limit the right of any court to issue warrants and make commitments to await the action of the grand jury under said sections in the case of crimes under the common law, and such power is hereby given to the courts of the commonwealth. (1912, 651, sec. 6.)

Sec. 13. Agreements to maintain or increase unreasonably the price of any necessary of life penalized.—Maintaining or increasing unreasonably the price of any necessary of life is hereby declared to be unlawful. Whoever, in combination or association with another or others, enters into any agreement or understanding to maintain or increase or cause to be maintained or increased unreasonably the price of any necessary of life shall be deemed guilty of criminal conspiracy, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than two years, or both. Prosecutions hereunder shall be under the control of the attorney general and shall be conducted by him or an assistant designated by him. (1919, 298.)

Ann. Laws (1933), c. 12

Sec. 10. Powers and duties [of Attorney General] relative to unlawful combinations, etc., in restraint of trade, etc.—He shall take cognizance of all violations of law or orders of courts, tribunals, or commissions affecting the general welfare of the people, including combinations, agreements, and unlawful practices in restraint of trade or for the suppression of competition, or for the undue enhancement of the price of articles or commodities in common use, and shall institute or cause to be instituted such criminal or civil proceedings before the appropriate state and federal courts, tribunals, and commissions as he may deem to be for the public interest, and shall investigate all matters in which he has reason to believe that there have been such violations. To carry out this section, he may appoint necessary assistants, with such compensation as, with the approval of the governor and council, he may fix, and may expend such sums as may be approved by the governor and council. In criminal proceedings hereunder he may require district attorneys to assist him and under his direction to act for him in their respective districts. (1913, 709, secs. 1, 2; 1914, 728, sec. 1.)

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

Unreasonable agreements in restraint of trade are invalid at common law, if they affect trade in articles which are of prime or public necessity. *Gamerell Fire-Alarm Telegraph Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 (1893). Fire-alarm telegraph instruments have been held to be articles of prime necessity, and restraints of trade in them have been declared void. *Ibid.* But a monopoly with respect to an article which is not a prime necessity is not illegal, unless there is injury to the public. *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629 (1887) (shade rollers); *Gloucester Isinglass Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005 (1891) (fish glue).

Constitutionality of Statutes.

Chapter 93, sections 8 to 12 (L. 1913, c. 651), are constitutional. *Commonwealth v. Dyer*, 243 Mass. 472, 138 N. E. 296, cert. den. 262 U. S. 751, 43 Sup. Ct. 700, 67 L. Ed. 1214 (1922). Opinion of the Justices, 211 Mass. 620, 99 N. E. 294 (1912).

A proposed law compelling automobile owners to take out insurance exclusively with a state "fund" would be unconstitutional. Opinion of the Justices, 271 Mass. 582, 171 N. E. 294 (1930).

Application of Statutes.

In General

Only such monopolies as come within the express provisions of chapter 93, sections 2 and 3 (L. 1908, c. 454, secs. 1 and 2), can be prosecuted under the act. Otherwise the suitor's remedy is at common law. *Commonwealth v. North Shore Ice Delivery Co.*, 220 Mass. 55, 107 N. E. 402 (1914). Chapter 93, section 2 (L. 1908, c. 454, sec. 1) is simply declaratory of the common law. *Milliken-Tomlinson Co. v. American Sugar Refining Co.*, 9 Fed. (2d) 809 (C. C. A. 1st, 1925). Trading stamps for merchandise are "articles" within this act. *Merchants Legal Stamp Co. v. Murphy*, 220 Mass. 281, 107 N. E. 968 (1915).

In construing chapter 93, sections 2 and 3, the court stated: "Whether there is an unlawful purpose creating or tending to create a monopoly depends on the circumstances of each case. The facts peculiar to the business, the conditions before and after the alleged restraint was imposed, its nature, and the purpose sought to be attained, as well as prevalent economic necessities are to be considered as relevant." *Berenson v. H. G. Vogel Co.*, 253 Mass. 185, 148 N. E.

450, cert. den. 269 U. S. 577, 46 Sup. Ct. 103, 70 L. Ed. 421 (1925); *Keith v. Heywood Boot & Shoe Co.*, 255 Mass. 321, 151 N. E. 309 (1926). Where there is no attempt to suppress or destroy competition, the combination is legal. Thus the organization of a "Fire Protection Survey Bureau," whose members were fire-sprinkler companies, its purpose being to reduce the cost of obtaining information necessary to submit bids for installation was held to be a lawful combination. *Berenson v. H. A. Vogel Co.*, *supra*.

An advantage obtained by superior business efficiency, resulting from combination, is not within the prohibition of the statute, especially where the supply of the commodity is unlimited. *Commonwealth v. North Shore Ice Delivery Co.*, 220 Mass. 55, 107 N. E. 402 (1914).

For cases arising under the Sherman Anti-Trust Act, cf. *Wheeler-Stenzel Co. v. American Window Glass Co.*, 202 Mass. 471, 89 N. E. 28 (1909); *United Shoe Machinery Co. v. La Chapelle*, 212 Mass. 467, 99 N. E. 289 (1912).

A combination in restraint of trade cannot enjoin a competitor from continuing alleged predatory practices. *Merchants' Legal Stamp Co. v. Murphy*, *supra*; *Duane v. Merchants' Legal Stamp Co.*, 231 Mass. 113, 120 N. E. 370 (1918). Nor can it enjoin its customer from violating its contract. *Merchants' Legal Stamp Co. v. Scott*, 220 Mass. 389, 107 N. E. 969 (1915). Nor will a court of equity lend its aid to a member of such combination seeking his share of the profits. *Duane v. Merchants' Legal Stamp Co.*, 227 Mass. 466, 116 N. E. 873, cert. den. 249 U. S. 613, 39 Sup. Ct. 388, 63 L. Ed. 802 (1917).

The court will not lend its aid to anyone who is "culpably connected with the executed illegality" of a monopoly. Thus, a guilty shareholder, even though he had demanded that the monopolistic practices cease after they had been held illegal, could not recover in suit for an accounting for damages suffered by the corporation as a result of the continuation of its illegal activities. *Duane v. Merchants' Legal Stamp Company*, *supra*. However, an illegal monopoly can sue its officers and employees, who, in their fiduciary capacity, fraudulently diverted funds of the company. Their wrongdoing arose independently of the corporation's illegality. *The American Agricultural Chemical Co. v. Robertson*, 273 Mass. 66, 172 N. E. 871 (1930). A contract for sale and future delivery of sugar at fixed prices between seller and buyer, not inherently unlawful, and merely collateral to the seller's alleged illegal purpose of unreasonable increase in the price of a necessary commodity, may be sued on by the seller. In construing chapter 93, sections 2 and 8 (L. 1908, c. 454, sec. 1; L. 1919, c. 298, sec. 1), the court

said it is only where the invalidity is inherent in the contract that the buyer may interpose the statute as a defense. *Milliken Tomlinson Co. v. American Sugar Refining Co.*, 9 Fed. (2d) 809 (C. C. A. 1st 1925).

Both at common law and under statute, combinations formed for an unlawful purpose, or for a lawful purpose to be accomplished by unlawful means, are illegal conspiracies. *Martell v. White*, 185 Mass. 255 (1904), 69 N. E. 1085 (1904); *Commonwealth v. Dyer*, 243 Mass. 472, 138 N. E. 296, cert. den. 262 U. S. 751, 43 Sup. Ct. 700, 67 L. Ed. 1214 (1922); *Robitaille v. Morse*, 283 Mass. 27, 186 N. E. 78 (1933); *Neustadt v. Employers Liability Assurance Corp.*, 1939 Adv. Sh. 975, 21 N. E. (2d) 538 (1939); *Potter Press v. C. W. Potter, Inc.*, 1939 Adv. Sh. 1241, 22 N. E. (2d) 68 (1939).

A voluntary association which imposes unreasonably heavy fines on its members for dealing with nonmembers is guilty of conspiracy. *Martell v. White, supra*.

A conspiracy to create a monopoly in fresh fish, by fixing and enhancing unreasonably the prices thereof with intent to cheat the public and injure competitors, is criminal, under chapter 93, sections 8 to 12 (L. 1912, c. 651). *Commonwealth v. Dyer, supra*.

A combination formed to drive a competitor out of business is not illegal if this purpose is merely incidental to other valid objectives. If, however, the primary object of the combination is to injure the competitor, such would be illegal. *Robitaille v. Morse, supra*; *Neustadt v. Employers Liability Assurance Corp., supra* (combination of insurance companies agreed to write insurance only through approved lists of brokers).

A corporation may be a conspirator. *Potter Press v. C. W. Potter, Inc., supra*.

Under chapter 93, section 9 (L. 1912, c. 651, sec. 2), a combination whose purpose is to destroy the business of another, thereby creating a monopoly is indictable. A "malevolent purpose" is unnecessary as in chapter 93, section 8 (L. 1912, c. 651, sec. 1). *Commonwealth v. Dyer, supra*.

As to Massachusetts Trust.

Chapter 156, section 5, does not apply to a Massachusetts trust. It applies only to corporations. *Flynn v. Commissioner of Department of Public Utilities*, 18 N. E. 2d 538, 1939 Adv. Sh. 51 (1939).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Ann. Laws (Supp. 1938), c. 231, as amended by L. 1939, c. 313
Resale Price Maintenance

Sections 14A to 14D validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal contracts between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Ann. Laws (1933), c. 157
Cooperatives

Section 16 provides that an agricultural cooperative organized under section 10 shall not be liable to prosecution for any action reasonable and proper in the exercise of the rights conferred upon such a cooperative by sections 10 to 18. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also Vol. *Cooperative* in projected study.

C. SPECIAL ANTITRUST LAWS

I. Special Industry Antitrust Acts

Ann. Laws (1933), c. 156
Public Utilities

Section 5 provides that no corporation, other than a utility or financial corporation, shall acquire, directly or indirectly, more than ten percent of the stock of any domestic railroad, street railway, electric railroad, elevated railway, trolley-motor, gas or electric light, heat or power corporation.

Ann. Laws (Supp. 1939), c. 138
Liquor

Section 12 provides that no person, directly or indirectly, or through any agent, employee, stockholder, officer, or other person, or any subsidiary whatsoever, shall be granted a retail license for consumption on the premises if already holding a license for sale of liquors not to be drunk on the premises, or a wholesaler's and importer's or manufacturer's license.

Section 18 provides that no person, firm, corporation, association, or other combination either directly or indirectly shall be granted more than one wholesaler's and importer's license.

Section 25 provides that it shall be unlawful for any retail licensee authorized to sell alcoholic beverages for consumption on or off the

premises to lend or borrow money or receive credit, directly or indirectly, to or from any manufacturer, wholesaler, or importer of alcoholic beverages, and for any such manufacturer, wholesaler, or importer to lend money or otherwise extend credit except in the usual course of business and for a period not exceeding ninety days, directly or indirectly, to any such licensee, or to acquire, retain, or own, directly or indirectly, any interest in the business of any such licensee. The commission may revoke the license of any licensee who in its opinion is violating this section or participating in such a violation.

Nothing in this chapter shall prevent a person holding any interest in a business licensed to manufacture alcoholic beverages from holding at the same time any interest in not more than one business as a licensed wholesaler and importer.

Section 62 provides that a violation by any person of any provision of this chapter for which a specific penalty is not provided or a violation by a licensee or permittee of any provision of his license or permit or of any regulation made under authority of this chapter shall be punished by a fine not less than \$50 nor more than \$500 or by imprisonment for not less than one month nor more than one year, or both.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

In order to prevent duplication of services, an electric and gas company's agreement to divide certain undeveloped territory between them was held valid. *Weld v. Gas and Electric Light Commissioners*, 197 Mass. 556, 84 N. E. 101 (1908). A municipality's revocation of a jitney license which, if permitted to operate, threatened discontinuance of a certain street-railway service in town was held not to contravene the antitrust laws. The public expressed preference for the street-railway service. *David C. Burgess v. Mayor and Aldermen of Brockton*, 235 Mass. 95, 126 N. E. 456 (1920).

For the extent and effect of a franchise granted to a railroad company, see *Boston & Lowell Railroad Corp. v. Salem & Lowell Railroad Company*, 2 Gray (68 Mass.) 1 (1854).

An agreement not to bid or prevent others from bidding for the service or labor of inmates in a house of correction is invalid. Any

agreement for the purpose of preventing competition is against public policy. It is immaterial whether the seller or any other person is injured thereby. *Gibbs v. Smith*, 115 Mass. 592 (1874).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to Sale of a Business.

In General.

A valid agreement, ancillary to sale of business and goodwill, not to compete with the buyer must be reasonably restrictive as to time and place. *Taylor v. Blanchard*, 95 Mass. (13 Allen) 370 (1866) (manufacture of shoe-cutters—agreement not to compete in the whole state of Massachusetts held invalid); *Stearns v. Barrett*, 18 Mass. (1 Pick) 443 (1823) (agreement between joint patentees to divide up the sales territory of the United States between them held valid); *Alger v. Thacher*, 36 Mass. 51 (1837) (business of founding iron—agreement unrestricted in time or territory held invalid); *Gilman v. Dwight*, 79 Mass. 356 (1859) (physician—agreement restricted to specified town held valid); *Angier v. Webber*, 96 Mass. (14 Allen) 211 (1867) (teaming business in a particular locality—agreement valid). *Perkins v. Lyman*, 9 Mass. 522 (1813) (trade of otter and beaver skins on the northwest coast of America—held valid). The agreement, to be valid, must be “partial,” reasonable, and for an adequate consideration. *Pierce v. Fuller*, 8 Mass. 223 (1813).

An agreement not to compete with buyer ancillary to sale of business and goodwill is valid if not injurious to the public, is of benefit to the buyer, and restricts the seller no more than is reasonably necessary. The restraint, if reasonable, need not be restrictive in duration or territory. *Morse Twist Drill and Machine Co. v. Morse*, 103 Mass. 73 (1869) (sale of twist drill patents—no restriction in time or place—held valid); *Boutelle v. Smith*, 116 Mass. 111 (1874) (sale of bread route and bakery); *Gamewell Fire Alarm and Tel. Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 (1893) (sale of police and fire alarm patent—unrestricted territory for 10 years—held invalid); *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509 (1898) (no

restriction in territory—held valid); *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, 97 N. E. 790 (1907) (shoe machinery—no restriction in time or space—held valid); *Marshall Engine Company v. New Marshall Engine Co.*, 203 Mass. 410, 89 N. E. 548 (1909) (no restriction in time or space—held valid—manufacture of machine for reducing pulp to paper); *Ruggiero v. Salomone*, 248 Mass. 237, 142 N. E. 764 (1924) (barber shop).

Implied Covenants Not to Compete.

In every sale of a business and goodwill, the courts will imply an agreement by the seller that he will do nothing that will impair the value of the goodwill sold. *Rosenberg v. Adelson*, 234 Mass. 488, 125 N. E. 632 (1920); *Hutchinson v. Nay*, 187 Mass. 262, 72 N. E. 974 (1905); *Dwight v. Hamilton*, 113 Mass. 175 (1873) (sale of physician's practice and goodwill); *Foss v. Roby*, 195 Mass. 292, 81 N. E. 199 (1907) (sale of dentist's practice and goodwill); *Munsey v. Butterfield*, 133 Mass. 492 (1882) (sale of milk route—seller enjoined from soliciting even *new* customers in territory); *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 89 N. E. 548 (1909).

Formerly it was held at common law that an agreement not to complete would not be implied in a sale of a local retail store. *Bassett v. Percival*, 87 Mass. (5 Allen) 345 (1862) (grocery store); *Howie v. Chaney*, 143 Mass. 592, 10 N. E. 713 (1887). The rule, however, is no longer so rigid. An agreement not to compete will be implied insofar as it is necessary to protect the goodwill of the store sold. *Old Corner Book Store v. Upham*, 194 Mass. 101, 80 N. E. 228 (1907) (sale of book store, with Episcopalian book department—vendor had charge of the department and was prominent in Episcopalian circles—court enjoined him from competing in the sale of such books); *Martino v. Pontone*, 270 Mass. 158, 161, 170 N. E. 67 (1930). ("Plaintiffs are entitled to freedom from interference by the defendant in the neighborhood of the store which he sold, but not throughout the entire area of the city.")

Whether or not the court will imply an agreement not to complete is a question of fact, depending on the nature of the goodwill sold, the situation of the parties, and the implications involved in the terms of the contract of sale. *Moore v. Rawson*, 199 Mass. 493, 85 N. E. 586 (1908); *Old Corner Book Store v. Upham*, *supra*; *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184 (1908).

A contract not to compete will not be implied, if only the assets and not the goodwill of the business are sold. *Webster v. Webster*, 180 Mass. 310, 62 N. E. 383 (1902).

A contract not to compete will not be implied where the sale of the goodwill is forced and is not a voluntary one. *Hutchinson v. Nay, supra* (one member of partnership died—forced sale of goodwill—held surviving partner can compete with buyer and solicit former customers); *C. H. Batchelder & Co. v. Batchelder*, 220 Mass. 42, 107 N. E. 455 (1914) (receiver's sale of insolvent corporation—held former owner can compete with buyer.)

Construction.

A covenant, in the sale of a milk route, not to "engage in the milk business in any manner whatsoever" does not preclude the seller from operating a pasteurizing plant. *Begley v. O'Neill*, 281 Mass. 164, 183 N. E. 151 (1932).

Remedies.

Breach of the covenant not to compete will be enjoined despite a provision for liquidated damages. *Ropes v. Upton*, 125 Mass. 258 (1878).

Assignment.

Benefits of an agreement not to compete are assignable. *Rosenberg v. Adelson*, 234 Mass. 488, 125 N. E. 632 (1920); *Adamowicz v. Iwanicki*, 286 Mass. 453, 190 N. E. 711 (1934).

A covenant not to compete is assignable from one partner of a business to another. *Jenkins v. Eliot*, 192 Mass. 474, 78 N. E. 431 (1906).

Restrictive Covenants Ancillary to Employment.

The rule with respect to agreements not to compete ancillary to employment contracts is, in all respects, similar to the rule with respect to agreements in connection with the sale of a business and goodwill. Hence, an employee's agreement not to engage in a similar business after the termination of his employment, if not injurious to the public, and if not unduly burdensome on the employee, and if reasonably necessary for the protection of the employer will be held valid. *Sherman v. Pfefferkorn*, 241 Mass. 468, 135 N. E. 568 (1922) (covenant preventing laundry driver from engaging in the business generally is unreasonable; he may be employed by a competitor in a capacity not requiring contact with the customers of his former employer); *Chandler, Gardner & Williams, Inc. v. Reynolds*, 250 Mass. 309, 145 N. E. 476 (1924) (unique methods of doing business and certain secret processes were taught to employees—held 10 years is not an unreasonable restraint); *Boston & Suburban Laundry Co. v. O'Reilly*, 253 Mass. 94, 148 N. E. 373 (1925) (agreement for 2 years not to interfere with the company's customers in certain cities

was held valid); *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117 (1897) (restraint on employee so long as he is in the employ held valid); *Commonwealth Laundry Company v. Daggett*, 283 Mass. 79, 186 N. E. 41 (1933) (agreement "never" to disturb employer's customers—held unreasonable as to time).

An employee in charge of customer's lists is restrained from working for a competitor in a similar capacity. *Walker Coal & Ice Co. v. Westerman*, 263 Mass. 235, 160 N. E. 801 (1928). But if the information acquired is not confidential, a restrictive covenant will not be enforced. *Horn Pond Ice Co. v. Pearson*, 267 Mass. 256, 166 N. E. 640 (1929) (list of customers of the employer-ice company comprising the only people in town who used ice held not confidential).

An employer cannot, by contract, prevent his employee from using the skill or intelligence required or increased through experience or instruction received in the course of employment. *Club Aluminum Co. v. Young*, 263 Mass. 223, 160 N. E. 804 (1928) (salesman of aluminum cooking utensils under a "plan" which was not secret but required training and ability was not restrained). See also *Padover v. Axelson*, 268 Mass. 148, 167 N. E. 301 (1929), *May v. Angoff*, 272 Mass. 317, 172 N. E. 220 (1930).

An agreement by a former employee not to engage directly or indirectly in any branch of the laundry business within definite territory will not prevent him from holding stock in a competing company. *Sherman v. Pfefferkorn*, *supra*. A restrictive agreement may be enforced even prior to actual breach. *Walker Coal & Ice Co. v. Westerman*, *supra*.

The scope of a restrictive covenant if broader than necessary either in territory or duration, or both, may be narrowed by court to more reasonable limits. *Edgecomb v. Edmonston*, 257 Mass. 12, 153 N. E. 99 (1926) (business of supplying shorthand reporters—restriction in state of Massachusetts narrowed to city of Boston); *Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N. E. 856 (1935) (duration of 15 years narrowed to 18 months); *Brannen v. Bouley*, 272 Mass. 67, 172 N. E. 104; *Walker Coal & Ice Company v. Love*, 273 Mass. 564, 174 N. E. 199 (1931); *Whiting Milk Companies v. O'Connell*, 277 Mass. 570, 179 N. E. 169 (1931) (a reasonable time limitation however does not save an unreasonable territorial limitation); *Suburban Coat, Apron & Linen Supply Co. v. Le Blanc*, 15 N. E. (2d) 828 (1938) (duration narrowed by court).

A restrictive covenant otherwise valid was not enforced in *Economy Grocery Stores Corporation v. McMenemy*, 290 Mass. 549; 195 N. E. 747 (1935) because employee was unjustifiably discharged during an existing emergency. An employee breaching a similar cove-

nant was not enjoined, since he was discharged during the employer company's reorganization under section 77B of the Bankruptcy Act. *Southern New England Ice Co. v. Ferrero*, 4 N. E. (2d) 359 (1936).

A competing employer hiring a discharged employee with knowledge of the restrictive covenant and with intent to injure the others business is liable in tort for damages to employee's former employer. *Suburban Coat, Apron & Linen Supply Co. v. Le Blanc*, 15 N. E. (2d) 828, (1938) Cf. *New England Co. v. Pritchard*, 15 N. E. (2d) 440 (1938).

A covenant not to compete will not be implied where a laundry route man makes solicitations after terminating his employment, when there has been no use of confidential lists of the employer, but solicitations are made solely from memory. *Wooley's Laundry v. Silva*, 23 N. E. (2d) 899 (1939).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Ann. Laws (1933), c. 93

Sec. 1. Sales on condition that buyer deal only in seller's goods penalized.—No person, firm, association, or corporation, doing business in the commonwealth, shall make it a condition of the sale of goods, wares, or merchandise that the purchaser shall not sell or deal in the goods, wares, or merchandise of any other person, firm, association, or corporation; but this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares, or merchandise. Whoever, as principal or agent, violates this section shall be punished for the first offence by a fine of not less than fifty nor more than one hundred dollars, and for a subsequent offence by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for not more than one year, or both. (1901, 478; R. L. 56, sec. 1.)

Sec. 14. Conditions for sale or lease of machinery regulated; penalty.—No person, firm, association, or corporation shall insert in or make it a condition or provision of any sale or lease of any tool, implement, appliance, or machinery that the purchaser or lessee thereof shall not buy, lease, or use machinery, tools, implements, or appliances or material or merchandise of any person, firm, association, or corporation other than such vendor, or lessor, but this provision shall not impair the right, if any, of the vendor or lessor of

any tool, implement, appliance, or machinery protected by a lawful patent right vested in such vendor or lessor to require by virtue of such patent right the vendee or lessee to purchase or lease from such vendor or lessor such component and constituent parts of said tool, implement, appliance, or machinery as the vendee or lessee may thereafter require during the continuance of such patent right; and all leases, sales, or agreements therefor made after July 1st, *nineteen hundred and seven*, shall be void as to any and all of the terms or conditions thereof in violation of this section; provided, that nothing in this section shall be construed to prohibit the appointment of agents or sole agents to sell or lease machinery, tools, implements or appliances. Whoever, himself or by his agent, violates this section shall be punished by a fine of not more than five thousand dollars. (1907, 469.)

Cooperatives
Ann. Laws (1933), c. 157

Section 16 provides that agricultural cooperative associations organized under secs. 1-14 of c. 157 may enter into marketing contracts with its members by which the members shall agree to sell for any period of time, not exceeding 10 years, all or any specified part of their products or of certain specified products exclusively to or through the corporation or any agency designated by it. Such marketing contract shall not be considered illegal as in restraint of trade, under c. 93 secs. 1-7.

Judicial Decisions

Tying Contracts.

Application of the Common Law.

An agreement whereby plaintiff loaned defendant a gas pump at no cost but on condition that defendant purchase plaintiff's gas exclusively, was held valid. At common law, a contract in restraint of trade is valid if the restraint is such as affords only a fair degree of protection to the legitimate interests of the party in whose favor it is imposed, and is not so large as to interfere with public interests. *Quincy Oil Company v. Sylvester*, 238 Mass. 95, 130 N. E. 217 (1921).

Constitutionality of Statute.

Chapter 93, section 14 is constitutional as a valid exercise of the state police power. Opinion of the Justices, 193 Mass. 605, 81 N. E. 142 (1907).

Application of Statute.

Lessee of certain shoe machinery agreed to pay a definite percentage of entire output for lease of machinery. If unsatisfactory, lessee was able to obtain additional or other machinery from the lessor company only, but at no additional cost. Lessee also had the option to terminate the leasing arrangement upon 30 days' notice. Lessor brought this action for the amount due on the contract. Lessee defended on the ground of an unreasonable restraint of trade in violation of the anti-trust laws. The court held that chapter 93, section 14 (L. 1907, c. 469) is a penal statute and should be strictly construed. The act renders leases void only to the extent that the terms or conditions thereof violate its provisions. Mere inducement to lease necessary additional machinery from the same manufacturer does not violate the provisions of the act. Such an inducement is not the same as an agreement by the lessee to lease additional machinery. The lessee had the right to obtain additional machinery at no additional cost and the option to terminate the leasing arrangement. The contract is not an unreasonable restraint, and the lessee is liable for the money agreed upon to be paid for the use of the machinery. *Witherell & Dobbins Co. v. United Shoe Machinery Co.*, 267 Fed. 950 (C. C. A. 1st 1920). See also *Keith v. Heywood Boot & Shoe Co.*, 255 Mass. 321; 151 N. E. 309 (1926).

Exclusive Dealing Arrangements.**Application of the Common Law.**

An agreement to deal in another's goods exclusively if not unreasonable is valid. *Palmer v. Stebbins*, 20 Mass. (3 Pick) 188 (1825); *Squires v. Wason Manufacturing Co.*, 182 Mass. 137, 65 N. E. 32 (1902); *New York Bank Note Co. v. Kidder Press Manufacturing Co.*, 192 Mass. 391, 78 N. E. 463 (1906); *Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683 (1895).

A license granted by an inventor for the exclusive manufacture and sale of his invention as well as for all future improvements thereon is valid and not an unreasonable restraint. *Squires v. Wason Manufacturing Co.*, *supra*.

An agreement by a purchaser of electrotypes to refrain from duplicating them for the purpose of selling them to others is reasonable in view of the nature of the property. *Meyer v. Estes*, *supra*. An agreement by a printing press manufacturer not to sell a strip-ticket machine to anyone else for twenty years was held reasonable in *New York Bank Note Company v. Kidder Press Manufacturing Co.*, *supra*, as necessary for the protection of the purchaser of the machine.

Constitutionality of Statute.

Chapter 93, section 1 is constitutional. Enactment of federal anti-trust law dealing only with interstate commerce contracts does not affect the validity of this statute. *Commonwealth v. Abe Strauss*, 191 Mass. 545, 78 N. E. 136, cert. den. 207 U. S. 599, 28 Sup. Ct. 253, 52 L. Ed. 358 (1906).

Application of Statute.

An offer of a 6 percent trade discount by a manufacturer to deal in his product exclusively is not of itself within purview of the act. *Commonwealth v. Abe Strauss, supra*. See also *Butterick Publishing Co. v. Fishr*, 203 Mass. 122, 89 N. E. 189 (1909).

Where, however, such inducement is tantamount to an exclusive dealing arrangement, since the dealer could not carry on his business successfully except upon compliance with terms proposed by the manufacturer, the inducement is, in fact, a condition declared illegal under chapter 93, section 1. *Commonwealth v. Abe Strauss, supra* (manufacturer controlled 95 percent of the plug tobacco industry). In *Merchants' Legal Stamp Co. v. Murphy*, 220 Mass. 281, 107 N. E. 968 (1915), exclusive contracts imposed by plaintiff controlling 90 percent of the trading stamp business were declared illegal.

Where an exclusive licensee of a toy cannon patent agreed to sell to but one company for 2 years, the licensee is under no duty to the company to restrain infringement of patent. *American Toy Cannon Manufacturing Co. v. McLoughlin*, 221 Mass. 567, 109 N. E. 836 (1915).

MICHIGAN



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. Ann. (Henderson, 1936)

Criminal Conspiracies

Sec. 28.348. Definition and punishment.—**Sec. 151.** All contracts, agreements, understandings, and combinations made, entered into, or knowingly assented to, by and between any parties capable of making a contract or agreement which would be valid at law or in equity, the purpose or object or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production or the quantity of any article or commodity to be raised, or produced by mining, manufacturing, agriculture, or any other branch of business or labor, or to enhance, control, or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any such article or commodity, shall be illegal and void, and every such contract, agreement, understanding, and combination shall constitute a criminal conspiracy. And every person who, for himself personally, or as a member, or in the name of a partnership, or as a member, agent, or officer of a corporation, or of any association for business purposes of any kind, who shall enter into or knowingly consent to any such void and illegal contract, agreement, understanding, or combination, shall be deemed a party to such conspiracy.

All parties so offending shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than six (6)

months or by a fine of not more than two hundred fifty (250) dollars. And the prosecution for offenses under this section may be instituted and the trial had in any county where any of the conspirators become parties to such conspiracy, or in which any one of the conspirators shall reside: *Provided, however,* That this section shall in no manner invalidate or affect contracts for what is known and recognized as common law and in equity as contracts for the "good will of a trade or business"; but all such contracts shall be left to stand upon the same terms and within the same limitations recognized at common law and in equity.¹

Sec. 28.349. Certain contracts illegal wherever made.—Every contract, agreement, understanding, and combination declared void and illegal by the first (1st) section of this chapter shall be equally void and illegal within this state, whether made and entered into within or without the state.

Sec. 28.350. Carrying into effect such unlawful contracts.—The carrying into effect, in whole or in part, of any such illegal contract, agreement, understanding, or combination as mentioned in the first (1st) section of this chapter and every act which shall be done for that purpose by any of the parties or through their agency or the agency of any one of them, shall constitute a misdemeanor punishable by imprisonment in the county jail not more than one (1) year, or by fine of not more than five hundred (500) dollars.

Sec. 28.351. Violation by corporation forfeits charter.—Any corporation now or hereafter organized under the laws of this state, which shall enter into any contract, agreement, understanding, or combination declared illegal and criminal by the first (1st) section of this chapter, or shall do any act towards or for the purpose of carrying the same into effect in whole or in part, and which shall not within thirty (30) days from the time when this chapter shall take effect, withdraw its assent thereto and repudiate the same and file in the office of the secretary of state such refusal and repudiation under its corporate seal, shall forfeit its charter and all its rights and franchises thereunder.

Sec. 28.352. Quo warranto against offending corporations.—It shall be the duty of the attorney general upon his own relation, or upon the relation of any private person, whenever he shall have good reasons to believe that the same can be established by proof, to file an information in the nature of a quo warranto against any corporation offending against any of the provisions of this chapter;

¹ For further treatment of sec. 28.348, see *Contracts not to Compete, infra*.

and thereupon the same proceedings shall be had as provided by chapter thirty-eight [38] of act number three hundred fourteen [314] of the public acts as nineteen hundred fifteen [1915], being sections fifteen thousand two hundred seventy-one [15271] to fifteen thousand three hundred [15300] inclusive of the compiled laws of nineteen hundred twenty-nine [1929], relating to proceedings by information in the nature of quo warranto, against corporations offending against any of the provisions of the act or acts creating, altering, or renewing such corporations, and in other cases.

Sec. 28.353. Exemptions.—The provisions of this chapter shall not apply to agricultural products or live stock while in the hands of the producer or raiser, nor to the services of laborers or artisans who are formed into societies or organizations for the benefit and protection of their members.²

Sec. 28.354. Incriminating testimony and immunity of witnesses except for perjury.—No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court or magistrate, upon any investigation, proceeding, or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to degrade or incriminate him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding, or trial: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Trusts and Combinations

Sec. 28.31. Trust; definition, unlawfulness; inapplicability of act to cooperative associations.—That a trust is a combination of capital, skill, or arts by two (2) or more persons, firms, partnerships, corporations or associations of persons, or of any two (2) or more of them, for either, any, or all of the following purposes:

1. To create or carry out restrictions in trade or commerce;
2. To limit or reduce the production, or increase or reduce the price of, merchandise or any commodity;

² Sections 28.348 to 28.353 were originally Act 225 of 1889. In the recodification of the Penal Code in 1931 they were repealed as such and reenacted in their present form.

3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity;

4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state;

5. It shall hereafter be unlawful for two (2) or more persons, firms, partnerships, corporations or associations of persons, or of any two (2) or more of them, to make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity, or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy, and void: *Provided, however,* That nothing contained in the provisions of this act shall be construed to forbid producers of farm or dairy products from cooperating or organizing corporations or associations not primarily for profit, for the purpose of insuring and providing a reasonably certain and stable market for, and distribution of, such products upon terms fair and reasonable to the public and to themselves, and bargaining with distributors of such products singly or collectively in relation thereto, nor shall such cooperative undertaking, corporations, associations, or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade. (C. L. '29, sec. 16647; C. L. '15, sec. 15013.)

Sec. 28.32. Quo warranto proceedings and suits; prosecution, venue.—For a violation of any of the provisions of this act by any corporation or association mentioned herein, it shall be the duty of the attorney general, or the prosecuting attorney of the proper county, to institute proper suits or quo warranto proceedings in the court of competent jurisdiction in any of the county seats in

the state where such corporation or association exists or does business, or may have a domicile. And when such suit is instituted by the attorney general in quo warranto, he may also begin any such suit in the supreme court of the state, or the circuit court of Ingham, Kent or Wayne counties, for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state. (C. L. '29, section 16648; C. L. '15, section 15014.)

Sec. 28.33. Violation of act by foreign corporation; effect, duty of attorney general, revocation of certificate.—Every foreign corporation, as well as any foreign association, exercising any of the powers, franchises, or functions of a corporation in this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings in quo warranto in the supreme court, or the circuit court of the county in which defendant resides or does business, or other proper proceedings by injunction or otherwise. The secretary of state shall be authorized to revoke the certificate of any such corporation or association, heretofore authorized by him to do business in this state. (C. L. '29, sec. 16649; C. L. '15, sec. 15015.)

(Secs. 4, 5 were repealed by Pub. Acts 1931, No. 328, which revised the Penal Code, and were replaced by sec. 28.826, *infra*.)

Sec. 28.34. Proof; sufficiency.—In prosecutions under this act it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such. (C. L. '29, sec. 16652; C. L. '15, sec. 15018.)

Sec. 28.35. Penalty; recovery, venue.—Each and every firm, person, partnership, corporation, or association of persons, who shall in any manner violate any of the provisions of this act, shall for each and every day that such violations shall be committed or continued, after due notice given by the attorney general or any prosecuting attorney, forfeit and pay the sum of fifty [50] dollars, which may be recovered in the name of the state, in any county where the offense is committed, or where either of the offenders reside. And it shall be the duty of the attorney general, or the prosecuting attorney of any county on the order of the attorney general, to prosecute

for the recovery of the same. When the action is prosecuted by the attorney general against a corporation or association of persons, he may begin the action in the circuit court of the county in which defendant resides or does business. (C. L. '29, sec. 16653; C. L. '15, sec. 15019.)

Sec. 28.36. Contract in violation of act; invalidity.—That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity. (C. L. '29, sec. 16654; C. L. '15, sec. 15020.)

Sec. 28.37. Cumulative effect of provisions.—That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state. (C. L. '29, sec. 16655; C. L. '15, sec. 15021.)

(Sec. 10 was repealed by Pub. Acts 1931, No. 328, which revised the Penal Code, and replaced by sec. 28.827, *infra*.)

Sec. 28.38. Civil liability; double damages, adding party defendant.—In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not. (C. L. '29, sec. 16657; C. L. '15, sec. 15023.)

(Sec. 11a was repealed by Pub. Acts 1931, No. 328, which revised the Penal Code, and replaced by sec. 28.828, *infra*.)

Sec. 28.39. Person; definition.—The word "person" or "persons" whenever used in this act, shall be deemed to include corporations, partnerships, and associations existing under or authorized by the laws of the state of Michigan, or any other state, or any foreign country. (C. L. '29, sec. 16659; C. L. '15, sec. 15025.)

Sec. 28.40. Repeal.—All acts or parts of acts contravening the provisions of this Act are hereby repealed. (C. L. '29, sec. 16660; C. L. '15, sec. 15026.)

The foregoing 13 sections constitute the Act of Sept. 23, 1899, No. 255.

Section 28.826 is identical with section 28.31 except that it contains the following additional provisions:

Any violation of the provisions of this section shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes or orders thereunder or in pursuance thereof, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two (2) years or by a fine of not more than one thousand (1,000) dollars. Each day's violation of this provision shall constitute a separate offense.

In any indictment for any offense named in this and the following section, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with or in pursuance of it, or aided, or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created.

In prosecutions under this and the following section, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

Obligation of Witnesses

Sec. 27.909. Obligation to testify and produce books and papers in antitrust cases, immunity of natural persons from prosecution except for perjury.—No person shall be excused from attending and testifying, or from producing books, papers, contracts, agreements, and documents in any cause, suit, or proceeding, civil, criminal, or otherwise, based upon or growing out of any alleged violation of any of the provisions of act two hundred fifty-five (255) of the public acts of eighteen hundred ninety-nine (1899), relating to trusts and combinations in restraint of trade or of any act amendatory or declaratory thereof, or supplemental thereto in any court of competent jurisdiction, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to fine, punishment, penalty, or forfeiture. The attendance and testimony of such persons in such

cases and the production of such books, papers, contracts, agreements, and documents may be enforced in the same manner as in any other cause, suit, or proceeding. But no person shall be prosecuted or subject to any fine, imprisonment, penalty, or forfeiture for or on account of any matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in any such case, suit, or proceeding. No testimony so given by him shall in any prosecution be used as evidence, either directly or indirectly, against him: *Provided*, That immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath, or produces evidence, documentary, or otherwise, under oath: *Provided further*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. (C. L. '29, sec. 14214; C. L. '15, sec. 12548.)

Unlawful Restraints on Trade

Sec. 28.827. Unlawful to hold trust certificates or enter into agreement to control production through trustee.—Any person, partnership, association, or corporation, or any agent thereof, who shall issue or own trust certificates, or any person, partnership, association, or corporation, agent, officer or employe, or the directors or stockholders of any corporation, who shall enter into any combination, contract, or agreement with any person or persons, corporations or corporation, or with any stockholder or director thereof, the purpose and effect of which combination, contract, or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict, or diminish the manufacture or output of any such article, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one (1) year or by a fine of not more than five hundred (500) dollars.

Sec. 28.828. Incriminating testimony; production of books, papers, etc., and immunity of witnesses except for perjury.—No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to degrade or incriminate him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary, or other-

wise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding, or trial: *Provided*, That immunity shall extend only to a natural person, who in obedience to a subpoena, gives testimony under oath or produces evidence, documentary, or otherwise, under oath: *Provided further*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Agreements in Restraint of Trade

Sec. 28.61. Contract not to engage in business; illegality.—All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession, or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void. (C. L. '29, sec. 16667; C. L. '15, sec. 15033.)

Sec. 28.62. Combination for monopoly; illegality.—All combinations of persons, copartnerships, or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession, or business, are hereby declared to be against public policy and illegal and void. (C. L. '29, sec. 16668; C. L. '15, sec. 15034.)

Sec. 28.63. Same; corporation organized to maintain; illegality.—Any corporation organized under the laws of this state for the purpose of establishing and maintaining, or attempting to establish or maintain, any combination of persons, copartnerships, or corporations with intent to establish and maintain or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession, or business, is hereby declared to be against public policy and illegal and void. (C. L. '29, sec. 16669; C. L. '15, sec. 15035.)

Sec. 28.64. Foreign corporation for monopoly; right to do business.—Any foreign corporation organized for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession, or business, is hereby prohibited from doing business in this state, and any permission or authority heretofore obtained by any such corporation to do business in this state is hereby declared to be illegal and void. (C. L. '29, sec. 16670; C. L. '15, sec. 15036.)

Sec. 28.65. Applicability of act to existing contracts and combinations.—This act shall apply to agreements, contracts, and combinations in restraint of trade or commerce heretofore entered into

or made, and which are sought to be enforced or maintained after this act takes effect; and all contracts and agreements in violation of this act heretofore made, expressly or impliedly, continuing in force after this act takes effect, are hereby declared to be against public policy and illegal and void. (C. L. '29, sec. 16671; C. L. '15, sec. 15037.)

Sec. 28.66. Contracts in restraint of trade; exceptions.—This act shall not apply to any contract mentioned in this act, nor in restraint of trade where the only object of restraint imposed by the contract is to protect the vendee, or transferee, of a trade pursuit, avocation, profession, or business, or the goodwill thereof, sold and transferred for a valuable consideration in good faith, and without any intent to create, build up, establish, or maintain a monopoly; nor to any contract of employment under which the employer furnishes or discloses to the employe a list of customers or patrons, commonly called a route list, within certain territory in which such employe is to work, in which contract the employe agrees not to perform similar services in such territory for (himself or) another engaged in a like or competing line of business for a period of ninety (90) days after the termination of such contract or services. (C. L. '29, sec. 16672; C. L. '15, sec. 15038.)

Sec. 28.67. Effect of act.—This act is declared to be supplementary to, and declaratory of, and in addition to act number two hundred fifty-five (255) of the public acts of eighteen hundred ninety-nine (1899), page four hundred nine (409). (C. L. '29, sec. 16673; C. L. '15, sec. 15039.)

The foregoing seven sections constitute the Act of June 20, 1905, No. 329.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

Monopolies and combinations in restraint of trade are illegal at common law. Thus a contract with a village for exclusive control of a public market was held illegal in *Gale v. Village of Kalamazoo*, 23 Mich. 343 (1871). This doctrine was also expressed in *Niles Water Works v. City of Niles*, 59 Mich. 311, 26 N. W. 525 (1886). However, franchises by municipalities, conferring practical monopolies, have been subsequently upheld. *Ludington Water Supply Co. v. City of Ludington*, 119 Mich. 480, 78 N. W. 558 (1889); *Lewick v. Glazier*, 116 Mich. 493, 74 N. W. 717 (1898).

A contract to furnish money for the purchase of stock, in a corporation formed to monopolize the match industry, is void. In a suit to recover a share of the dividends on the stock purchased, the court, on its own motion will take notice of the illegality of the contract and dismiss the suit. *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102 (1889).

With respect to a contract with the State for construction of a road, the lowest bidder contracted to withdraw and allowed the next lowest to be substituted as the successful bidder in consideration of the latter's promise to surrender part of the profits earned in carrying out the contract. Enforcement of the agreement was refused as an unlawful conspiracy against the State. *Hannah v. Fife*, 27 Mich. 172 (1873).

Constitutionality of Statutes.

L. 1889, art. 225 (repealed by L. 1931, act 228, and reenacted in substance as part of the present Penal Code, c. 286a, secs. 28.348 to 28.354), was held constitutional. *Bingham v. Brands*, 119 Mich. 255, 77 N. W. 940 (1899). Its unconstitutionality was hinted at in *Mers Capsule Co. v. U. S. Capsule Co.*, 67 Fed. 414 (1895), and in *A. Booth Co. v. Davis*, 127 Fed. 875 (1904), affd. 131 Fed. 31 (C. C. A. 6th, 1904), cert. den. 195 U. S. 636, 25 Sup. Ct. 793, 49 L. Ed. 355 (1904). However, a conviction based upon a violation of this act was sustained without question of its validity. *People v. Butler*, 221 Mich. 626, 192 N. W. 685 (1923). Cf. *People v. Farrell*, 263 Mich. 669, 249 N. W. 26 (1933), where the court appears to concede its unconstitutionality because of section 6 (sec. 28.353), which exempts from application of the antitrust laws combinations of producers of agricultural products. A similar Illinois act was held unconstitutional because of a like exemption in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679 (1902), later distinguished in *Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Marketing Ass'n*, 276 U. S. 71, 48 Sup. Ct. 291, 72 L. Ed. 473. (1928).

L. 1889, act 255 (secs. 28.31 to 28.40), was upheld as a separate act. The court rejected the contention that, by section 28.37, it was only supplementary to Act 225 of 1889 (secs. 28.348 to 28.354) declared unconstitutional. *People v. Farrell*, *supra*.

Section 28.33 authorizing the ouster of foreign corporations violating sections 28.31 to 28.40 was held valid as against the contention that the fourteenth amendment of the Federal Constitution limited the State to punishment or prevention of unlawful acts by such corporations. *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth Co.*, 143 Mich. 89, 106 N. W. 868 (1906). A literal interpretation of the

act would seem to authorize the secretary of state to act on his own administrative determination of the facts, but an attorney general has ruled that a prior judicial determination of a violation is essential to a valid revocation of a certificate to do business. Op. Atty. Gen., 1909 p. 183.

Application of Statutes.

In General.

A corporation, assignee of contracts of sale of several businesses, technically becoming the combination itself, may be proceeded against under L. 1899, act 255 (secs. 28.31 to 28.40), although it is not literally "two or more persons" as stated in the act because the object of the suit is to prevent carrying out of a plan in restraint of trade. *Atty. Gen. ex. rel. Wolverine Fish Co. v. A. Booth Co.*, 143 Mich. 89, 106 N. W. 868 (1906). But cf. *A. Booth Co. v. Davis*, 127 Fed. 875 (1904), *aff'd.* 131 Fed. 31 (C. C. A. 6th 1904), *cert. den.* 195 U. S. 636, 25 Sup. Ct. 793, 49 L. Ed. 355 (1904).

Although L. 1899, act 255 (secs. 28.31 to 28.40), does not apply to combinations fixing the price of labor as such, yet, where goods are sold and installing labor is furnished under one contract, the prices of both being fixed by the combination, a decree enjoining the price-fixing of labor in conjunction with the sale of goods is proper. *Hunt v. Riverside Cooperative Club*, 140 Mich. 538, 104 N. W. 40 (1905).

The Michigan anti-trust laws are not applicable to a stock pool formed and operated in New York. *Shambleau v. Hoyt*, 265 Mich. 560, 251 N. W. 778 (1933). Cf. *Erpelding v. McKearnan*, 143 Mich. 409, 107 N. W. 107 (1906).

L. 1899, act 255 (secs. 28.31 to 28.40), cannot operate retroactively. *A. Booth Co. v. Davis*, *supra*.

In an action for the purchase price for the sale of goods by a member of a "trust," the court held that acts done or contracts made which are otherwise lawful are not made illegal so as to preclude recovery in suits brought thereon or to prevent their use as defenses, by the fact that they are done or made by the member of a "trust." *International Harvester Co. v. Eaton Circuit Judge*, 163 Mich. 55, 127 N. W. 695 (1910).

Evidence that a contract of carriage was assigned by the shipper for the purpose of eliminating competition between shippers was held inadmissible in a suit by the assignee against the carrier for refusal to transport. *C. H. Little Co. v. Cadwell Transit Co.*, 197 Mich. 481, 163 N. W. 952 (1917). See also *Baker v. City of Grand Rapids*, 142 Mich. 687, 106 N. W. 208 (1906).

In an action to recover the fair value of goods sold, evidence that the current market price has been controlled by a combination of which the vendor is a member was eliminated as a factor in determining the current market price as the standard of fair value. *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901 (1891).

The owner of half the stock of a corporation that had sold out to another company sued to make the vendor's manager disgorge a secret personal profit received in the deal. Evidence that the parties were privies to an illegal contract to sell out to a furniture "trust" was held erroneously excluded. *Erpelding v. McKearnan*, *supra*.

In one of a series of similar contracts, defendant agreed to buy all salt produced by plaintiff. They also agreed that in payment of a certain stipulated sum, plaintiff would retire and cease to engage in production. In a suit for money alleged to be due on the contract, the court held this evidence sufficient to establish a violation of the antitrust law, and directed a verdict for the defendant. *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103, 96 N. W. 1 (1903).

A proposed contract between car-lot receivers of produce and wholesalers thereof, by which the former agreed not to sell directly to retailers, was a sufficient basis for a prosecution for conspiracy in restraint of trade. *People v. Butler*, 221 Mich. 626, 192 N. W. 685 (1923).

Agreements between members of a "club" of master plumbers and wholesalers of plumbing supplies fixed the prices of supplies, limited sales to an approved list, and provided for price discriminations between members and nonmembers. On contract work, bids were to be based on certain price and profit schedules, including the price of labor supplied. The bidding arrangements were enjoined as a violation of the antitrust laws, the remaining portions of the plan having been abandoned after institution of the suit. *Hunt v. Riverside Cooperative Club*, 140 Mich. 538, 104 N. W. 40 (1905).

Intimidation and obstruction of rival salesmen, interference with the customers, interference with contracts made and to be made, multiplicity of infringement suits, use of "knockout" credit cards and "knockout" machines were acts which, when done with the declared intention of driving out competitors and monopolizing the cash register industry, were sufficient to establish a violation of L. 1905, act 329 section 4 (sec. 28.64) *Atty. Gen. ex rel. James v. National Cash Register Co.*, 182 Mich. 99, 148 N. W. 420 (1914).

Specific prior acts of the above nature and acts of agents and statements of officers of the corporation are admissible to show the intent of the corporation to create and maintain a monopoly. *Ibid*.

If the same ownership and agencies persist in engaging in similar practices through several corporate changes, the acts of agents and statements of officers of former corporations are similarly admissible against the present corporation. *Ibid.*

A group of individuals engaged in the fish business entered into a contract with A, whereby A was to purchase all of their interests in their respective businesses, and assign all such interests to a newly formed corporation. In return, each of the group was to receive one-third of the agreed price in cash, the other two-thirds in corporate stock of the corporation. Each of them also agreed not to engage in business to compete with A. The court held that the transactions were a series of purchases, and the contracts not to compete ancillary to the sale of the businesses. Thus, not violative of the antitrust laws. *A. Booth Co. v. Davis, supra.* Cf. *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth Co., supra*, where the legality of the same corporation was directly attacked.

In dismissing quo warranto proceedings against defendant corporation the court held evidence of a corporation formed through combined interests of four contractors, who had previously done most of the paving in the city of Detroit, insufficient to establish an attempt to stifle competition and restrain trade. The city's power to reject bids was considered sufficient protection against the combination. *People ex rel. Retan v. Detroit Paving Co.*, 244 Mich. 119, 221 N. W. 122 (1928).

In absence of evidence of an intent to restrain competition, and where such was not the necessary effect, acquisition by a domestic copper mining company of a controlling interest in another such company by purchase of its corporate stock was held authorized by the State corporation laws and not violative of the antitrust laws. *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 704 (1908), *aff'd.* 167 Fed. 721 (C. C. A. 6th, 1909). See also *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668 (1919); *Voigt v. Remick*, 260 Mich. 198, 244 N. W. 446 (1932).

Procedural and Remedial Provisions.

The indictment must state facts to show that the restraint is unreasonable. *People v. Farrell*, 263 Mich. 669, 249 N. W. 26 (1933).

Suit for misuser of franchise must be by the State in a direct proceeding for that purpose and not by a private party. The applicable statutory provisions are sections 28.32, 28.33, and 28.64. *International Harvester Co. v. Eaton, supra.*

Although the private relator may have no interest in a proceeding in quo warranto, the allegation of relation is harmless. The proceeding is, in fact, by the attorney general and the relation does not

convert it into a private action. *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth, supra.*

Section 28.32 was construed to mean that quo warranto proceedings may be instituted by either the attorney general or the prosecuting attorney. It is optional with the attorney general whether to commence an action in the Supreme Court. *Atty. Gen. ex rel. Wolverine Fish Co. v. A. Booth Co., supra.*

Whether a prior suit under section 28.32 is necessary before quo warranto proceedings may be instituted is immaterial when the suit is against a foreign corporation. Section 28.33 clearly gives that right without reference to a precedent suit. *Ibid.*

Penalties.

A fine and suspended judgment of ouster of a corporation, or a simple fine are permitted in the discretion of the court. *Op. Atty. Gen., 1911, p. 221.*

A private person may sue to enjoin practices in violation of the antitrust laws where he is directly injured. *Bigelow v. Calumet and Hecla Mining Co., 167 Fed. 704 (1908), aff'd. 167 Fed. 721 (C. C. A. 6th 1908).*

Loss of directorship and diminished value of stock resulting from possible loss of charter through forfeiture, or from proposed revolutionary changes in the manner of operating the business, are injuries distinct from those suffered by the general public and are grounds for seeking a restraining order. *Ibid.*

In a suit by a member of a combination of coal dealers to enjoin the city from selling coal, the court held that the doctrine of clean hands will apply in an equity proceeding brought by a member of the combination. *Baker v. City of Grand Rapids, 142 Mich. 687, 106 N. W. 208 (1906) (suit by a member of a combination of coal dealers to enjoin the city from selling coal).*

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. Ann. (Henderson, Supp., 1939)

Resale Price Maintenance

Sections 19.321 to 19.325 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. Sec. 19.323. See Vol., *State Price Control Legislation: Resale Price Maintenance*.

Stat. Ann. (Henderson, 1936)

Cooperatives

Sections 28.31 and 28.826 provide that the antitrust law shall not be construed to prohibit producers of farm or dairy products from cooperating to insure a reasonably stable market for such products and from bargaining with distributors of such products singly or collectively, and that such cooperative undertakings shall not be held to be combinations or conspiracies in restraint of trade. See *General Antitrust Laws, supra*.

Agricultural Products; Labor Unions

Section 28.353 provides that the provisions of sections 28.348 to 28.354 shall not apply to agricultural products or livestock while in the hands of the producer or raiser, nor to labor unions. See *General Antitrust Laws, supra*.

Judicial Decisions

The legality of Cooperative Marketing Associations was not questioned in this case. It was expressly left for determination in subsequent proceedings. *Edmore Marketing Association v. Skinner*, 248 Mich. 695, 227 N. W. 681 (1929).

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****CONSTITUTIONAL PROVISIONS****Railroads**

Const. art XII, sec. 8, provides that a railroad may not consolidate its stock, property, or franchises with that of another railroad owning or controlling a parallel or competing line.

STATUTORY PROVISIONS

Stat. Ann. (Henderson, 1936)
Railroads

Section 22.651 provides that the sale or lease of one railroad by another may only be accomplished if the roads do not have the same terminals and are not competing lines.

Section 22.621 provides that the sale to another railroad of a partially constructed railroad whose incorporators are unable to complete it, is allowed only where they would not have the same terminals nor be competing lines.

Section 22.232 provides that a railroad company may subscribe to the capital stock of another such company if it does not have the same terminal points and is not a competing line.

Street Railways

Sections 22.435 and 22.481 permit the consolidation, purchase, or lease of one street railway by another provided they are not competing lines.

Common Carrier

Section 22.34 provides that it shall be unlawful for any common carrier to enter into any combination, contract, or agreement, express or implied, to prevent by any means or device, the carriage of freight from being continuous from the place of shipment to the place of destination.

Insurance

Section 24.52 provides that fire insurance companies may maintain rating bureaus in common with each other, subject to the anti-monopoly laws of the state.

Section 24.165 provides that it shall be unlawful for any corporation, foreign or domestic, to take subscriptions for the capital stock of any insurance corporation, or to take part in the formation of any insurance corporation for the purpose of controlling the management thereof in any way; and every contract, order, or subscription for stock, made directly or indirectly with such corporation, or any voting trust or other agreement, the purpose of which is to control such corporation, is declared to be void.

Sections 24.99 to 24.101 prohibit any foreign fire, fire and marine, or marine and inland insurance company doing business in this state, or any agent thereof, from entering into any agreement or understanding with any other company or its agents, the object or effect of which is to prevent free and open competition between them or their agents in any business transacted in the state, and require

as a condition precedent to doing business in the state, that such company shall file an undertaking with the Commissioner of Insurance, that it will not enter into any such agreement.

Commission Merchants

Sections 19.674 and 19.679 provide that entrance by commission merchants into a combination to fix prices below the market level, shall constitute a misdemeanor and ground for refusal or revocation of their license.

Foodstuffs

Section 12.77 makes it the duty of the Director of Markets to report to the Attorney General any violations of laws in restraint of trade or unlawful combinations to fix prices of foodstuffs.

Petroleum Products—Discrimination

Sections 28.71 to 28.77 provide that it shall be unlawful for any person engaged in the production, manufacture, or distribution of any petroleum products to discriminate as to price between different localities with the intention and for the purpose of destroying the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Machinery and Tools

Sections 28.51 to 28.55 and 28.825 provide that contracts or understandings to control or regulate the sale, enhance the price, or restrict competition in the sale of machinery, tools, vehicles, or appliances used in productive industry are illegal. The act specifically prohibits exclusive dealing contracts either by express agreement not to handle a similar line or by agreement to pay a certain sum as liquidated damages for each sale of a competing article. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Poultry—Discrimination

Section 28.821 provides that it shall be unlawful for any person engaged in the business of buying poultry, dairy products, potatoes, grain, or beans for the purpose of manufacturing, to discriminate as to price between different localities with the intention of creating a monopoly or destroying the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Potatoes—Discrimination

Section 28.822 provides that it shall be unlawful for any person engaged in the business of buying potatoes, grain, or beans for the purpose of resale, to discriminate as to the price between different

localities with the intention of creating a monopoly or destroying the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Petroleum Products—Discrimination

Section 28.823 provides that it shall be unlawful for any person engaged in the production, manufacture, or distribution of petroleum products to discriminate as to price between different localities with the intention and for the purpose of destroying the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Stat. Ann. (Henderson, Supp., 1939)

Bakery, Petroleum—Discrimination

Sections 28.78 (1) to 28.78 (14) provides that it shall be unlawful for any person engaged in the production, manufacture, distribution, or sale of bakery products or petroleum products to discriminate as to price between different localities with the intention to injure or destroy the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Stat. Ann. (Henderson, 1936)

Liquor

Section 18.1001 provides that no manufacturer, warehouseman, or wholesaler shall aid or assist any other vendor by gift or loan of money or property of any description or other valuable thing, or by the giving of premiums or rebates, and it shall be unlawful for any vendor to accept the same.

Section 18.1002 provides that no manufacturer, warehouseman, or wholesaler shall have any financial interest, directly or indirectly, nor shall the above or any stockholder thereof have any interest by ownership in fee, leasehold, mortgage, or otherwise, nor shall they have any interest directly or indirectly by interlocking directors or stock ownership in a corporation, all the above prohibitions having reference to and being concerned with the establishment, maintenance, operation, or promotion of the business of any other vendor.

Section 18.1021 provides that any licensee who shall violate any of the provisions of this act, or any rule or regulation pursuant thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail for not more than six months or by a fine of not more than \$500, or both, in the discretion of the court. Any person, other than persons required to be licensed under this act, who shall violate any of the provisions of this act shall be guilty of a misdemeanor.

Section 18.1022 provides that where a license for any premises has been revoked for any violation of this act, no license shall be

thereafter issued for such premises for a period of one year, and no license shall be issued to the person so violating this act for a period of two years after such revocation.

2. Public Contract Provisions

Stat. Ann. (Henderson, 1936)
Textbooks

Section 15.716 provides that the publisher of school textbooks must enter into a contract with the Superintendent of Schools, that he shall not enter into any understanding or combination to control the prices of school textbooks, or to restrict competition in the sale thereof in the State. See projected vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Railroads.

Where there is only a common junction point and there are other railroads in the area, the purchase of the stock of one railroad by another is not void under section 22.651 (L. 1901, act 30) on the ground that they have common terminals or are competing roads. *Lisman v. Knickerbocker Trust Co.*, 211 Fed. 413 (C. C. A. 6th, 1914).

Other Utilities.

Street Railways.

Section 22.481 (L. 1901, act 143) refers to the consolidation of companies in the State with companies organized in neighboring States, and does not apply to the consolidation of street and electric railways organized under the laws of Michigan and lying within its territorial limits. *Green v. Michigan United Rys. Co.*, 159 Mich. 58, 123 N. W. 607 (1909).

Where the question is whether an amalgamation of street railways is the result of purchases or of consolidation, the legality of the organization may be attacked only by the State in a direct proceeding for that purpose, and not collaterally in suits by and against the corporation based on dealings with it. *Shadford v. Detroit Y. & A. A. Ry.*, 130 Mich. 300, 89 N. W. 960 (1902).

Telephone Companies.

A bill to set aside an order issued by the commission permitting the consolidation of two telephone companies on the ground it would create a monopoly may not be maintained by another telephone company. The question involves a public grievance which must be redressed by those in whom the law has entrusted such authority. *Home Tel. Co. v. Michigan R. R. Comm.*, 174 Mich. 219, 140 N. W. 496 (1913).

The phrase "telephone company" includes any person, copartnership or corporation doing a telephone business. Op. Atty. Gen., 1916, p. 362.

Fire and Marine Insurance.

A bureau of inspection and rating which inspected risks, made rates for member insurers, and stamped rates on reports submitted by company agents daily, the agents being bound to conform to the ratings and rules made by the bureau, was considered a plan to suppress competition and in violation of section 24.100 (L. 1887, act 285, sec. 2). *Hartford Fire Insurance Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474 (1888).

Members of underwriters clubs, consisting of special and State agents of foreign insurance companies, who enter into an agreement, arrangement, or understanding of any kind, the object of which is to restrain open and free competition between the representatives of such companies in business done in the State, are amenable to the penalties of the statute. The visiting of local agents to warn them that rate cutting would result in reductions of rates for the locality by a specified percentage, the object or effect of the plan being to prevent free competition, would be a violation of sections 24.99 to 24.101 (L. 1887, act 285). Op. Atty. Gen., 1905, p. 100.

A reinsurance agreement which provides that one of the fire-insurance companies party thereto shall cease doing fire-insurance business under an agency system, except in New Hampshire and in the territory controlled by a New York agency, for a period of 3 years was held to be a violation of section 24.100 (L. 1887, act 285, sec. 2) prohibiting entrance into an agreement to suppress competition. Op. Atty. Gen., 1912, p. 190.

Liquor.

The term "vendor" as used in sections 18.1001, 18.1002, and 18.1021 (Act 8 of 1st Ex. 1933) includes distillers, brewers, and wholesalers. Op. Atty. Gen., 1935-36, p. 13.

In an opinion of the attorney general, the provisions in sections 18.1001 and 18.1002 were designed to eliminate monopolies from

arising within any one group of breweries or distilleries by prohibiting stockholders of a brewery to purchase stock in another brewery or distillery, interlocking directorates between several breweries or distilleries or between a brewery and a distillery, and the purchase of stock by a holding company in several breweries or distilleries. Op. Atty. Gen., 1935-36, p. 13.

Recovery against a brewing company for materials and labor furnished by contractor to one of the brewing company's retailers was refused because the contract was in violation of sections 18.1001, 18.1002, and 18.1021. The court held that the brewing company was both "wholesaler" and "vendor" within the express terms of these provisions. *Turner v. Schmidt Brewing Co.*, 278 Mich. 464, 270 N. W. 750 (1936).

II. CONTRACTS NOT TO COMPETE

Stat. Ann. (Henderson, 1936)

Section 28.348, prohibiting contracts and combinations to restrict production, control prices, or in any manner restrict free competition in the production or sale of any commodity, provides that such provisions shall in no way invalidate contracts known at common law and in equity as contracts for the "goodwill of a trade or business," which contracts shall be left upon the same terms and subject to the same limitations as at common law and in equity. See *General Antitrust Laws, supra*.

Sections 28.61 to 28.67 provide that all contracts by which anyone agrees not to engage in a trade, profession, or business, whether the restraint is partial or general, limited or unlimited, reasonable or unreasonable, are void, but that the act shall not apply to any contract in restraint of trade where the object of the restraint is to protect the transferee or goodwill of a trade, profession, or business without intent to create a monopoly; nor to employment contracts where the employer furnishes a route list within a certain territory and the employee agrees not to engage in a competing business for a period of 90 days after termination of his contract. See *General Antitrust Laws, supra*.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

Application of Common Law.

Contracts not to compete, ancillary to the sale of a business, if reasonable in their restraint, are valid at common law. *Jaquith v. Hudson*, 5 Mich. 123 (1858); *Hubbard v. Miller*, 27 Mich. 14 (1873); *Beal v. Chase*, 31 Mich. 490 (1875); *Grow v. Seligman*, 47 Mich. 607, 11 N. W. 404 (1882); *Thompson v. Andrus*, 73 Mich. 551, 41 N. W. 683 (1889); *Barrett Co. v. Ainsworth*, 156 Mich. 351, 120 N. W. 797 (1909); *Bottomley v. Brown*, 188 Mich. 134, 154 N. W. 37 (1915).

The basis for the validity of these contracts is the mutual advantage to seller and buyer: The former can get a good price when the latter can be reasonably protected in the enjoyment of the goodwill of the business. *Beal v. Chase, supra*. Cf. *Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140 (1897).

The restraint need not be limited in both time and space. *Beal v. Chase, supra* (not to engage in the printing business in Michigan while the buyer remained in the printing business in Ann Arbor); *Grow v. Seligman, supra* (not to enter into similar clothing business again in Bay City); *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157 (1897) (not to engage in ice business in Port Huron); *Bottomley v. Brown, supra* (not to engage in elevator or grain business at or near the town). Even though a restraint is expressed to be general as to place, the courts have limited it to the place where the business was carried on and its immediate vicinity. *Hubbard v. Miller, supra*; *Buck v. Coward*, 122 Mich. 530, 81 N. W. 328 (1899) (bill to enforce restraint dismissed on other grounds). In *Beal v. Chase, supra*, a restraint as to the whole State was held reasonable because an extensive mail-order business had been built up.

Sale of the stock of goods in a business branch was held sufficient to support a contract not to compete in *Hubbard v. Miller, supra*. However, where a principal stock in trade was sold to a competitor with a covenant not to compete and not to allow the building that had housed it to be used in competition with the buyer, the restraint was held invalid as its effect was simply to remove a competitor. *Western Wooden-Ware Assn. v. Starkey*, 84 Mich. 76, 47 N. W. 604 (1890).

The restraint is valid against informed stockholders of a corporation organized by a seller to evade his covenant, *Beal v. Chase, supra*; against the present partner of one of the covenantors as long as their association continues, *Hubbard v. Miller, supra*; and against the son of the seller who had acted as manager of the business sold and had signed a contract not to compete as a principal, *Thompson v. Andrus, supra*. The restraint also binds a seller who later is appointed to operate another competing business as trustee. *Geiger v. Carley*, 146 Mich. 550, 109 N. W. 1064 (1906).

A stockholder of the complainant ice company sold his stock to a third person not previously connected with the ice company, with a covenant not to engage in the ice business in Port Huron or vicinity. The purchaser subsequently assigned the benefit of this restriction to the ice company, retaining the stock. There was evidence that the arrangement had been entered into for the benefit of the ice company. However, the court expressed the opinion that the benefit of such a restrictive agreement might generally be assigned to a party having a direct interest in protection from such competition. Consequently, the court granted the assignee's request for an injunction restraining the defendant from engaging anew in the ice business. *Up River Ice Co. v. Denler, supra*.

Constitutionality of Statutes.

Sections 28.61 to 28.67 (L. 1905, act 329) have been held to be a valid declaration of the public policy of the State and not violative of the United States Constitution, amendment XIV. *Grand Union Tea Co. v. Lewitsky*, 153 Mich. 244, 116 N. W. 1090 (1908). At that time the only exception in section 28.66 related to contracts for the protection of the transferee of a trade or business or its goodwill.

Application of Statutes.

Section 28.67 (L. 1905, act 329, section 7) does not limit the application of this statute to contracts which are prohibited by sections 28.31 to 28.40 (L. 1899, act 255). Act 329 of 1905 is a separate act, having its own title, and applies, as such, to contracts within its terms. *Grand Union Tea Co. v. Lewitsky, supra*.

Section 28.66 (L. 1889, act 225; L. 1905, act 329, section 6) provides for exceptions in favor of contracts to protect the goodwill of a business transferred. *Grand Rapids Wood Finishing Co. v. Hatt*, 152 Mich. 132, 115 N. W. 714 (1908); *Buckhout v. Witwer*, 157 Mich. 406, 122 N. W. 184 (1909); *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513 (1913); *Wolverine Sign Works v. Powers*, 248 Mich. 371, 227 N. W. 669 (1929); *Arctic Dairy Co. v. Winans*, 267 Mich. 80, 255 N. W. 290 (1934); *Knudsen v. Sanitary Dairy Co.*, 270 Mich. 650, 259 N. W. 160 (1935). *Sewall v. Feller*, 288 Mich. 107, 284 N. W. 662 (1939).

The extent of the permissible restraint is determined as at common law; it must be reasonable as to time and place in the light of what is sought to be protected. *Weickgenant v. Eccles, supra* (not to engage in the furniture business in Battle Creek while the buyer remained in the furniture business there); *Wolverine Sign Works v. Powers, supra* (never to engage in the outdoor advertising business in the territory north of Cadillac, Mich.). In the latter case the business sold was conducted in 6 counties, but the restraint applied to 36 counties.

A vendor engaged in the coal and fish business on a dock sold a parcel of land nearby, on which was situated another dock, to a lumber dealer who agreed not to engage in such coal or fish business for 7 years nor "do anything that will conflict with the said coal or fish business" of the grantor. In a subsequent suit for damages for breach of this covenant, the court held the agreement was limited, as to the locality, to the dock situated on the property sold, and was valid both at common law and under Act 225 of 1889, substantially similar to sections 28.348 to 28.354. *Hitchcock v. Anthony*, 83 Fed. 779 (C. C. A. 6th, 1897).

Section 28.61 (L. 1905, act 329 sec. 1) prohibits all contracts not to compete, even if the restraint is reasonable, partial, or limited. Section 28.66 excepts only contracts for the benefit of transferees or vendees of a business or trade sold. Under the cases decided, however, there has been practically no change from the common law rule that a restraint reasonable in the light of the business sought to be protected is valid. The important elements appear to be a transfer of some type of business or trade which is connected with the property transferred and which is sought to be protected. See *Grand Rapids Wood Finishing Co. v. Hatt, supra* (sale for 20 years of exclusive rights to formula for furniture polish and contract not to sell them and not to divulge their contents); *Buckout v. Witwer, supra* (sale of large block of stock in baking company, promise by seller not to engage in baking business in Kalamazoo for 5 years); *Hitchcock v. Anthony, supra* (protecting business of vendor of wharf); *Gasses v. Rask, 219 Mich. 500, 189 N. W. 37 (1922)* (protecting business of surrendering lessee).

In view of the interpretation of section 28.66, it seems likely that, as at common law, the restraints will be enforced against persons importantly connected with businesses transferred who are not personally transferors, because the promises of such persons may be essential to an effective sale. *Arctic Dairy Co. v. Winans, supra* (promise by vendor's sons and nephews) followed in *Knudsen v. Sanitary Dairy Co., supra* (covenant by stockholder). Where stock in a corporation is sold, a restraint on impairing the goodwill of the corporation's business may be enforced by an individual promisee. The transfer may be treated as one of a beneficial interest in the goodwill. *Buckout v. Witwer, supra*.

Restrictive Covenants Ancillary to Employment.

Application of Common Law.

Contracts not to compete, ancillary to employment contracts are valid when the restraint on trade is reasonable. Thus an agreement between two physicians in a town by which D agreed for a payment of \$500 to go into practice with T for 6 months, at the end of which time D was to leave the city and not practice there for 5 years, was specifically enforced, the only discussion on appeal relating to the extent of the decree. *Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230 (1883)*.

Application of Statutes.

Section 28.66 (L. 1905, act 329 sec. 6) as amended by Act 171 of 1917, allowed a contract of employment to provide that an employee using a route list of customers would not "perform similar services in such territory for another engaged in a like or competing line

of business for a period of ninety days after the termination of such contract or services." The words "for another" were construed to mean one other than the parties to the contract and therefore not to prevent the employee himself from engaging in such business. *C. F. Burger Creamery v. Deweerdt*, 263 Mich. 366, 248 N. W. 839 (1933). Act 202 of 1935 amended this section to read "for himself or another."

The language in section 28.61 (L. 1905, act 329, sec. 1) is much more specific regarding contracts not to compete than Act 225 of 1889. All contracts by which employees promised not to compete on termination of service were invalid until section 6 of the former Act, section 28.66, was amended to provide for limited restraints on employees who were furnished route lists. *Grand Union Tea Co. v. Lewitsky*, 153 Mich. 244, 116 N. W. 1090 (1908). Before the amendment, the employee could be restrained by injunction from using the list, but he still could work for another on his former route. *Grand Union Tea Co. v. Dodds*, 164 Mich. 50, 128 N. W. 1090 (1910). See *Federal Laundry v. Zimmerman*, 218 Mich. 211, 187 N. W. 335 (1922). Cf. *C. F. Burger Creamery v. Deweerdt*, 263 Mich. 366, 248 N. W. 839 (1933); *Nissenbaum v. Pikstein*, 266 Mich. 28, 253 N. W. 203 (1934).

Sections 28.61 to 28.67 (L. 1905, act 329) prohibit contracts by employees to disclose or make personal use of secret processes of the employer. *Glucol Mfg. Co. v. Schulist*, 239 Mich. 70, 214 N. W. 152 (1927). Cf. *Dow Chemical Co. v. American Bromine Co.*, 210 Mich. 262, 295, 177 N. W. 996, 1007 (1920), indicating the employee could not bind himself by contract not to engage in manufacturing using processes he had learned.

A covenant in an agreement for property settlement in contemplation of a divorce, in which the wife who assisted her husband in his undertaking business agreed not to engage in the undertaking business in the county and not to use her name in connection with carrying on such business, although she could work as an assistant or employee, was held invalid under sections 28.61 to 28.67 (L. 1905, act 329). *Lyzen v. Lyzen*, 221 Mich. 302, 191 N. W. 6 (1922).

Restrictive Covenants Ancillary to the Lease of Property.

Application of Common Law.

A lease of the right to use railroad lines on the condition that the lessee would pick up no freight for delivery to the lessor's competitor was held valid. The lessor, if it wished, could have refused to lease at all. *Michigan Central R. R. Co. v. Pere Marquette R. R. Co.*, 128 Mich., 333, 87 N. W. 271 (1901). See also, *Western Wooden Ware Assn. v. Starkey*, 84 Mich. 76, 47 N. W. 604 (1890).

Application of Statutes.

If the purpose is not the protection of a business or good will, but to remove a competitor, the restraint is invalid. Thus a covenant not to compete in the manufacture of chaplets or anchors ancillary to a lease of the machinery by the manufacturer thereof to a competitor was held to violate Act 225 of 1889, now in substance sections 28.348 to 28.354. *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027 (1900). The fact that the machinery was immediately leased back to the original lessor for use in any other line of business was indicative of the purpose of the arrangement. *Ibid.*

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (Henderson, 1936)

Act 229, 1905, p. 331

Sec. 28.51. Contracts in restraint of trade; illegality; inapplicability of act to contracts relating to good will.—That all contracts, understandings, and agreements, made or entered into by and between parties capable of making a valid contract, the purpose or intent of which is to prohibit, restrict, limit, control, or regulate the sale of any article of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry; or to enhance or control or regulate the price thereof; or in any manner to restrict, limit, regulate, or destroy free and unlimited competition in the sale thereof, shall be deemed illegal and void as in restraint of trade: *Provided*, That nothing in this act shall be construed to impair or invalidate agreements or contracts known to the common law and in equity as those relating to good will of trade. (C. L. '29, sec. 16661; C. L. '15, sec. 15027.)

Sec. 28.52. Same; illegality of certain kinds.—Contracts, understandings, and agreements of the following nature, whether written or oral, are hereby declared to be illegal and void under the provisions of section one (1) of this act:

First. Contracts compelling and requiring that any particular make or brand of any article of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry, shall be dealt in or sold, by either party to such contract, to the exclusion of all other makes or brands of such article or articles.

Second. Contracts providing for the exclusive sale of certain makes or brands of manufactured articles of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry, and stipulating certain sums to be paid as liquidated damages to either party for every article so sold of other than the specified make or brand. (C. L. '29, sec. 16662; C. L. '15, sec. 15028.)

Sec. 28.53. Same; forfeiture of charter.—Any partnership limited, or corporation, organized under the laws of this state, or authorized to carry on business in this state, which shall make, execute or enter into any contract, understanding, or agreement made illegal under the terms of this act, or shall do any act in pursuance of carrying the same into effect in whole or in part, shall be deemed to be guilty of a misuser and shall forfeit its charter and all rights thereunder. (C. L. '29, sec. 16664; C. L. '15, sec. 15030.)

Sec. 28.54. Same; filing quo warranto by attorney general.—It shall be the duty of the attorney general to file an information in the nature of quo warranto, upon his own relation, or the relation of any person, on leave granted, against any corporate body whenever it shall violate any of the provisions of this act. (C. L. '29, sec. 16665; C. L. '15, sec. 15031.)

Sec. 28.55. Same; civil liability.—Any person who shall be injured in his business or property, through the making or operating of any contract, understanding or agreement, made in violation of this act, shall have a right of action against the parties to such contract, understanding, or agreement for all damages sustained by him in consequence thereof, and may recover the same in any court of competent jurisdiction. (C. L. '29, sec. 16666; C. L. '15, sec. 15032.)

The foregoing six sections derive from the Act of June 16, 1905, No. 229.

Sec. 28.825. Contracts deemed illegal and in restraint of trade; exception.—Any person making or entering into any contract, understanding, or agreement made illegal by the terms of this section, or who shall do any act in pursuance of carrying the same into effect in whole or in part, shall be guilty of a misdemeanor.

All contracts, understandings, and agreements, made or entered into by and between parties capable of making a valid contract, the purpose or intent of which is to prohibit, restrict, limit, control, or regulate the sale of any article of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry; or to enhance or control or regulate the price thereof; or in any manner to restrict, limit, regulate, or destroy free

and unlimited competition in the sale thereof, shall be deemed illegal and void as in restraint of trade: *Provided*, That nothing in this section shall be construed to impair or invalidate agreements or contracts known to the common law and in equity as those relating to goodwill of trade.

Contracts, understandings, and agreements of the following nature, whether written or oral, are hereby declared to be illegal and void under the provisions of this section:

First. Contracts compelling and requiring that any particular make or brand of any article of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry, shall be dealt in or sold, by either party to such contract, to the exclusion of all other makes or brands of such article or articles;

Second. Contracts providing for the exclusive sale of certain makes or brands of manufactured articles of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry, and stipulating certain sums to be paid as liquidated damages to either party for every article so sold of other than the specified make or brand.

Judicial Decisions

Exclusive Dealing Arrangements.

There appears to be no common law policy against exclusive dealing contracts. The following contracts were enforced: *Selznick v. Garson*, 202 Mich. 106, 167 N. W. 1010 (1918) (exclusive rights to motion pictures); *White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 172 N. W. 603 (1919) (exclusive sale of fuel wood); *Shell Petroleum Corp. v. Ford*, 255 Mich. 105, 237 N. W. 378 (1931) (lease and sublease back with contract of employment and exclusive handling of plaintiff's products); *Beck's Service Stations, Inc., v. Sun Oil Co.*, 259 Mich. 210, 242 N. W. 890 (1932) (lease and contract for exclusive handling of lessor's products).

For exclusive contracts with a municipality, see *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. 659 (1888) and *City of Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269 (1900).

A contract to buy clothing patterns exclusively from a certain firm for five years was held valid and not in violation of the statutes, 1905, act 329). *Peerless Pattern Co. v. Gauntlett*, 171 Mich. 158, 136 N. W. 1113 (1912).

A corporation may give one person in a particular locality the exclusive right to sell a certain brand of commodity and such contract is not in violation of the law preventing monopolies and contracts in restraint of trade. Op. Atty. Gen., 1909, p. 114.

MINNESOTA



I. TRUSTS, COMBINATIONS, MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. (Mason, 1927)

Sec. 10463. Trusts and combinations in restraint of trade prohibited.—No person or association of persons shall enter into any pool, trust agreement, combination, or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade, within this state, or between the people of this or any other state or country, or which tends in any way or degree to limit, fix, control, maintain or regulate the price of any article of trade, manufacture, or use bought and sold within the state, or which limits or tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do; *provided, however*, that it shall be lawful for any person, firm, corporation, or association of persons conducting or carrying on a lawful business, to purchase the business and property of a competitor and thereafter consolidate such business and the property used in connection therewith under the sole management of and control of the purchaser if, before such purchase and consolidation, the attorney general of this state shall, after hearing duly had upon notice to all persons interested, find and determine that such consolidation will not unreasonably limit and restrain the production and sale of an article of trade, commodity or service, and will not be detrimental to the public interest. Every person violating any provision of this section, or assisting in such violation, shall be guilty of a felony, and upon conviction thereof shall be punished

by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the state prison for not less than three nor more than five years. (R. L. '05 sec. 5168, G. S. '13 sec. 8973, amended '23 c. 251 sec. 1.)¹

Sec. 10468. Domestic corporations to forfeit franchises—Foreign corporations.—Every domestic corporation which shall, directly or indirectly, violate any provision of section 10463, or which shall in any way assist in carrying out any of the purposes of such illegal pool, trust agreement, combination, or understanding, in addition to the penalties imposed upon the members thereof by said section, shall forfeit all its corporate franchises and every foreign corporation admitted to transact business in this state, guilty of like conduct, shall thereafter be prohibited from continuing its business therein. The attorney general and the several county attorneys shall begin and conduct, in the district court, all actions and proceedings necessary to enforce the provisions of this section, and any citizen may do so. Said court, by injunction or restraining order, may prohibit the transaction of business by such corporation pending the trial of such action (5169) [8974].

Sec. 10469. Foreign corporations, how readmitted.—Any foreign corporation which has heretofore or may hereafter be prohibited by judgment under section 5169, Revised Laws, 1905 [10468], from continuing its business within this state, and whose business at the beginning of the proceedings resulting in such judgment was and thereafter continued to be in whole or in part manufacturing within this state, shall be entitled to the rights, benefits, and privileges of section 2889, Revised Laws, 1905 [7494], by filing with the secretary of the state the affidavit specified in the next section, provided that such corporation shall within the times hereinafter specified apply for the assessment of and pay the fine mentioned in section "3" [10471] hereof. *Provided*, That at the time of filing said affidavit the said corporation shall deposit in court with the clerk thereof the sum of \$10,000.00, which sum or any part thereof shall be applied on any fine imposed upon such corporation under section (3) hereof. ('13 c. 378 sec. 1) [8975]

Sec. 10470. Affidavit.—Said affidavit above mentioned shall be made by the president, secretary, general manager, or other officer or agent of said corporation having knowledge of the facts, and shall state that the business of said corporation at the beginning of said

¹ Secs. 10464 to 10467 dealing with locality discrimination, were repealed by L. 1937, c. 116, pt. 1, sec. 3, Mason (Supp. 1938), sec. 3976-39, and replaced by secs. 3976.37 to 3976.49, Stat. (Mason, Supp. 1938.)

proceedings was and thereafter continued to be in whole or in part manufacturing within the state, and that the said corporation does not at the date of said affidavit directly or indirectly violate any provision of section 5168, Revised Laws 1905 [10463], and does not at said date in any way assist in carrying out any of the purposes of any pool, trust agreement, combination, or undertaking mentioned in said section 5168 [10463]. ('13 c. 378, sec. 2) [8976].

Sec. 10471. Application to fix fine.—Within thirty days after the filing of said affidavit such corporation shall make application in the case in which said judgment was entered for an order of the court to assess and fix a fine upon said corporation in pursuance of this act. Eight days' notice of such application shall be given to the attorney general, and the court, after hearing, shall assess and fix said fine at such sum not exceeding ten thousand dollars (\$10,000) as to it shall seem just and reasonable under the circumstances shown in the record of said case. If said corporation shall fail to make within said thirty days such application for assessing and fixing said fine, or shall fail to pay said fine within said sixty days after the written notice of the amount thereof from the attorney general, all said rights, benefits, and privileges under said section 2889 [7494] shall cease. ('13 c. 378, sec. 3) [8977].

Sec. 10472. Applicable only to first judgment.—This act shall apply only to the first judgment entered against such corporation under said section 5169 [10468], and shall be inapplicable to any subsequent judgment against it under said section 5169 [10468], and said rights, benefits, and privileges of said section 2889 [7494],² shall cease whenever the business of such corporation shall cease to be in whole or in part manufacturing within this state. ('13 c. 378, sec. 4) [8978].²¹

Sec. 10473. Vacation of rights, etc.—Motion by attorney general.—At any time after the filing of said affidavit the attorney general may make, in the case in which such judgment was entered, a motion for an order vacating said rights, benefits, and privileges under said section 2889 [7494]. Said motion shall contain a specification of the grounds thereof and shall be served on such corporation in the manner provided for the service of a summons. The court shall hear said motion in a summary maner on said specification and on the corporation's answer thereto and, on such evidence as may be submitted at the hearing, and shall make its findings of facts and con-

² Sec. 7494 was repealed by L. 1935, c. 200, secs. 27 and 30 (Mason, Supp. 1938, sec. 7495-27). The equivalent provision, concerning reinstatement of foreign corporations' permit to do business, is found in sec. 7495-19, Mason, Supp. 1938.

clusions of law therein; and if it be found that such corporation has since the filing of said affidavit directly or indirectly violated any provision of said section 5168 [10463], or has in any way assisted in carrying out any of the purposes of any pool, trust agreement, combination, or understanding mentioned in said section 5168 [10463], the court (by a supplementary judgment in said case) shall enter judgment vacating all of said rights, benefits, and privileges or impose a fine not less than \$5,000 and not exceeding \$10,000. ('18 c. 378, sec. 5) [8979].

Stat. (Mason, Supp. 1940)
Corporations

Section 7492-40 provides that nothing in the general corporation laws referring to consolidation and merger shall be construed to authorize a corporation to do any act in violation of the common law or statutes of the State or of the United States with regard to monopolies and illegal restraints of trade.

Stat. (Mason, Supp. 1940)
Discriminations

Sections 3976-37 to 3976-39 provide that it shall be unlawful for any person doing business in the State engaged in the production, manufacture, distribution of any commodity, from selling so as to discriminate as to price between localities for the purpose of destroying the competition of any regular-established dealer in such commodity, or to prevent the competition of any person or corporation who attempts to become such dealer. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Stat. (Mason, 1927)
Conspiracy Statute

Section 10055 provides in part that it is illegal for two or more persons to commit any act injurious to trade or commerce.

Judicial Decisions

Application of the Common Law.

A contract between connecting carriers providing for transportation arrangements over their respective lines, even though resulting in a monopoly, was neither illegal nor void in contravention of

public policy. *Stewart v. Erie & Western Transportation Co.*, 17 Minn. 372 (Gil. 348) (1871).

An agreement by members of an association of retail lumber dealers to boycott any manufacturer who sold directly to consumers is not in restraint of trade. A person may refuse to deal with another, at his will, and the fact that this action is taken in concert by agreement does not render it illegal. Whether the agreement is lawful or unlawful, it is not actionable at the instance of third parties, and plaintiff manufacturer has therefore no cause of action against defendant association. *Bohn Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337 (1893).

An allegation was held to set out a good cause of action which stated that defendants, a produce exchange consisting of nearly all the produce dealers in Minneapolis, maliciously and without serving the legitimate ends of defendant's business conspired together by refusing and inducing others not to deal with plaintiff, resulting in complete ruination of his business. *Ertz v. Produce Exchange Co. of Minneapolis et al.*, 79 Minn. 140, 81 N. W. 737 (1900).

Constitutionality of Statutes.

A foreign corporation found guilty of entering into a combination in restraint of trade in violation of sections 10463 and 10468 (Rev. Laws 1905, secs. 5168, 5169) was prohibited from continuing its business only insofar as it affected intrastate traffic. *State v. Creamery Package Manufacturing Co.*, 115 Minn. 207, 132 N. W. 268 (1911).

Application of Statutes.

In General.

The constitution and bylaws of a produce-exchange corporation providing for the extent of credit to be allowed its members, discriminations in prices for produce sold to nonmembers, and the control of delivery of goods, were held in violation of section 10463 (L. 1899, c. 359) as an unlawful restraint tending to limit and control the market price in produce and limit and interfere with the free and open purchase and sale of commodities. *Ertz v. Produce Exchange Co. of Minneapolis et al.*, 82 Minn. 173, 84 N. W. 743 (1901).

The State brought a proceeding to forfeit the corporate franchise of the Duluth Board of Trade and to restrain it from transacting business for violation of section 10463 (L. 1899, c. 359; Rev. Laws 1905, sec. 5168). The court in dismissing the bill held that the board is not engaged as a conspiracy or combination in restraint of trade; it does not limit or interfere with free competition in the production, purchase or sale of grain; it is a combination of dealers in articles of similar nature in a particular locality for the purposes of fairly

regulating business methods and providing rules for free dealing among its members; and that in doing so it exercises no improper control over nonmembers so as unreasonably to restrict operations and trade in grain and other commodities. *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395 (1909).

Plaintiff, a victim of an unlawful conspiracy in restraint of trade involving the sale and assignment of patent rights, may sue for rescission of these transactions where his demand is not dependent upon an unlawful agreement, even though, in the course of business, both parties may have committed illegal acts. *Disbrow v. Creamery Package Manufacturing Co.*, 110 Minn. 237, 125 N. W. 115 (1910).

Plaintiff and defendant entered into a patent pooling contract for the manufacture of automatic electric breadtoasters. The resale price-fixing agreements contained therein were declared valid as necessary for the protection of their respective license interests. *Dial Toaster Corp. v. Waters-Genter Co. et al.*, 181 Minn. 606, 233 N. W. 870 (1930).

An agreement between several competing corporations and the stockholders of each for the purpose of creating and pyramiding the several companies into a single holding corporation through transfer of stocks and nominal transfer of properties was held invalid as a combination in restraint of trade. The fact that the corporation taking title subsequently carried on the business in the names of the old concerns and placed traveling agents in the field who pretended to compete with each other, but in fact secretly agreed upon prices in advance, is further evidence of their intent to stifle competition. *State v. Creamery Package Manufacturing Co.*, 110 Minn. 415, 126 N. W. 126 (1910). Rehearing denied, 110 Minn. 437, 126 N. W. 623 (1910).

A contract between a motion-picture distributor and an exhibitor containing an arbitration provision (declared unlawful as a violation of the Federal Antitrust Act by the United States Supreme Court in *Paramount Famous Lasky Corp. v. U. S.*, 282 U. S. 30, 51 Sup. Ct. 42, 75 L. Ed. 145) to which exhibitors were required to agree before obtaining pictures, was held illegal as against public policy; the illegality of the arbitration clause rendered the entire contract void. *Fox Film Corp. v. Muller*, 192 Minn. 212, 255 N. W. 845 (1934). Followed in *United Artists Corp. v. Miller*, 192 Minn. 219, 255 N. W. 848 (1934).

Labor Agreements.

An agreement or combination between employees to raise wages and fix charges for personal services and hours of work is not within the prohibitions of section 10463 (Rev. Laws 1905, sec. 5168). *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395 (1909).

Members of a building trade union agreed to withhold their services from the plaintiff contractor, or its subcontractors, until a bona fide dispute was settled. Such an agreement among union employees was held not to be in violation of section 10463 (Gen. Stat. 1913, sec. 8973). *George J. Grant Construction Co. v. St. Paul Building Trades Council et al.*, 136 Minn. 167, 161 N. W. 520 (1917). Reh'g. den., 136 Minn. 176, 161 N. W. 1055 (1917).

Defenses.

An agreement between a group of independent milk dealers to increase prices of milk and other products was held to be in violation of section 10463 (Rev. Laws 1905, secs. 5168 and 5169). That defendants had been selling their milk and cream at a loss, or that other dealers, more favorably situated, occupied an advantageous position in the trade, or that the increased price was necessary to afford them a reasonable profit, or that each could have independently raised its prices were all defenses insufficient to justify or excuse the combination. *State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417 (1913).

The court also held that the original antitrust statutes (L. 1899, c. 359) imposed the penalties of both fine and forfeiture of charters but that the penalty sections in the 1905 enactment provided for the forfeiture of charters exclusively. *State v. Minneapolis Milk Co.*, 124 Minn. 34, 144 N. W. 417 (1913).

A foreign corporation, found guilty of violating sections 10463 and 10468 (Rev. Laws 1905, sec. 5168 and 5169), was properly prevented from continuing to do business in the state. *State v. Creamery Package Manufacturing Co.*, 115 Minn. 207, 132 N. W. 268 (1911).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. (Mason, Supp. 1940)

Resale Price Maintenance

Sections 3976-51 to 3976-60 validate contracts fixing the resale price of commodities bearing a trade-mark, but the statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation*.

Stat. (Mason, 1927)

Cooperatives

Section 6106 provides that an agricultural cooperative marketing association organized under sections 6079 to 6113-1 shall not be deemed to be a combination in restraint of trade, an illegal monopoly,

or attempt to lessen competition by arbitrary price fixing. See; *Tying Contracts and Exclusive Dealing Arrangement, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Agricultural Cooperatives.

A cooperative organized under the Cooperative Marketing Act, sections 6079 to 6133, brought an action to enforce a contract entered into with one of its members. The act was held constitutional and not in contravention of Const. art. IV, sec. 35, forbidding persons from interfering with or restricting the freedom of competition in marketing food products and other necessities; it makes no provision for methods or means for marketing, nor does it preclude the regulation thereof. *Minnesota Wheat Growers' Cooperative Marketing Association v. Huggins*, 162 Minn. 471, 203 N. W. 420 (1925).

A pooling agreement was entered into between owners of large quantities of wheat for the purpose of controlling the market and forcing up prices; in so doing, schemes for options and other devices were adopted. As this was an attempt to monopolize the markets for food products and restrict freedom of competition in such markets, the contract was held unlawful in violation of Const. art. IV, sec. 35. *Lane v. Leiter* and *Interior Elevator Co. v. Leiter*, 237 Fed. 149 (C. C. A. 7th, 1916).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Food Products

Const. art. IV, sec. 35, declares that any combination of persons, either as individuals or officers of any corporation, to monopolize the market for food products or to interfere with or restrict the freedom of such markets is a criminal conspiracy punishable as the legislature provides.

STATUTORY PROVISIONS

Stat. (Mason, 1927)

Railroads

Section 7506 prohibits the consolidation, lease, purchase, or ownership in any way of the stock or franchise of parallel and competing railroads; the purchase of any property owned and operated by any

other railroad corporation as part of a railroad which is parallel to and competing with the railroad of such purchasing company; and the question whether such railroads are parallel and competing lines may be tried by a jury as in civil cases, at the application of the complaining party.

Section 7507 prohibits the consolidation of the capital stock, lines, property, franchise, or control of two or more parallel and competing lines of railroad in the hands of any corporation, trustee, agent, or representative of any corporation wheresoever situated.

Section 7511, relating to aid in the construction of connecting railroads, provides that a railroad corporation may lease or purchase part or all of a railroad constructed by any other corporation whose lines are continuous or connected but not parallel with its own.

Common Carriers

Section 4831 provides that no common carrier shall enter into any agreement or combination with another carrier for the division or pooling of the business of different and competing carriers, or to divide their aggregate or net proceeds.

Necessities

Sections 6241, 6242, and 6244 authorizes the Commissioner of Agriculture to investigate the prices of common necessities including heat, light and power, food, clothing, and automobiles, and to publish reports of the same. If it appears to him any laws of the state have been violated, he shall present all information available to the proper law-enforcing or prosecuting officer.

Food Products

Sections 10485 and 10486 provide that any combination of persons, either as individuals or officials of any corporation, to monopolize the markets for food products or to restrict freedom of such markets is a criminal conspiracy punishable by a fine of \$50 to \$100 or imprisonment for not to exceed 90 days.

Grain

Sections 5068 and 5069 make it unlawful for any person handling grain in any public local grain warehouse, to enter any agreement or understanding with any other person operating another such warehouse at a railroad station whereby the amount of grain handled by them, or the profits thereof, shall be pooled or apportioned or the price of grain at the station fixed or affected in any way. Violation

of this provision constitutes a misdemeanor and the Railroad and Warehouse Commission may, after proper hearing, revoke the license of any person operating such a warehouse.

Livestock Exchanges

Sections 5237 and 5238 provide that rules or regulations of livestock exchanges restricting their business to members are null and void, and any dealings of members with nonmembers shall not be a cause for cancellation or forfeiture of membership. Upon violation of these provisions the attorney general may proceed to dissolve the organization or restrain any continued violation.

Boards of Trade, Chambers of Commerce

Sections 7905 to 7908 provide that every chamber of commerce or board of trade in which members buy grain, livestock, or other farm products for themselves or others is a public market; that every such market shall be open to membership to any person, firm, or corporation who makes application and whose method of business operation does not conflict with any reasonable rule, regulation, or bylaw of such market; that any such exchange adopting a rule to avoid the provisions of this act or to delay membership is declared a monopoly in restraint of trade and guilty of a felony, and further trading therein by any member shall be unlawful; and finally, that the attorney general may prosecute such organization for any violation thereof and institute quo warranto proceedings to dissolve the exchange and prevent its further operation.

Insurance Companies—Funeral Supplies

Section 3315 provides that an insurance company shall not operate, directly or indirectly, in affiliation with or connection with a funeral director or undertaking establishment in any manner so as to deprive deceased's representatives of the opportunity to obtain funeral and burial supplies in the open market, but that this shall not apply to cooperative burial associations.

Cold Storage

Section 6215 provides that if market conditions of food articles, resulting from hoarding or deterioration, are such as to require the release for immediate sale of foodstuffs held in cold storage, so that there will be an immediate market at fair and reasonable prices, the Commissioner of Agriculture may shorten the period food products may remain in cold storage, from twelve months to a shorter period.

Petroleum—Discrimination

Sections 10474 to 10481 provide that it shall be unlawful for any person or corporation doing business in the State and engaged in the production of petroleum to discriminate as to price between localities, for the purpose of destroying the business of a competitor or creating a monopoly in any locality. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Grain—Discrimination

Sections 5096 to 5097 provide that it shall be unlawful for any person or corporation buying grain to discriminate as to price between localities for the purpose of creating a monopoly or destroying the business of a competitor. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Stat. (Mason, 1927) as amended by Stat. (Mason, Supp. 1938)

Farm Products—Discrimination

Sections 6248-1 to 6248-9 provide that it shall be unlawful for any person engaged in the business of buying or selling farm products to discriminate as to price between different localities. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Stat. (Mason, Supp. 1940)

Liquor

Section 3200-27 provides that no manufacturer or wholesaler shall either directly or indirectly own or control or have any financial interest in any retail business selling intoxicating liquor, but this restriction shall not be construed to deny such person the right to use or have his property rented for such purpose in any case where the manufacturer or wholesaler was the bona fide owner of the premises prior to November 1, 1933. No retailer's "on-sale" or "off-sale" license shall be directly or indirectly issued to any person or for any place for which a license for another class has been granted.

Section 3200-33 provides that when any licensee shall wilfully violate the provisions of this Act, his license shall immediately be revoked and his bond forfeited, and no license of any class shall for a term of 5 years thereafter be issued to the same person or to any person who at the time of the violation owns any interest, whether as holder of more than 5% of the capital stock of a corporation licensee, as partner, or otherwise, in the premises or in the business conducted thereon, or to any corporation, partnership, association, enterprise, business, or firm in which any such person is in any manner interested. See *Tying Contracts and Exclusive Dealing Arrangements*.

2. Public Contract Provisions

Stat. (Mason, Supp. 1938)
County and Municipal Supplies

Section 1933-77 provides that specifications for purchases of supplies for counties, townships, cities, boroughs, or school districts shall not be so prepared as to exclude all but one type or kind, but shall include competitive supplies and equipment. See projected Vol. *Governmental Purchasing*.

Stat. (Mason, 1927)
Textbooks

Section 3054 provides that if any publisher enters into any agreement or understanding to control the price of school books, or restrict competition in the adoption or sale thereof, the attorney general shall institute proceedings for the forfeiture of the publisher's bond and revocation of his license, and every contract made by the publisher contrary to the provisions of this section shall become null and void at the option of the other parties thereto. See Vol. *Governmental Purchasing*, a projected study.

3. Anticoercive Financing Statutes

Stat. (Mason, Supp. 1938)

Sections 3976-71 to 3976-85 are identical in text with the California statute except that:

(1) Section 3976-74 adds the paying or giving of "anything of value." (Cf. Cal., sec. 4.)

(2) Sections 3976-75, 3976-76 add the receiving of "anything of value." (Cf. Cal., secs. 5, 6.)

(3) Section 3976-79 provides that a violation of the act shall be a gross misdemeanor, and exempts retail sellers or their employees. (Cf. Cal., sec. 9.)

(4) Section 3976-83 omits subsection (c) of the California act. (Cf. Cal., sec. 13.)

See Cal. Gen. Laws (Deering, 1937) Act 5137, secs. 1 to 15 set forth in full at pages 50-54.

Judicial Decisions

Railroads.

The enactment of a legislative restriction revokes an unexecuted power inconsistent thereto, granted in a corporate charter by a prior legislative act. The statute (L. 1874, c. 29; L. 1881; c. 94; sec.

7506) prohibiting the consolidation, merger, or purchase of competing railroads limits a prior grant of power to the defendant to merge and consolidate with other railroads generally, when this power has not theretofore been exercised. While the agreement between the defendant, Great Northern Railroad and the Northern Pacific Railroad provided for an interchange of traffic upon fixed tariffs, the purchase by the defendant of a controlling interest in the latter prevented unrestricted competition between the two parallel railroads and was therefore in violation of section 7506 and invalid. *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838 (1896).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

In General.

A contract, in connection with the sale of a lumber business, contained a provision not to engage in the same business at the same place for 5 years. Such a contract is not to be extended beyond its fair and natural import. It cannot be extended to subsequent isolated acts or occasional services in good faith, nor employment in some subordinate capacity not affecting the management of the business. *Nelson v. Johnson*, 38 Minn. 255, 36 N. W. 868 (1888).

A contract providing that the seller of a benefit certificate business refrain from selling benefit certificates for a period of 3 years in the three States in which he had established a lucrative business was held to be a valid covenant. The question of reasonableness depends upon whether it goes far enough to afford only a fair protection to the party in whose favor it is made. This depends upon the kind of trade or business which is the subject of the contract. *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 (1891).

A contract for the sale of the controlling stock of a mercantile business which provided that the seller would not engage in the mercantile business in the same village so long as the buyer continued in trade was held valid. *Kronschabel-Smith Co. v. C. Kronschabel*, 87 Minn. 230, 91 N. W. 892 (1902).

In connection with the sale of a retail mercantile business a contract that the seller, also the lessor, would not rent the building to any other party for the purpose of a general merchandise business for the term of one year was held valid. *Berghuis v. Schultz*, 119 Minn. 87, 137 N. W. 201 (1912).

An agreement for the sale of a hog and cattle shipping business with a provision not to engage in such business for 5 years within an area of 10 miles is valid. *Espenson v. Koepke*, 93 Minn. 278, 101 N. W. 168 (1904).

A contract for the sale of a laundry business providing that the vendors agreed not to engage in such business within a radius of 5 miles of a city is not void because unlimited as to time. *Southworth v. Davison*, 106 Minn. 119, 118 N. W. 363 (1908). See also *Holliston v. Ernston*, 124 Minn. 49, 144 N. W. 415 (1913).

A contract for the sale of a garage and automobile sales business is valid even though it provides that the seller will not engage in such business in the county for a period of 10 years, except that after 2 years seller may locate at the largest city in the county to sell automobiles, provided that he does no repairing or garage work on any automobile sold by him. *Williams v. Thomson*, 143 Minn. 454, 174 N. W. 307 (1919).

In a suit on a contract not to engage in the meat business in the city of Duluth for a period of 2 years from the date the business is sold, the evidence was sufficient to sustain a verdict for breach of contract where the facts showed that defendant became interested in the same kind of business and interfered with plaintiff's sales to a certain hotel. *Persha v. Zabukover*, 180 Minn. 95, 230 N. W. 263 (1930).

Assignee's Rights.

A valid covenant not to compete may be assigned unless by its peculiar nature it cannot be. Such a covenant adds to the goodwill of the business and may be transferred with the goodwill as a part thereof. *Peterson v. Johnson Nut Co.*, 204 Minn. 300, 283 N. W. 561 (1939).

Implied Contracts Not to Compete.

A contract not to reengage in the auto livery business in Minneapolis for a period of 3 years was not waived or abrogated by failure to incorporate it in the instruments evidencing the transfer of the property on a showing that such instruments were not intended to include the entire contract. It was held that seller violated the agreement by becoming the manager of another livery business. *Bradley v. Paul*, 153 Minn. 441, 190 N. W. 789 (1922).

A laundry and dry cleaning business, including the plant, machinery, all assets and goodwill and all of the rights and claims against the business were sold without agreements restricting the seller from reengaging in the same business. As the instrument purports to be complete, restrictions cannot be implied against the seller's engaging in a rival business. *Gibbons v. Hansch*, 185 Minn. 290, 240 N. W. 901 (1932).

Restrictive Covenants Ancillary to Employment.

Where an employer seeks to enjoin a breach of a covenant of an employee not to engage in the credit clothing business for a period of 4 years after termination of employment it must be made to appear that irreparable injury has resulted or will in all probability result from the breach. Where the services have been of such a character that the employee's name carries with it the good will of the employer's business, or where the employee has obtained knowledge of secrets in such business, irreparable damage may result. *Menter Company v. Brock*, 147 Minn. 407, 180 N. W. 553 (1920).

After employment for a number of years, the employee left and engaged in a similar business soliciting the customers of his former employer. Where no trade secret or secret process is involved and where there is no peculiar trust or confidence between employer and employee an agreement not to compete cannot be implied. *Boone v. Krieg*, 156 Minn. 83, 194 N. W. 92 (1923).

In consideration of a sale of shares of stock in a corporation by a person employed by that corporation, an agreement not to compete with the corporation in the same business within the same city for 6 years is valid. *Peoples' Cleaning & Dyeing Co. v. Share*, 168 Minn. 474, 210 N. W. 397 (1926).

A contract, stipulating that upon the termination of employment as an agent the employee would not reengage in the oil business directly or indirectly in the city or surrounding trade area for a period of 1 year, does not justify the issuance of an injunction restraining the employee from working for a competitor located in the same city. A man's right to labor in any occupation for which he is fitted is a valuable right and should not be taken away or limited by injunction except in a clear case showing the justice and necessity therefor. *Standard Oil Co. v. Bertelsen*, 186 Minn. 483, 243 N. W. 701 (1932).

A covenant by an employee physician not to engage in the practice in the city of Rochester or within 20 miles thereof for 3 years after termination of his employment is valid. The protection was reasonable in view of the fact that the employer had practiced for over 30

years in Rochester and the adjacent territory. *Granger v. Craven*, 159 Minn. 296, 199 N. W. 10 (1924). See *Andrews et al. v. Cosgriff*, 175 Minn. 431, 221 N. W. 642 (1928) (employee physician—25 miles—5 years—valid); *Shaleen v. Stratte*, 188 Minn. 219, 246 N. W. 744 (1933) (dissolution of a partnership—2 counties—5 years—valid).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. (Mason, Supp. 1938)

Liquor

Section 3200-27 provides that no manufacturer or wholesaler of intoxicating liquors shall require by contract, understanding, or otherwise, any licensed retailer to handle or sell only the products of any particular manufacturer or wholesaler. See *Special Antitrust Laws: Liquor, infra*.

Stat. (Mason, 1927)

Cooperatives

Sections 6095 and 6106 provide that an agricultural cooperative marketing association organized under sections 6079 to 6113-1, may make marketing agreements with its members requiring them to sell, for any period of time not exceeding ten years, all or any specified part of their agricultural products exclusively to or through the association, and that such marketing agreements shall not be considered illegal or in unlawful restraint of trade or as a part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Tying Contracts.

The State Liquor Control Commissioner refused to approve and issue a license authorized and granted by City Council of Minneapolis. In an appeal by the State Commissioner from a judgment in mandamus requiring him to approve the license, it was held that the Commissioner under the Liquor Act, sections 3200-11 to 3200-58, has the authority to approve or disapprove the issuance of a license after

making investigation and after proper notice and hearing. The Commissioner was justified in refusing the license because the licensee's lessors were interested in the sale of certain brands of liquor and the purchasing arrangements provided for in the lease were in violation of section 3200-27. *State ex rel. Minnehaha Liquor Store, Inc. v. Arundel*, 200 Minn. 305, 273 N. W. 817 (1937).

Exclusive Dealing Arrangements.

A gas company entered into an arrangement with a coal company whereby it agreed to sell and deliver to the coal company all of its accumulations of coke and agreed not to sell coke to any other person or company. The contract was upheld. A distinction was drawn between a corporation entering into a combination to dispose of all of its products to another for the purpose of enabling it to fix prices and control the market, and one, situated as the defendant in this case, dealing incidentally with one of its by-products. That the gas company is a public-service corporation was held unimportant. *State ex rel. Berryhill v. St. Paul Gaslight Co.*, 92 Minn. 467, 100 N. W. 216 (1904).

A contract between a brewing corporation and a corporation engaged in supplying manufacturer premium catalogues which stipulated that the premium catalogue corporation would not sell such catalogues to certain other competitors of the brewing corporation within a given trade area is valid. *John Newton Porter Co. v. Kiewel Brewing Co.*, 137 Minn. 81, 162 N. W. 887 (1917).

Equitable relief by injunction was allowed to prevent the breach of an exclusive marketing contract between a cooperative marketing association and a member thereof. An injunction preventing the members of the association from selling to others was necessary to preserve the nature and existence of the association. The restraining order was granted even though the contract provided for liquidated damages in the case of breach. *Minnesota Wheat Growers' Cooperative Marketing Ass'n v. Huggins*, 162 Minn. 471, 203 N. W. 420 (1925).

A manufacturer entered into an agreement with several dealers to cease to solicit contract work in Duluth and to sell its goods to no other contractor or dealer in that city except to those with whom the agreement was made. The agreement also provided that when jobs came to the manufacturer without solicitation one-third of the profits would be paid to the dealers. The dealers agreed to buy 50 percent of their total joint necessities from the manufacturer. The court held

that although the agreement was technically in violation of section 10463, the antitrust statutes should be construed in light of reason. This contract appeared to be a reasonable arrangement between the dealers and the manufacturer to sell exclusively the products of the manufacturer within a certain territory and was therefore valid. *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 234 N. W. 453 (1930).

MISSISSIPPI

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1890) art. VII, sec. 198. The legislature shall enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare.

STATUTORY PROVISIONS

Code Ann. (1930)

Sec. 3436. Trust and combine—Defined.—A trust or combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms, or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

- (a) To restrain trade;
- (b) To limit, increase, or reduce the price of a commodity;
- (c) To limit, increase, or reduce the production or output of a commodity;
- (d) To hinder competition in the production, importation, manufacture, transportation, sale, or purchase of a commodity;
- (e) To engross or forestall a commodity;
- (f) To issue, own, or hold the certificate of stock of any trust and combine within the spirit of this statute knowing it to be such at the time of the issue, or the acquisition or holding such certificate; or
- (g) To place the control to any extent of business, or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or
- (h) To enable or empower any other person than themselves, their proper officers, agents, and employees to dictate or control the man-

agement of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this statute.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof, shall for a first offense be fined in any sum not less than one hundred dollars nor more than five thousand dollars and for a second or subsequent offense not less than two hundred dollars nor more than ten thousand dollars, and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney general, from the further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter. (1926, ch. 182: 3281, 3282; 1908, chs. 88, 119: 5002, 4437.)

Sec. 3437. Additional contracts or combinations not allowed by law.—Any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimicable to public welfare, and shall thus:

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control, or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business;

(c) Or shall engross or forestall or attempt to engross or forestall any commodity;

(d) Or shall destroy or attempt to destroy competition in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;

(e) Or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling, or storing any commodity

for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines. And it shall be sufficient to make out a prima facie case of a violation of this subdivision of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one locality than another; differences of freight and other necessary expenses of operating business considered. (1926 ch. 182: 3283; 1908 ch. 119: 5002, 4437.)

Code Ann. (Supp. 1938)

Sec. 3438. Agricultural and other organizations not forbidden.—Nothing contained in this chapter shall be construed to forbid the existence of agricultural, horticultural, poultry, cattle, or dairy organizations, instituted for the purpose of cooperation or mutual help, having no capital stock and not conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust law; nor shall this chapter prevent or penalize agreements entered into between canners or catchers of sea-food products or between canners and catchers of such products for the advancement and welfare of the sea-food industry in Mississippi, when such agreements so made between canners or catchers of such products, or canners and catchers of such products, shall be approved by an order entered upon the minutes of the Mississippi sea-food commission. (1934 ch. 379.)

Code Ann. (1930)

Sec. 3439. Penalty for violation of antitrust laws.—Any person, corporation, partnership, firm, or association of persons and the officers and representatives of the corporation or association violating any of the provisions of this chapter shall forfeit not less than one hundred dollars nor more than two thousand dollars for every such violation; and each month in which such person, corporation, or association shall violate this chapter shall be a separate violation, the forfeiture and penalty in such case to be recovered alone by suit in the name of the state on the relation of the attorney general and by the consent of the attorney general suits may be brought by any district attorney, such suits to be brought in any court of competent jurisdiction. (1926 ch. 182: 3286, 5004, 4439.)

Sec. 3440. Private persons and corporations may sue.—Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars, by suit in any court of competent jurisdiction; said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. And such penalty may be recovered in each instance of injury. All recoveries herein provided for may be sued for in one suit. (1926 ch. 182: 3289, 5007, 4440.)

Sec. 3441. Contracts void.—Every contract or agreement to enter into or pursue any trust and combine, and every contract or agreement made by another with any trust and combine, or with any member of a trust and combine for any purpose relative to the business of such trust and combine, is void, and cannot be enforced in any court. (3285, 5003, 4438.)

Sec. 3442. Corporations not to purchase competing one.—No corporation shall acquire directly or indirectly, the whole or any part of the capital stock of any competing corporation doing business in this state, nor directly or indirectly acquire the franchise, plant, or equipment of any other competing corporation doing business in this state if such other corporation be engaged in the same kind of business and be a competitor therein, where the effect of such acquisition of stock, franchise, plant, or equipment may be to substantially lessen competition or to restrain trade or competition in the state, or any community thereof, or tend to create a monopoly of any line of commerce and will be inimical to public welfare. This section shall not apply to corporations purchasing such stock in payment of an indebtedness, and not using the same by voting or otherwise, to bring about or attempting to bring about, the substantial lessening of competition. *Provided, however,* That fire and marine insurance corporations may own stock in other insurance companies and may be licensed to do business in this state, or authorized to continue business in this state, but the state insurance commissioner may refuse permission to any company to be licensed in the first instance or he may subsequently revoke the license of any company if it appears after notice and hearing that to permit one insurance corporation owning stock in a competing corporation to continue to do business in this state would be injurious to, or contrary to the public interest. (1926 ch. 182, 1920 ch. 313; 3287, 3287a, 5005.)

Sec. 3443. To defraud in public contracts.—If any person, association, firm, or corporation shall combine with any other person,

association, firm, or corporation, or if either of them combine with one or more of the others to prevent, by pooling, any or either of said persons, associations, firms, or corporations from separately or individually bidding for the performance of a public work for the state, or any county, municipality, or levee board thereof; or if any person, association, firm, or corporation shall prevent, by persuasion or reward, any other person, association, firm, or corporation, or any one or more of them, from bidding for the performance of such public work, they, and each of them, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five nor more than one thousand dollars. (3290, 5008, 4441.)

Sec. 3444. Moneys not collectible.—All sums of money to be paid on any contract on behalf of the state, or any county, municipality or levee board thereof, when the provision of the last preceding section had been violated, shall not be collectible, nor shall the same be paid by any officer or board having the payment thereof. (3291, 5009, 4442.)

Sec. 3445. Proceedings for forfeiture of charter and right to do business.—Proceedings of any and every kind for forfeiture of charter, for forfeiture of right to do business in this state, for recovery of damages and all civil proceedings of any character whatever authorized by law for the execution and enforcement of the antitrust laws of this state may be brought against any corporation in any county where it has a domicile or place of business, or where any of its officers or agents may be found. (3292, 5010; 1902 ch. 62.)

Sec. 3446. Proceedings may be brought in county where trust and combine formed.—Like proceedings against any two or more of any number of corporations or individuals, or of corporations and individuals believed to be parties to any trust and combine, may be brought in the county where the trust and combine was formed, or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed; or in any county in which either of the defendants may have a domicile, or where an officer or agent of any defendant corporation may be found. And all such proceedings may be prosecuted to final judgment or decree against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, judgment, or decree in favor of the local or any other defendant. (3293, 5011.)

Sec. 3447. Proceedings may be brought in county where violation of law occurred.—Criminal prosecutions, under the antitrust laws of this state, may be instituted and conducted to final judgment against any one or more of any number of corporations or individuals, or both in any county in which a violation of said laws

has been committed by them or in any county in which they formed a trust and combine, or in which such trust and combine, though formed elsewhere, is by them, or any of them, carried on, promoted, employed, operated, used, or enjoyed. (3294, 5012.)

Sec. 3448. Witness not to be excused from testifying.—No person called as a witness in any prosecution or proceeding to enforce the antitrust laws of this state, though himself a defendant therein, or an officer, attorney, agent, or employee of a defendant or stockholder in a defendant corporation, shall be excused from testifying upon the ground that his evidence might criminate or tend to criminate himself; but every person, otherwise competent, when called as a witness in such cases, shall be required to testify and to disclose all facts known to him which are pertinent to the issue. (3295, 5013.)

Sec. 3449. Witness not liable to indictment or prosecution.—But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment, information, or prosecution. (3296, 5014.)

Sec. 3450. Books, records to be produced in court.—Any corporation may be required under a subpoena duces tecum served upon its president, secretary, or any of its directors, to produce in court and submit to inspection upon the trial of any proceeding, civil or criminal, under the antitrust laws of this state, any books, minutes, records, papers, documents, vouchers, or writings belonging to or in the possession of such corporation. (3299, 5017.)

Sec. 3451. Penalty for failure to comply.—Any corporation failing or refusing to comply with the order of such subpoena duces tecum, when duly served as herein provided, shall be in contempt of court, and shall be punished by a fine of not less than one hundred dollars nor more more than two thousand dollars. (3300, 5019.)

Sec. 3452. Right to examine books, records, and accounts of corporations.—The state or any person, natural or artificial, in the manner and in such instances as now provided by law shall always have the right to investigate the books, records, and accounts of all corporations created by it and of all corporations doing business in this State, but this right shall not be exercised further than to examine books, records, and accounts made and kept within three years next preceding the beginning of the examination thereof, unless an examination of books, records, and accounts made before that time be necessary to an understanding of the books, records, and accounts made within said three years. (1926 ch. 182.)

Sec. 3453. Corporations answerable for unlawful act.—Every corporation shall be answerable for any unlawful act, contract, agreement, arrangement, understanding, or combination done, made, or entered into for and on its behalf by any officer, stockholder, agent, or attorney permitted or suffered to manage, direct, regulate, or control its business in that particular, and such unlawful act, contract, agreement, arrangement, understanding, or combination shall be deemed and held to have been done, made, or entered into by the corporation itself as fully as if done, made, or entered into by its board of directors by regular vote duly entered upon the minutes. (3297, 5015.)

Sec. 3454. Duties of district attorneys.—It shall be the duty of the district attorneys in their several districts, when requested by the Attorney General, to enforce the civil features of the antitrust laws of this state by appropriate legal proceedings and suits at law or in equity; and their duty to enforce criminal features of said laws shall be the same as their duty to enforce other criminal statutes. All such suits shall be brought by and in the name of the State of Mississippi upon the relation of the Attorney General or an authorized district attorney. (1926 ch. 182: 3298, 5016.)

Sec. 3455. Application of chapter.—No right, liability, pain, penalty, forfeiture, prosecution, or suit under laws existing prior to the adoption of this chapter shall be in any wise affected thereby, but the same may be asserted, prosecuted, declared, inflicted, and imposed under the laws in force prior to the adoption of this chapter. This chapter shall be liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state. (3302, 5021.)

Sec. 4370. Antitrust suits—Consent of attorney general required.—No district attorney of this state without the consent in writing of the attorney general, shall institute or prosecute any civil suit for a violation of the antitrust statutes of this state; and no court shall take cognizance of any such suit without such written consent of the attorney general.

Code Ann. (1930).
Conspiracy Statute

Section 830 provides (in part) that it is illegal for two or more persons to conspire to prevent another from exercising a lawful trade or calling by force, threats or intimidation, or by interfering or threatening to interfere with property belonging to another, or to conspire to commit any act injurious to trade or commerce.

Judicial Decisions

GENERAL ANTITRUST LAWS

Constitutionality of Statutes.

Section 3437 is constitutional and does not violate Const. 1890, art. VII, sec. 198, *Standard Oil Co. of Ky. v. State, ex rel. Attorney General*, 104 Miss. 886, 61 So. 981 (1913) (dictum); *Delmas v. Pascagoula St. R. & Power Co.*, 103 Miss. 235, 60 So. 210 (1912); *State v. Jackson Cotton Oil Co.*, 95 Miss. 6, 48 So. 300 (1909).

Section 3437 is severable. Any provision or portion thereof declared void may be eliminated. *State v. Jackson Cotton Oil Co.*, *supra*.

In attacking the constitutionality of section 3439, the equal protection or due process clauses cannot be interposed as a defense in absence of allegations indicating the extent of property owned and injury sustained by defendants. *Grenada Lumber Co. v. State, ex rel. Attorney General*, 98 Miss. 536, 54 So. 8 (1911).

Application of Statutes.

In General.

The formation of a trust is a felony. *American Fire Insurance Co. v. State*, 75 Miss. 24, 22 So. 99 (1897).

The words "and is inimical to the public welfare, unlawful, and criminal conspiracy" declare the effects of a trust and do not supplement the definitions in section 3437. *Barataria Canning Co. v. Jouliau*, 80 Miss. 555, 31 So. 961 (1902).

Courts must determine from the facts in each case the existence of a monopoly within the meaning of section 3437, *Cumberland Tel. & Tel. Co. v. State*, 100 Miss. 102, 54 So. 670 (1911). The test of a trust or of its existence depends on whether or not the effect of the contracts or combinations are obnoxious to public policy. *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 37 So. 939. Courts will look through the form of an organization and regard its actual operation, deciding the legality or illegality according to the true nature and probable effect of the arrangement upon the public. *Ibid.* See also *State ex rel. Knox v. Edward Hines Lumber Co.*, 150 Miss. 1, 115 So. 598 (1928); *Brown v. Staple Cotton Co-op. Ass'n*, 132 Miss. 859, 96 So. 849 (1923); *Jackson v. Price*, 140 Miss. 249, 105 So. 538 (1925); *Industrial Finance & Thrift Corp. v. Smith*, 179 Miss. 323, 175 So. 206 (1937). Antitrust acts include only those agreements which at common law were held to be invalid as against public policy. *Sivley v. Cramer*, 105 Miss. 13, 61 So. 653 (1913).

The act of a bank in acquiring stock of another contrary to provisions of section 3442 is *ultra vires* of which the State alone may complain. *Peoples Bank v. Lamar County Bank*, 107 Miss. 852, 67 So. 961 (1915). Section 3442 cannot be invoked as a defense to an action against one guaranteeing a note given for the price of corporate stock. *Kelley v. Bank of Commerce*, 101 Miss. 692, 57 So. 978 (1912).

A corporation buying an interest in another corporation from an individual cannot avoid payment of the purchase price on the ground that the transaction was *ultra vires* and in violation of section 3442. *Watts Mercantile Co. v. Buchanan*, 92 Miss. 540, 46 So. 66 (1908).

Section 3442 is not applicable to the purchase by an industrial finance corporation of the stock of a hopelessly insolvent building and loan association. The combination of companies through such purchase does not create or tend to create a monopoly, and is not "inimical to the public welfare." *Industrial Finance & Thrift Co. v. Smith*, 179 Miss. 323, 175 So. 206 (1937).

An agreement by a local individual telephone company permitting another telephone company to handle its long-distance business exclusively is not in violation of section 3442. *Cumberland Tel. & Tel. Co. v. State*, 100 Miss. 102, 54 So. 670 (1911). See, *Tying Contracts and Exclusive Dealing Arrangements, infra*.

A combination of retail dealers agreeing not to purchase from any wholesale dealer competing with its members is in violation of section 3437. *Retail Lumber Dealer's Association v. State*, 95 Miss. 337, 48 So. 1021 (1909) *aff'd.* 217 U. S. 433, 54 L. Ed. 826, 30 Sup. Ct. 535 (1910).

A combination for the purpose of controlling the trade in sea foods under guise of a limited partnership is in violation of section 3449. Members are liable for the statutory penalties as provided. *Dukate v. Adams*, 101 Miss. 433, 58 So. 475 (1912).

An agreement by an oyster dealer to sell all of his output to a certain distributor, except three carloads which he agreed not to sell "at a price lower than that offered to the trade by the distributor," is invalid. Limiting the price of a commodity comes within purview of section 3437. Canned oysters are a commodity within meaning of the section. *Barataria Canning Co. v. Jouliau, supra.*

A contract between distributor and exhibitor containing an arbitration provision which has been held in violation of the Sherman Antitrust Act (*Paramount Famous Lasky Corporation v. U. S.*, 282 U. S. 30, 51 Sup. Ct. 42 (1930)), and which is not severable from the remainder of the contract, is in violation of section 3437. *Universal Films Exchange, Inc., v. West*, 163 Miss. 272, 141 So. 293 (1932).

Provision in a public contract that the seller may decline further deliveries if the buyer resold cement purchased, or used any part of it in work other than that described, is not invalid under section 3443. *Gano v. Delmas*, 140 Miss. 323, 105 So. 535 (1925).

A power company has the right to shut down a failing subsidiary ice plant and the incidental right of selling it to a competitor. The competitor has the corresponding right of purchasing it without incurring liability under section 3440. *Pitts v. Mississippi Power & Light Co.*, 177 Miss. 288, 170 So. 817 (1936).

A cotton-oil company, agreeing to refrain from purchasing seed in competitor's territory, so long as production and prices for cottonseed are controlled by competitor in that territory, violates section 3437. *State v. Jackson Cotton Oil Co.*, 95 Miss. 6, 48 So. 300 (1909).

An agreement between several oil companies to divide certain territories between them for the purpose of selling petroleum and other products at controlled prices is prohibited by section 3437. *Standard Oil of Ky. v. State*, 107 Miss. 377, 65 So. 468 (1914).

An agreement between several fire-insurance companies to delegate to an association the power to prescribe premium rates to be charged by its members is a "trust and combine." *American Fire Insurance Co. v. State*, 75 Miss. 24, 22 So. 99 (1897).

Prosecutions under section 3436 must aver an unlawful agreement. Adopting insurance rates promulgated by the Mississippi Inspection and Advisory Rating Bureau in absence of a delegation of rate-fixing power or an agreement compelling compliance therewith is not unlawful. *Miller v. Fidelity Union Fire Insurance Co.*, 126 Miss. 301, 88 So. 711 (1921). Contracts made by insurance company with its agents prescribing certain rates, but not part of an agreement to fix rates, is valid. *Aetna Insurance Co. v. Robertson*, 131 Miss. 343, 95 So. 137 (1923).

An association enforcing car service provisions and demurrage charges, but not engaged in a price-fixing scheme, does not violate section 3437. *Yazoo & M. V. R. Co. v. Searles, supra*.

A promotional scheme adopted by merchants and the chamber of commerce of a community offering certain prizes to stimulate sales on "Trades Day" is not a trust or combination in violation of the antitrust laws. *R. J. Williams Furniture Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579 (1927).

Consolidation of corporations through holding companies for the purpose of stifling competition is illegal. *Southern Elec. Co. v. State*, 91 Miss. 195, 44 So. 785 (1907). See also *Woodbury v. McClung*, 78 Miss. 831, 29 So. 514 (1901).

Procedural and Remedial Provisions:

Actions for the recovery of penalties are civil and not criminal in nature. *Dukate v. Adams*, 101 Miss. 433, 58 So. 475 (1912); *Grenada Lumber Co. v. State*, 98 Miss. 536, 54 So. 8 (1910).

Penalties provided for in section 3439 are not retroactive. *State v. Jackson Cotton Oil Co.*, 95 Miss. 6, 48 So. 300 (1909).

Bill to recover penalty under section 3439 is demurrable for not alleging the type and nature of contracts entered into for the purpose of destroying competition. *Standard Oil Co. of Ky. v. State*, 104 Miss. 886, 61 So. 981 (1913). An error in judgment or decree imposing penalties for violations of the Act on a certain day or days may be separately assigned on appeal. *Aetna Ins. Co. v. Robertson*, 131 Miss. 343, 95 So. 137 (1922). Where the action is against several defendants, it is immaterial that the bill prayed for separate and not joint penalties. *Standard Oil Co. of Ky. v. State*, *supra*.

Section 3440 provides that persons injured may sustain action for actual damages in addition to the stipulated amount as provided for in the section. Section 3439 imposes a penalty for each offense recoverable by an action in the name of the state. *Delmas v. Pascagoula St. Ry. Co.*, 103 Miss. 235, 60 So. 210 (1912).

Mere proof that one has been compelled to pay more than his competitors for services rendered is insufficient proof of damages as provided for in section 3440. *Yazoo & M. V. R. R. Co. v. Searles*, 85 Miss. 520, 37 So. 939 (1904).

Section 3439 does not preclude suit by the State revenue agent to collect the penalties as provided. *Dukate v. Adams*, *supra*. The power of the State revenue agent to bring suit for penalties is not affected by the insurance chapter of the code providing for supervision of insurance by the Insurance Commissioner. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883 (1921). The statute of limitations as enacted in section 104 of the Constitution (1890) does not run against the State or State revenue agent. *Nugent & Pullen v. Robertson*, 126 Miss. 419, 88 So. 895 (1921). Laches cannot be invoked against the State as a defense in a suit for violation of the antitrust laws. *Aetna Ins. Co. v. Robertson*, 131 Miss. 343, 95 So. 137 (1922).

Quo warranto proceedings may be brought under section 3439 to forfeit charters of corporations violating the antitrust provisions. The action being civil, venue is governed by section 3521. *State v. Miss. Cotton Oil Co.*, 79 Miss. 203, 30 So. 609 (1901).

Foreign corporations prosecuted under antitrust laws must answer interrogatories, file replies, and produce exhibits as required by

section 3450. *Cumberland Tel. & Tel. Co. v. State*, 98 Miss. 159, 53 So. 489 (1910).

Being a member of an unlawful combination within meaning of section 3437 does not affect the insurance company's right to subrogate to the right of action of the insured against a wrongdoer. *Freed v. American Fire Ins. Co.*, 90 Miss. 72, 43 So. 947 (1907).

Funds in the hands of a resident agent of nonresident corporations violating antitrust laws are subject to attachment. *Nugent & Pullen v. Robertson*, 126 Miss. 419, 88 So. 895 (1921).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code Ann. (Supp. 1938) Resale Price Maintenance

Section 478 subsections 1 to 6 validate contracts fixing the resale price of branded commodities. This statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Code Ann. (1930) Cooperatives

Section 4124 provides that no cooperative marketing association organized under sections 4099 to 4129, shall be deemed to be in violation of the antitrust laws of the state, a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangement*, *infra*. See also *Cooperatives* in projected study.

Code Ann. (Supp. 1938) Gas, Crude Oil, Petroleum

Sections 2650, 2651, 2652 provide that the production of gas, crude oil, or petroleum in the state in such manner as to constitute waste is prohibited. Waste is defined to include the production of natural gas in excess of transportation or market facilities or reasonable market demands. Section 2684 provides that agreements between owners or operators and royalty holders in a common pool for the prevention of waste, or for the cooperative development and operation of certain oil and gas pools, when authorized by the State Oil and Gas Board, shall not be construed to violate the antitrust laws.

C. SPECIAL ANTITRUST LAWS

I. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Railroads

Const. (1890) art. VII, sec. 197, provides that no foreign corporation or association shall lease or operate any railroad in this state or purchase the same or any interest therein. Consolidation is allowed only where the consolidated company becomes a domestic corporation of the State.

STATUTORY PROVISIONS

Code Ann. (1930)

Railroads

Section 6083 provides a railroad shall have power to lease its road, property, and franchises or to lease other railroads in or out of the state, except in either case of parallel or competing lines.

Section 6106 provides that it is unlawful, except as permitted by the acts regulating interstate commerce in the case of corporations which become domestic in Mississippi, for any railroad to consolidate with a parallel or competing company or to allow its affairs to be in any way managed or controlled by such company or by the persons who own or manage such company, and that it shall be unlawful for one of several competing railroad companies operating parallel lines within 20 miles of each other to lease or purchase directly or indirectly an opposing line or part of it or an interest in it. The consequence of violation by any company is forfeiture of its charter and franchise.

Cotton Gins—Discrimination

Sections 4812, 4813, and 4814 provide that it is unlawful for chain operators of cotton gins, operating gins in two or more places within the state, to discriminate in the price paid for cottonseed or in the price charged for ginning services when the effect would be to destroy or tend to destroy competition at any place where the gins are operated. Violation entails a fine of \$100 per bale for the first five bales and \$10 for each successive bale ginned a day in pursuance of such discriminatory practices, to be recovered by the attorney general in the name of the State. Any person injured may recover similar sums as liquidated damages. Injunctions also lie at the suit of the State or of an injured party. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Sections 4809, 4810, and 4811 provide that it is unlawful for a corporation interested in the operation, ownership, management, or control of the manufacture of cottonseed oil or any byproduct of cottonseed or of a compress business to own, lease, or control in any way or have any interest in a cotton gin and that no person interested directly or indirectly in an oil or seed company may become a stockholder, director, or manager of a corporation doing a ginning business. It is unlawful to grant a charter to a ginning company where any of the incorporators are owners, stockholders, trustees, or attorneys of any oil or seed company. But cottonseed oil or compress companies may, except for the purpose of destroying business, operate a cotton gin of a capacity not exceeding 600 saws, located in the city or town where the oil or compress plant is located. A natural person owning a gin and ginning for himself and tenants, but not for the public, may own stock in and become a director in a cotton oil company. Corporate violators are subject to forfeiture of charter or right to do business in the State.

Dairy Products—Discrimination

Section 4291 provides that local discrimination in the purchase or sale price of dairy products for the purpose of destroying a competitor or creating a monopoly, is unlawful. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Code Ann. (Supp. 1938)

Canned Sea Products

Sections 2591 to 2600 provide that canners, processors, or packers of aquatic products may act together in associations in collectively handling such products, have common marketing agencies, and make necessary contracts to this end. These contracts must have no reference to the price to be paid fishermen for raw products and must not curtail the production, canning, or packing of shrimp or oysters. If the Sea Food Commissioner shall have reason to believe that any such association monopolizes or restrains trade in intrastate or interstate commerce to such an extent that sea-food prices are enhanced, or that it discriminates against any person, or that it limits production, he may, after proper hearing, issue a cease-and-desist order. Nothing in this act shall apply to any labor organization or fishermen's union or deprive them of rights vested prior to the passage of the act. The right of these organizations to fix scales of wages for their members and prices to be charged by their members for raw sea food is recognized.

Code Ann. (Supp. 1938)

Liquor

Section 2878 provides that no manufacturer, distributor, or wholesale dealer to whom or to which this act applies, shall, directly or indirectly, make any loan or furnish any fixtures of any kind to any retail dealer; or have any interest, direct or indirect, in the business of or in the furnishings or fixtures or in the premises used by any such retail dealer in connection with his or its business; or by any lien on any such property of any such retail dealer.

Section 2890 provides that any violation of any provision of this act or of any rule or regulation pursuant thereto, shall be a misdemeanor, and where the punishment thereof is not elsewhere prescribed herein, shall be punished by fine of not more than \$500 or imprisonment for not more than six months, or both, in the discretion of the court. Any license held by a person so convicted shall become void and the holder shall not thereafter for a period of one year be entitled to any license.

2. Public Contract Provisions

Code Ann. (1930)

General

Sections 3443 and 3444 provide that a pool to prevent separate bidding for the performance of a public work for the State or any county, municipality, or levee board thereof, or by persuasion or reward to prevent any one from bidding on such public work, is a misdemeanor. State officers shall not make payment on contracts violating these provisions. See *General Antitrust Laws, supra*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Railroads.

Consolidation of part of the Yazoo railway line, running between Points Y and Z, and part of the main line of the Southern Railway, running between Z and a point 7 or 8 miles west connecting with a branch line 33 miles long to Y was held to be competing and parallel within meaning of section 6106. *Yazoo & M. V. R. R. Co. v. Southern Ry. Co.*, 83 Miss. 746, 36 So. 74 (1903). See also *State v. Mobile R. Co.*, 86 Miss. 172, 38 So. 732 (1905).

Cotton Oil.

Section 4809 et seq. (L. 1928, c. 305) does not violate the Fifth and Fourteenth amendments to the Constitution of the United States nor sections 14 and 87 of the State Constitution (1890). *State ex rel. Jordan v. Gilmer Grocery Co.*, 156 Miss. 99, 125 So. 710 (1930).

Application of Statutes

Section 4809 is a valid exercise of the State's legislative power. *State ex rel. Collins v. Crescent Cotton Oil Co.*, 116 Miss. 398, 77 So. 185 (1918); this section is not invalid as a burden on interstate commerce. Cotton ginning is an intrastate activity, although the cottonseed oil produced is destined for interstate shipment. *Crescent Cotton Oil Co. v. State ex rel. Collins*, 121 Miss. 615, 83 So. 680 (1920). This case was affirmed even though the enactment is applicable to corporations only. The classifications are neither arbitrary nor unreasonable. *Id.* 257 U. S. 129, 42 Sup. Ct. 42. 66 L. Ed. 166 (1921).

Cottonseed-oil manufacturers are prohibited from operating a cotton gin, except where the manufacturing plant and cotton gin are located in the same town. The charter of a foreign corporation may be forfeited, and fines imposed for violations as provided for in sections 4809, 4810. *State ex rel. Collins, Atty. Gen. v. Crescent Cotton Oil Co.*, 116 Miss. 398, 77 So. 185 (1917).

A cottonseed-oil company's operation of a cotton gin incidental to its purchase of cottonseed for shipment to its oil mill in another State is not in violation of section 4809 (L. 1914 c. 164) *Crescent Cotton Oil Co. v. State ex rel. Collins*, 121 Miss. 615, 83 So. 680 (1920).

Sections 4809, 4810 (L. 1914 c. 164) are not invalid as a burden on interstate commerce. *Ibid.*

Public Contract Provisions

Section 3437 is not applicable to the letting of contracts for the purchase of school books or other commodities by the State or any of its statutory agencies. Such contracts are valid even though the bids placed are below the normal cost of production. A public contract for an article below cost is not "inimical to the public welfare" under section 3437, nor in violation of section 197, Constitution (1890). *Johnson Publishing Co. v. Mills*, 79 Miss. 543, 31 So. 101 (1901).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Covenants Ancillary to Sale of a Business.

The defendant, vendor of a business and owner of the realty, covenanted not to rent adjoining stable and lot for a period of 5 years to any other person handling horses or mules. Held error to admit evidence to the effect that the defendant built and rented a stable in another part of town to parties engaged in the livery business. *Pitts v. Montgomery*, 79 Miss. 250, 30 So. 649 (1901).

Defendant, ancillary to the sale of an insurance agency, agreed not to engage in that business in four counties for a period of 10 years. In an action for breach of the contract, plaintiff failed to show that the restriction was reasonable and necessary for the protection of its goodwill. As section 3437 is declaratory of the common law, the court, in applying the rule of reason, held the limitation unwarranted. *Sively v. Cramer*, 105 Miss. 13, 61 So. 653 (1913).

An agreement by a seller of a restaurant not to engage in a like business in the same city although unlimited in time, is reasonable and not in violation of the antitrust law. Contracts in restraint of trade are not unlawful unless also shown to be "inimical to the public welfare." *Jackson v. Price et ux.*, 140 Miss. 249, 105 So. 538 (1925).

Covenants Ancillary to Employment.

The contract of an assistant physician not to engage in the practice of medicine in a city, or within 5 miles thereof, from the date of the termination of employment, was held valid. The limitation was reasonably necessary for the protection of the employer without imposing undue hardship on the employee. *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363 (1937).

Covenants Ancillary to the Lease of Property.

An agreement by a lessor not to engage in the moving-picture business in the same city for the duration of the lease would have been valid at common law. Applying the rule of reason, the court held the restriction valid under section 3437. *Plaza Amusement Co. et al. v. Rathenberg*, 159 Miss. 800, 131 So. 350 (1930). *Sively v. Cramer*, 105 Miss. 13, 61 So. 653 (1913).

Restrictive Covenants Not Ancillary to Sale of a Business Interest.

An agreement between two competing cottonseed-oil companies not to compete for the purchase of certain cottonseed in a specific territory was held in violation of section 3437 (L. 1900 p. 126, c. 88, sec. 30, *Kosciusko Oil, Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551, 43 So. 435, 8 L. R. A. (NS) 1053 (1907).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (1930) Cooperatives

Sections 4114 and 4115 provide that a cooperative marketing association organized under sections 4099 to 4129 may enter into contracts with its members requiring them to sell, for any period of time not over ten years, all or any specified part of their agricultural products or of specified commodities exclusively to or through the association and that such marketing agreements shall not be considered illegal or in restraint of trade or in violation of the antitrust statutes of the state. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

Application of the Common Law.

At common law an exclusive right granted by a railroad to a "hackman" to solicit business at its depot was held invalid. *State v. Reed*, 76 Miss. 211, 24 So. 308 (1898).

Application of Statutes.

An exclusive grant by a railroad to a telegraph company over its right-of-way is in violation of section 3437 (Code 1892, c. 140) as a restraint on trade. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 So. 370 (1899).

An exclusive right to sell manufacturer's pianos within a specific territory does not violate section 3437. (Dictum.) That such a

contract was illegal could not be interposed as a defense to an action for the purchase price of a piano sold as this sale is collateral to the seller's contract with the manufacturer. *Hauck v. Wright*, 77 Miss. 476, 27 So. 616 (1899).

An agreement by one telephone company to handle all of another's long-distance calls exclusively is not in violation of section 3437. *Cumberland Tel. & Tel. Co. v. State*, 100 Miss. 102, 54 So. 670 (1911).

An arrangement prohibiting the dealer from selling patterns of any but manufacturer's company is in violation of section 3437. *McCall v. Hughes*, 102 Miss. 375, 59 So. 794 (1912). The illegality of the contract, however, does not prevent the manufacturer from recovering for the reasonable value of products delivered under such illegal contract. *Ibid.* See also *McCall v. Parsons-May Oberschmidt Co.*, 107 Miss. 865, 66 So. 274 (1914) (recovery of the contract price).

The grant of an exclusive privilege by a railroad company to load logs at points between stations was upheld. Since the railroad company itself could engage in the business of logging to the exclusion of all others, it could grant that right to a third person. *Yazoo & M. V. R. Co. v. Crawford*, 107 Miss. 355, 65 So. 462 (1914).

An agreement by members of a cooperative marketing association organized under section 4114 to sell its produce exclusively through the association is not in violation of the antitrust laws. The member breaching such contract is liable for the penalties provided for by the Cooperative Marketing Act. *Brown v. Staple Cotton Cooperative Association*, 132 Miss. 859, 96 So. 849 (1923).

MISSOURI



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. Ann. (1932)

Sec. 8700. Combinations in restraint of trade declared a conspiracy.—Any person who shall create, enter into, become a member of, or participate in any pool, trust, agreement, combination, confederation, or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase, or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article. (R. S. 1919, sec. 9655.)

Sec. 8701. Pool and trust agreements defined.—Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation, or understanding with any other person or persons to regulate, control, or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining, or any article or thing whatsoever, of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated or fixed, or shall enter into become a member of or participate in any pool, trust, agreement, contract, combination, confederation, or understanding, to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever of any

class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and be punished as provided for in this article. (R. S. 1919, sec. 9656.)

Sec. 8702. Combinations to boycott or threaten to boycott made a conspiracy.—Any two or more persons engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any class or kind whatsoever, who shall create, enter into, become members of or participate in any pool, trust, agreement, combination, confederation, association, or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party to such pool, trust, combination, confederation, association, or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this article. (R. S. 1919, sec. 9657.)

Sec. 8703. Combinations to increase prices, declared conspiracy.—All arrangements, contracts, agreements, combinations, or understandings made or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importance, transportation, manufacture, or sale in this state of any product, commodity or article, or thing bought and sold, of any class or kind whatsoever, including the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, and all arrangements, contracts, agreements, combinations, or understandings made or entered into between any two or more persons which are designed or made with a view to increase, or which tend to increase, the market price of any product, commodity or article or thing, of any class or kind whatsoever bought and sold, including the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, are hereby declared to be against public policy, unlawful, and void; and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations, or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in this article. (R. S. 1919, sec. 9658.)

Sec. 8704. Penalties.—Any person violating any of the provisions of this article, or who shall do any act prohibited or declared unlawful by the provisions of this article, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment. (R. S. 1919, sec. 9659.)

Sec. 8705. Jurisdiction of circuit courts—Duties of prosecuting attorneys.—The several circuit courts of this state are hereby invested with jurisdiction to prevent and restrain any person or persons, corporation, partnership, individual or association of individual from entering into any combinations, pools, agreements in the form of trusts, confederation, conspiracy or understanding declared illegal by article I, chapter 47, R. S. 1929, or any other law of this state relating to pools, trusts, conspiracies, discriminations, and unlawful combinations in restraint of trade. And it shall be the duty of the attorney general to institute proceedings in equity to prevent and restrain all such violations. The attorney general shall have power, and he is hereby authorized, to call upon the prosecuting or circuit attorney of the county in which any such proceeding may be brought, or to appoint any reputable attorney in such county, to aid and assist in the conduct and trial of such proceedings, and in every such case when final judgment is entered, such prosecuting, circuit, or other attorney so called upon or appointed, shall be allowed a fee of not less than ten dollars, nor more than twenty-five dollars to be taxed, collected and paid in the way ordinary court costs are now taxed, collected and disbursed. In case the attorney general shall call upon any prosecuting, or circuit attorney to aid and assist in any such prosecution, it shall be the duty of such prosecuting or circuit attorney, under the direction of the attorney general, to render such assistance as the attorney general may require, and he shall be entitled to have and receive the fees herein authorized in addition to the salary allowed by law to such prosecuting, or circuit attorney. The attorney general shall also have power and he is hereby authorized to employ special counsel in the prosecution of offenses against, and violations of, the provisions of chapter 47, R. S. 1929, or any other law concerning pools, trusts, conspiracies, discriminations and unlawful combinations. The attorney general shall have power after the expiration of his term of office, and it shall be his duty, to retain control and prosecute to final judgment or otherwise make final disposition of all suits instituted by him for the violation of any of the provisions of chapter 47, R. S. 1929, or of any other law concerning pools, trusts, conspiracies, discriminations and unlawful

combinations, and he shall be entitled to the fees herein provided in such suits and proceedings. Such proceedings may be by way of petition, setting forth the case and praying that such violation be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may, at any time, make such temporary restraining order of prohibition as shall be deemed just in the premises. (R. S. 1919, sec. 9660.)

Sec. 8706. Offending corporations to forfeit charter and property.—Any corporation created or organized by or under the laws of this state which shall violate any of the provisions of this article may, upon proper proof being made thereof in any court of competent jurisdiction in this state, be declared by the court to have forfeited its corporate rights and franchises, and the same may by the court be declared forfeited, void and of noneffect, and shall thereupon cease and determine; and such court may, by such judgment and decree, also declare all or any part of the property of such corporation forfeited unto the state, or in lieu of the forfeiture of its corporate rights and franchises, or in lieu of the forfeiture of all or any part of the property of such corporation, assess against it a fine; and any corporation created or organized by or under the laws of any other state or country which shall violate any of the provisions of this article shall, upon proper proof being made thereof in any court of competent jurisdiction in this state, be declared by the court to have forfeited its right and privilege thereafter to do any business in this state, and the same shall by the court be declared forfeited, void and of noneffect, and shall thereupon cease and determine; and such court may, by judgment and decree, also declare all or any part of the property in this state of such corporation forfeited unto the state, or in lieu of the forfeiture of its right and privilege to do business in this state or in lieu of the forfeiture of all or any part of the property of such corporation, assess against it a fine; and in all proceedings for the violation of any of the provisions of this article against any corporation created or organized under the laws of this or any other state or country, proof of the acts of any person who has been acting as the agent of such corporation in transacting its business in this state in the name, behalf or interest of such corporation shall be received as prima facie proof of the acts of the corporation itself; and it shall be the duty of the clerk of the court in which any judgment of forfeiture shall be rendered, as herein provided for, to certify the decree thereof to the secretary of state, and if it be an insurance company, also to the superintendent of the insurance department, who shall take notice

and be governed thereby as to the corporate powers and rights of said corporation; and in case any court shall render a decree forfeiting all or any part of the property of any corporation violating the provisions of this article, such court shall also appoint a receiver thereof to dispose of the same in such manner as the court may direct, and the net proceeds arising from the sale thereof shall be paid into the state treasury. (R. S. 1919, sec. 9661.)

Sec. 8707. Persons injured to recover triple damages.—Any person injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this article may sue therefor in any circuit court of this state in which the defendant or defendants, or any of them, reside, or have any officer, agent or representative, or in which any such defendant or any agent, officer or representative may be found, without regard to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee. (R. S. 1919, sec. 9662.)

Sec. 8708. Corporations not to issue trust certificates or to place output in hands of trustee.—It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employe, or the directors or stockholders of any corporation, to enter into any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. (R. S. 1919, sec. 9663.)

Sec. 8709. Purchaser not liable for price of article, when.—Any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provision of the preceding sections of this article shall not be liable for the price or payment of such article or commodity, and may plead this article as a defense to any suit for such price or payment. (R. S. 1919, sec. 9664.)

Sec. 8710. Effect of forfeiture of franchises of corporations.—Whenever the corporate rights and privileges of any corporation organized under the laws of this state shall have been declared forfeited by a judgment of a court of competent jurisdiction for any violation of the provisions of this article, and whenever the rights and privileges of any corporation organized under the laws of any

other state or country to do business in this state have been declared forfeited by a judgment of a court of competent jurisdiction for the violation of any of the provisions of this article, it shall thereafter be unlawful for any person, corporation, or association of persons, to deal in or offer for sale in this state any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or article or thing whatsoever, or contract of insurance against loss or damage by fire, lightning, or storm, made, produced, manufactured, or dealt in by any corporation whose rights, franchises, or privileges have been so declared to be forfeited; and the foregoing provisions of this section are hereby made applicable in all respects to the successors or assigns of any corporations whose rights, franchises, or privileges have been so declared to be forfeited. (R. S. 1919, sec. 9665.)

Sec. 8711. "Person" or "persons" defined.—The words person or persons, used in this article, shall be deemed to include natural persons, partnerships, associations of persons, and corporations created or organized by or under the laws of this state, or under the laws of any other state or country. (R. S. 1919, sec. 9666.)

Sec. 8712. Sufficiency of pleadings.—In any suit that is now pending, or which may hereafter be brought, in which it is charged that any person, corporation, partnership, or association of persons has created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation, or understanding in restraint of trade, or competition with any other person, corporation, partnership or association of persons, it shall not be necessary to allege or plead the manner in which, or when or where such pool, trust, agreement, combination, confederation, or understanding was made or effected. (R. S. 1919, sec. 9667.)

Sec. 8713. Witnesses—Production of books and papers.—In any proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, or shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such questions might tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers. (R. S. 1919, sec. 9668.)

Sec. 8714. Sufficiency of indictments and informations.—In any indictment or information for the violation of any of the provisions of this article, or for the doing of anything forbidden or declared

unlawful by the provisions of this article, it shall be sufficient to allege that any person or persons have created, entered into, become members of, or participated in any pool, trust, agreement, combination, confederation, or understanding without alleging the manner in which such pool, trust, agreement, combination, confederation, or understanding has been effected, and it shall not be necessary to allege how, when or where such pool, trust, agreement, combination, confederation, or understanding was effected. (R. S. 1919, sec. 9669.)

Sec. 8715. Article not to affect pending litigation.—The enactment and taking effect of this article shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred by any corporation or person on account of the violation of any law of this state prior to the taking effect of this article. (R. S. 1919, sec. 9670.)

Sec. 8716. What shall be prima facie evidence in proceeding against insurance companies.—In any proceeding against or prosecution of any insurance company under the provisions of this article, it shall be prima facie evidence that such company is a member of a pool, trust, agreement, confederation, or understanding to control, effect, or fix the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, if it be shown that such company or any agent or representative thereof, in writing insurance, has used any insurance rate, or made use of or consulted any rate book, paper, or card containing any insurance rate, prepared, published, kept, or furnished by any person, association of persons, or bureau employed by, representing or acting on behalf of any other insurance company or association in and about the making and publishing of insurance rates for use in any portion of this state. (R. S. 1919, sec. 9671.)

Sec. 8717. Unfair discriminations, prevention of.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the state of Missouri and engaged in the production, manufacture, purchase, sale, or distribution of any commodity or article of commerce in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer of such commodity, or to prevent the competition of any person, who in good faith intends and attempts to become such dealer, shall discriminate between different sections, localities, communities, cities, or towns of this state, by purchasing such commodity or article at a higher price or rate in one section, locality, community, city, or town, than is paid for the same commodity or article by the said person, firm, company, association, or corporation, in another section, locality, community, city, or town; or by selling such commodity or arti-

cle in one section, locality, community, city, or town at a lower price or rate than such commodity or article is sold for by said person, firm, company, association, or corporation in another section, locality, community, city, or town, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of purchase to the point of manufacture or storage, or from the point of production, manufacture, or storage to the place of sale or distribution, or by giving or paying or promising to give or pay a secret or private rebate or bonus in connection with the purchase, sale, or distribution of any commodity or article of commerce, shall be deemed guilty of unfair discrimination which is hereby prohibited and declared unlawful. (R. S. 1919, sec. 9672.)¹

Sec. 8718. Penalty.—Any person, firm, company, association, or corporation violating any of the provisions of the preceding section, and any officer, agent, or receiver of any firm, company, association, or corporation, or any member of the same, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred dollars nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or suffer both penalties. (R. S. 1919, sec. 9673.)

Sec. 8719. Contracts void, when.—All contracts or agreements made in violation of any of the provisions of chapter 47, R. S. 1929, or of any other law relating to pools, trusts, conspiracies, discriminations, and unlawful combinations in restraint of trade shall be void. (R. S. 1919, sec. 9674.)

Sec. 8720. Duties of attorney general.—It shall be the duty of the attorney general to enforce the provisions of chapter 47, R. S. 1929, and every other law relating to pools, trusts, conspiracies, discriminations, and unlawful combinations in restraint of trade by appropriate actions in courts of competent jurisdiction. In all prosecutions under chapter 47, R. S. 1929, or any other law concerning pools, trusts, conspiracies, discriminations, and unlawful combinations, the attorney general for his services shall, in addition to the salary now allowed by law, be allowed a fee in each case equal in amount to one-fourth of the fine, penalty, or forfeiture imposed, to be taxed, collected, and paid in the same manner as ordinary court costs are now taxed, collected, and disbursed. (R. S. 1919, sec. 9675.)

Sec. 8721. Duty of secretary of state when complaint is made.—If complaint shall be made to the secretary of state that any corporation authorized to do business in this state is guilty of unfair discrimination within the terms of article 2, chapter 47, R. S. 1929,

¹ For further treatment of sec. 8717 see vol. *State Price Control Legislation: Antidiscrimination Legislation*.

it shall be the duty of the secretary of state to refer the matter to the attorney general, who may, if in his judgment the facts justify, institute proceedings in any court of competent jurisdiction against such corporation. If the facts set forth in such complaint do not, in the judgment of the attorney general, justify the institution of such proceedings, he may in his discretion proceed to take testimony as provided in article 4 of this chapter. (R. S. 1919, sec. 9676.)

Sec. 8722. Forfeiture of permit for violation.—If any corporation, foreign or domestic, authorized to do business in the state is found guilty of unfair discrimination within the terms of said article 2, chapter 47, R. S. 1929, or of the violation of any other law concerning pools, trusts, conspiracies, discriminations and unlawful combinations, it shall be the duty of the secretary of state, when a certified copy of the judgment, or verdict, against such foreign or domestic corporation is filed in his office, to immediately revoke the permit of such corporation to do business in this state; and it shall be the duty of the clerk of the court in which such judgment, or verdict, is rendered to immediately file such certified copy in the office of the secretary of state. Any such clerk who shall fail to comply with the provisions of this section shall be deemed guilty of and punished as for a misdemeanor. (R. S. 1919, sec. 9677.)

Sec. 8723. Attorney general to institute suit.—If after revocation of its permit any such corporation found guilty of having violated any of the provisions of chapter 47, R. S. 1929, or any other law concerning pools, trusts, conspiracies, discriminations and unlawful combinations, shall continue to do business in this state; or if any other corporation not having a permit to do business in this state and found guilty of having violated any of the provisions of chapter 47, R. S. 1929, or any other law concerning pools, trusts, conspiracies, discriminations, and unlawful combinations, shall thereafter continue to do business in this state, it shall be the duty of the attorney general, by a proper suit in the name of the state of Missouri, in some court of competent jurisdiction, to proceed to oust such corporation from all business of every kind and character in the state of Missouri; and such court may by its judgment and decree also declare all or any part of the property of such corporation forfeited unto the state; or, in lieu of the forfeiture of all or any part of the property of such corporation, the court may assess a fine against such corporation and permit it to continue in business in this state, in obedience to, and in compliance with, the law of this state relating to the incorporation, and licensing, of corporations to do business in this state, and under such other conditions as the court may impose. (R. S. 1919, sec. 9678.)

Sec. 8724. Remedy not exclusive.—Nothing in this article shall be construed as repealing any other law, or part of law, but the remedies herein provided shall be cumulative to all other remedies provided by law. (R. S. 1919, sec. 9679.)

Sec. 8725. Deemed guilty of unfair discrimination, when.—Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Missouri and engaged in the business of buying milk, cream, butterfat, butter, poultry, and eggs, for the purpose of manufacture, sale or storage, that, for the purpose of destroying or injuring the business of a competitor, shall discriminate between different sections, localities, communities, cities or towns of this state by purchasing such commodity or commodities at a higher price or rate in one section, locality, community, city or town than is paid for the same commodity by such person, firm, company, association or corporation in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality of such commodity, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale or storage; together with the actual expenses of labor, storage, or rent in purchasing the same at point of purchase, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful: *Provided*, That the fact that any person, firm, company, association or corporation purchases any of above mentioned commodities at a higher price or rate in the one section, locality, community, city or town than is paid at the time for the same commodity by the same person, firm, company, association or corporation in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of purchase to the point of manufacture, sale or storage, shall be prima facie evidence that such higher price or rate was paid for the purpose of destroying or injuring the business of a competitor, and that such person, firm, company, association or corporation is guilty of unfair discrimination. (Laws 1921, p. 287, sec. 1.)²

Sec. 8726. Conviction for unfair discrimination—Penalty.—Any person, firm, company, association, or corporation who shall be convicted of unfair discrimination, as defined by sections 8725 to 8727, inclusive, shall be fined for each offense not less than one thousand dollars nor more than ten thousand dollars, and, in addition thereto,

² For further treatment of sec. 8725 see vol. *State Price Control Legislation: Antidiscrimination Legislation*.

shall be enjoined, upon the application of the state of Missouri, from engaging directly or indirectly in the business of purchasing in any such commodities. (Laws 1921, p. 287, sec. 2.)

Sec. 8727. Attorney general to institute suit—Court shall issue injunction, when.—It is hereby made the duty of the attorney general of the state of Missouri, upon being informed that any person, firm, company, association, or corporation has been convicted of unfair discrimination, as defined in sections 8725 and 8726, immediately to institute suit in the name of the state of Missouri in any circuit court of this state where service may be had upon the defendant, against such person, firm, company, association, or corporation, to enjoin such person, firm, company, association or corporation from engaging directly or indirectly in the business of buying any such commodities; and upon proof that any such person, firm, company, association or corporation has been convicted of unfair discrimination, the court shall issue such injunction. (Laws 1921, p. 287, sec. 3.)

Sec. 8728. Secretary of state to make inquiry—Form of affidavit.—It shall be the duty of the secretary of state, on or about the the fifteenth day of June of each year, to address to the president, secretary, or managing officer of each incorporated company in this state, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in article 1 of chapter 47, R. S. 1929, and to require an answer, under oath, of the president, secretary, or managing officer of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

AFFIDAVIT

STATE OF MISSOURI,
County of _____, ss.

I, _____, do solemnly swear that I am the _____ (president, secretary, or managing officer) of the corporation known and styled _____, duly incorporated under the laws of _____, on the _____ day of _____, 19____, and now transacting or conducting business in the state of Missouri, and that I am duly authorized to represent said corporation in the making of this affidavit, and I do further swear that the said _____, known and styled as aforesaid, is not now, and has not at any time within one year from the date of this affidavit, created, entered into, or become a member of or participated in any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm; and that it has not entered or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire,

lightning, or storm; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer, or employe, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract, or agreement, with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract, or agreement, would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use, or consumption, or prevent, restrict, or diminish the manufacture or output of any article; and that it has not made or entered into any arrangement, contract, or agreement with any person, association, or persons, or corporations designed to lessen or which tends to lessen full and free competition in the importation, manufacture, or sale of any article, product, or commodity in this state, or under the terms of which it is proposed, stipulated, provided, agreed, or understood that any particular or specified article, product, or commodity, shall be dealt in, sold, or offered for sale, in this state to the exclusion, in whole or in part of any competing article, product, or commodity.

(President, secretary, or managing officer)

Subscribed and sworn to before me, a _____ within and for the county of _____, this _____ day of _____, 19_____

And thereupon, it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein, and upon refusal to make oath in answer to said inquiry or the failure to do so within thirty days after the first day of July next following the mailing of said inquiry it shall be the duty of the secretary of state, within sixty days after said first day of July, to certify the fact of said failure to the attorney general; and, thereupon, it shall be the duty of the attorney general forthwith, in the name of the state and at the relation of the secretary of state, to proceed against such corporation for the forfeiture of its charter, or certificate of incorporation, or its license, right or privilege to do business in this state: *Provided, however,* That if such corporation shall file the affidavit required by the provisions of this section prior to the rendition of final judgment in such action, the court may assess against such corporation, in lieu of a judgment forfeiting its charter, or certificate of incorporation, or its license, right or privilege to do business in this state, a fine not exceeding five thousand dollars and not less than one hundred dollars: *Provided, however,* That if such corporation shall at any time, before final judgment, file, or cause to be filed, with the secretary of state, the affidavit herein prescribed, the trial court, in its discretion, for good cause shown, may, upon payment of a fine of twenty-five dollars, together with all the costs, including the fee allowed by law to the attorney general, remit any further penalty. (R. S. 1919, sec. 9680.)

Sec. 8729. Affidavit, by and before whom made.—The affidavit required by this article shall be made by the president, secretary, treasurer or managing officer of such corporation in this state, and

shall be made before some person authorized to administer oaths in this state. (R. S. 1919, sec. 9681.)

Sec. 8730. Penalty for false affidavit.—Every person who shall make, or cause to be made, and file, or cause to be filed, said affidavit, knowing the facts stated therein to be false, shall, on conviction, be adjudged guilty of perjury, and shall be punished by imprisonment in the penitentiary for a term not exceeding seven years. (R. S. 1919, sec. 9682.)

Sec. 8731. Secretary of state—Duty—Production of books.—It shall be the duty of the secretary of state, at any time upon satisfactory evidence that any company or association of persons duly incorporated under the laws of this or any other state, doing business in this state, has entered into any trust, combination or association, in violation of the preceding sections of this article, to demand that it shall make the affidavit as above set forth in this article as to the conduct of its business. In case of a failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in section 8728 of this article: *Provided*, That no person shall be subject to any criminal prosecution on account of any matter or thing truthfully disclosed by the affidavit required by this article: *And provided further*, That in any prosecution or proceeding brought to enforce the provisions of this article, no witness shall be permitted to refuse to answer any question material to the matter in controversy, nor shall be permitted to refuse to produce any books or papers material to such inquiry upon the ground that to produce such books and papers or to answer such question might tend to incriminate him or subject him to a penalty or a forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers. (R. S. 1919, sec. 9683.)

Sec. 8732. Attorney general, circuit and prosecuting attorneys—Duties—Compensation.—It shall be the duty of the attorney general to enforce the provisions of chapter 47, R. S. 1929, and any other provisions of law concerning pools, trusts, conspiracies, discriminations, and unlawful combinations. He shall institute and conduct all suits and proceedings for the violation of the provisions of this section, or of any other law concerning pools, trust, conspiracies, discriminations, and unlawful combinations, and shall prosecute such suits on appeal to any court of appellate jurisdiction. As compensation for his service in this behalf, the attorney general shall, in addition to his salary, be entitled to have and receive a fee equal in amount to one-fourth of the fine, penalty, or forfeiture imposed upon such corporation, to be taxed as costs and collected and disbursed in the

manner in which ordinary court costs are now collected and disbursed. The attorney general shall have power and he is hereby authorized to call on the prosecuting or circuit attorney of the county in which any such proceeding may be brought, or to employ any reputable attorney in such county to aid and assist in the conduct and trial of such proceeding; and in every proceeding, when final judgment is rendered, such prosecuting, circuit or other attorney so called upon, or appointed, shall be allowed a fee as provided in section 8705 of chapter 47, R. S. 1929. The attorney-general shall also have power, and he is hereby authorized, to employ some suitable person as special counsel in the prosecution of offenses against, and violations of, the provisions of chapter 47, R. S. 1929, or any other law concerning pools, trusts, conspiracies, discriminations and unlawful combinations. The attorney general shall have the power, and it shall be his duty, after the expiration of his term of office, to retain control of and prosecute to final judgment or otherwise make final disposition of all suits and proceedings instituted by him for the violation of any of the provisions of chapter 47, R. S. 1929, or of any other law concerning pools, trusts, conspiracies, discriminations, and unlawful combinations, and he shall be entitled to the fees herein provided in such suits and proceedings. The attorney general shall also have power and he is hereby authorized to employ such shorthand reporters as may be required to take and transcribe testimony in the performance of his duties as in this law prescribed. He may also, when he deems it advisable, employ confidential aids in procuring and compiling evidence of the violation of chapter 47, R. S. 1929, or any other law concerning pools, trusts, conspiracies, discriminations and unlawful combinations. (R. S. 1919, sec. 9684.)

Sec. 8733. Judgments—Fees of prosecuting officers.—In all suits instituted under the provisions of chapter 47, R. S. 1929, or under the provisions of any other law to forfeit the charter of a corporation, or to forfeit the right or license of a corporation to do business in this state, where a judgment of forfeiture is obtained and the cause is not appealed to the supreme court, or court of appeals, the court rendering such judgment shall allow the attorney general a fee equal in amount to one-fourth of the fine, penalty, or forfeiture, imposed upon such corporation, which in no case shall be less than twenty-five dollars, and when any prosecuting, or circuit attorney, or any other attorney, shall at the request of the attorney general aid and assist in any such prosecution, such prosecuting or circuit attorney, in addition to his salary, or such other attorney aiding or assisting in such prosecution, shall have and receive a fee of twenty-five dollars, to be taxed, collected and paid in the same manner as ordinary court costs are now taxed and paid. (R. S. 1919, sec. 9685.)

Sec. 8734. County officers to furnish certain information, when.—It is hereby made the duty of all county officers in this state to furnish, from their records to the attorney general, any information he may request of them, to enable him the more fully to execute the duties imposed upon him by this law, and, for such services, any county officer furnishing information to the attorney general shall, in addition to his salary, be paid the same fees as are allowed by law to the secretary of state for copying and certifying official records and documents, to be taxed as costs in any prosecution in which such information is required. (R. S. 1919, sec. 9686.)

Sec. 8735. Action to dissolve—Procedure—Witness not relieved from the production of books, when.—Whenever any proceeding shall be commenced in any court of competent jurisdiction in this state by the attorney general against any corporation or corporations, individual or individuals, or associations of individuals, or joint stock associations, or copartnership, under the law against the formation and maintenance of pools, trusts of any kind, monopolies in commodities, combinations, or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this state, then, in such case, if the attorney general desires to take the testimony of any officer, director, agent, or employe of any corporation or joint stock association proceeded against, or in case of a copartnership, any member of said partnership, or any employe thereof, in any court in which said action may be pending or before any person duly authorized by any court to take testimony in any such action; and the individual or individuals, whose testimony is desired, are without the jurisdiction of the courts of this state, or reside without the state of Missouri, then, in such case, the attorney general shall file in said court, in term time or in vacation, or with any person duly authorized to take the testimony in such case, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place in the state where he desires the said persons to appear; and, thereupon, the court in which, or one of the judges thereof, or the person before whom testimony is being taken, shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or any agent, officer, or employe of any corporation, joint stock association, or copartnership which are parties to said action, notifying said attorneys of record, or officer, agent, or employe, that the testimony of the person or persons named in the application of the attorney general is desired, and requiring said attorney or attorneys of record, or said officer, agent, or employe, to whom said notice is delivered, or upon whom the same is served, to

have said officer, agent, employe, or representative of said copartnership or agent thereof, whose evidence it is desired to take at the place named in the application of the attorney general, and at the time fixed in said application, then and there to testify: *Provided, however,* That the said application shall always allow, in fixing said time, the same number of days for travel to reach the designated point in Missouri that would be now allowed by law in case of taking depositions: *Provided, also,* In addition to the above-named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer, or employe on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice and the return thereon, in writing, may be made by anyone authorized by law to serve a subpoena: *Provided,* That no such witness shall be permitted to refuse to produce any books or papers in accordance with an order made under the provisions of this article, or to answer any question in reference to the subject matter of such litigation, upon the ground that to produce such books and papers, or to answer any question in reference to the subject matter of such litigation, upon the ground that to produce such books or papers or to answer such questions, would tend to incriminate him or subject him to a penalty or a forfeiture; but no such witness shall be liable to prosecution, or subject to an action of penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce books or papers. (R. S. 1919, sec. 9687.)

Sec. 8736. Proceedings upon failure to testify or to produce books, papers, etc.—Whenever any attorney or attorneys of record, or any agent, officer or employe of any such corporation, joint stock association or copartnership, shall be notified, as above provided, to request any officer, agent, director or employe to attend before any court or before any person authorized to take the testimony in said proceeding, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce whatever books, papers and documents they may be ordered to produce by the court, or the officer authorized to take said evidence, then it shall be the duty of the court, upon the motion of the attorney general, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by said corporation, joint stock association or copartnership, whose officer, agent, director or employe has neglected or failed to attend and to testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony; and said court shall proceed to render judgment by default against said corporation, joint stock association or copartnership. (R. S. 1919, sec. 9688.)

Sec. 8737. Ibid.—*And it is further provided*, That in case any officer, agent, employe, director or representative of any corporation, joint stock association or copartnership in such proceeding as hereinbefore mentioned, who shall reside or be found within this state, shall be subpoenaed to appear and testify or to produce papers, books and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then or thereafter filed by said corporation, joint stock association or copartnership in any such proceeding shall, on motion of the attorney general, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership. (R. S. 1919, sec. 9689.)

Sec. 8738. Action to be commenced—How determined.—For the purpose of determining whether an action or proceeding should be commenced against any pool, trust, conspiracy or combination in restraint of trade, the attorney general may examine and procure the testimony of witnesses in the manner herein prescribed. (R. S. 1919, sec. 9690.)

Sec. 8739. Procedure for securing testimony.—Whenever the attorney general deems it necessary or proper before beginning any action or proceeding against any pool, trust, conspiracy or combination made, arranged, agreed upon or entered into whereby a monopoly in the manufacture, production, or sale in this state of any article or commodity is or may be sought to be created, established, or maintained, or whereby competition in this state in the supply or price of any article or commodity is or may be restrained or prevented, then in such case the attorney general may present to any justice of the supreme court an application, in writing, for an order directing such persons, as the attorney general may require, to appear before a justice of the supreme court or any examiner designated in said order and answer such relevant and material questions as may be put to them concerning any alleged illegal contract, arrangement, agreement, or combination in violation of the laws of this state against pools, trusts, agreements, combinations, and conspiracies in restraint of trade, or to regulate, fix, or maintain the price of any commodity or to create a monopoly therein, if it appears to the satisfaction of the justice of the supreme court to whom the application for the order is made that such an order is necessary or expedient, then such order shall be granted. Such order shall be granted without notice, unless notice is required to be given by the justice of the supreme court to whom the application is made, in which event an order to show cause why such application should not be granted shall be made containing such pre-

liminary injunction or stay as may appear to said justice to be proper or expedient, and shall specify the time when and the place where the witnesses are required to appear, and such examination shall be held in the City of Jefferson. The justice of the supreme court or the examiner may adjourn such examination from time to time and witnesses must attend accordingly. (R. S. 1919, sec. 9691.)

Sec. 8740. Order for examination.—The order for such examination must be signed by the justice making it; and the service of a copy thereof, with an indorsement by the attorney general signed by him, to the effect that the person named therein is required to appear and be examined at the time and place and before the justice or referee specified in such indorsement, shall be sufficient notice for the attendance of witnesses. Such indorsement may contain a clause requiring such person to produce on such examination all books, papers, and documents in his possession or under his control relating to the subject of such examination: *Provided, however,* That the production of books and papers for inspection shall always be subject to the order of the supreme justice who has ordered such examination, and either party may, by a petition, in writing, ask that the said justice pass on the question as to whether or not said books and papers should be produced and examined and introduced in evidence. The order to appear as a witness may be served and return of service made in the same manner and by the same officer by whom a subpoena may now be served. (R. S. 1919, sec. 9692.)

Sec. 8741. Evidence, to whom delivered—Witness not excused from producing records or testifying, when.—The testimony of each witness must be subscribed by him, and all testimony taken by such justice or examiner appointed must be certified and delivered by such justice or examiner to the attorney general at the close of the examination. The justice or examiner shall cause said testimony to be taken down by a competent stenographer: *Provided,* That no witness shall be permitted to refuse to produce books or papers in accordance with an order made under the provisions of this article, or to answer any questions in reference to the subject matter of such litigation upon the ground that to produce such books and papers or to answer such questions would tend to incriminate him or subject him to a penalty or a forfeiture; but no such witness shall be liable to prosecution or subject to an action of penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce books or papers. (R. S. 1919, sec. 9693.)

Sec. 8742. Power of examiner.—An examiner appointed under this article shall have his power and authority specified in the order appointing him. And he shall have all the ordinary power and

authority of an examiner appointed by the supreme court, in addition to what special duties may be devolved on him by the order of appointment. (R. S. 1919, sec. 9694.)

Sec. 8743. Power to punish for contempt.—If any witness or witnesses be properly served, as herein provided, with notice to appear and testify, and they fail to obey said notice, or appearing, refuse to testify, the attorney general may file a statement, in writing, with the supreme court justice setting out such facts, and said justice may, if he deems it proper, issue a citation to said parties causing them to forthwith appear and show cause why he or they should not be fined or imprisoned, or both, for contempt. And in such contempt proceedings the justice of the supreme court shall have full power to either fine or imprison, or both, as a punishment for either failing to appear and testify, or appearing, failing to testify, or to produce books and papers when so ordered to do. (R. S. 1919, sec. 9695.)

Sec. 8744. Costs, how collected.—The supreme court or the justice thereof making the order for examination as provided in article 5, chapter 47, R. S. 1929, and amendments thereto, may make such order concerning the taxation and payment of costs in these proceedings against either the state of Missouri or the person examined, or any corporation, joint stock company, or combination of persons interested in or in any manner connected with the subject of such examination as such court or justice may deem just and proper. Such costs when taxed as in this section provided shall be collected in the ordinary way costs are now collected in the supreme court, and an itemized statement thereof shall be filed with the clerk of the supreme court, to whom all costs shall be paid. (R. S. 1919, sec. 9696.)

Stat. Ann. (1932), c. 32, Corporations

Section 4614 provides that every corporation at the time of its annual registration shall file with the secretary of state an affidavit setting forth that it has no part of its business or interests in or with any trust, combination, or association in violation of the laws of the state relating to pools, trusts, and combinations.

Sections 4630 (page 2054) and 4633 provide that every corporation must file the affidavit required by sec. 4614 annually and also as a condition precedent to filing an affidavit of dissolution with the secretary of state or procuring a decree of court dissolving such corporation.

Section 4639 provides that nothing in article I of chapter 32 on Corporations shall be held to exempt any corporation from any of the fines and penalties prescribed by c. 47, R. S. 1929 (Stat. Ann. (1932) secs. 8700 to 8744) relating to pools, trusts, conspiracies, and discriminations.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

An agreement among 24 stone-quarry operators in one district of a city to sell, for a period of 6 months, their respective outputs through a single agent who was to determine the quota of production for each quarry and sell the stone at uniform prices was held not in restraint of trade in *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880). The court stated that the contract did not deprive men of work, or unduly raise prices, or cause a monopoly, or end competition, and was therefore not injurious to the public.

Constitutionality of Statutes.

The general antitrust laws have been held constitutional under State and Federal constitutions in the following cases: *State ex rel. Crow, Attorney General v. Firemen's Fund Insurance Co. et al.*, 152 Mo. 1, 52 S. W. 595 (1899); *State ex rel. Crow, Attorney General v. Continental Tobacco Co. et al.*, 177 Mo. 1, 75, S. W. 737 (1903); *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al.*, 218 Mo. 1, 116 S. W. 902 (1909), aff'd. 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760 (1912); *State ex rel. Major, Attorney General v. International Harvester Co. of America*, 237 Mo. 369, 141 S. W. 672 (1911), aff'd. 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276 (1914); *State ex rel. Jones v. Mallinckrodt Chemical Works*, 249 Mo. 702, 156 S. W. 967 (1913) aff'd. 238 U. S. 41, 35 Sup. Ct. 671, 59 L. Ed. 1192 (1915); *State ex rel. Attorney General v. Arkansas Lumber Co. et al.*, 260 Mo. 212, 169 S. W. 145 (1914); *State ex rel. Mueller Baking Co. et al. v. Calvird, Judge*, 338 Mo. 601, 92 S. W. (2d) 184 (1936).

Procedure under section 8735 to secure compulsory attendance of nonresident officers of a corporation by giving notice to their attorneys of record is constitutional. *State ex rel., Hadley, Attorney General v. Standard Oil Co. of Indiana et al.*, 194 Mo. 124, 91 S. W. 1062 (1906).

Acts of 1889, section 6, page 97, requiring an officer of every corporation to report whether his company had violated the antitrust act was held unconstitutional. *State ex rel. Attorney General v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125 (1892).

Act March 24, 1897, section 1, page 208, prohibiting fire-insurance companies from combining to fix premium rates except in cities with a population of 100,000 or over was held constitutional. The exception was subsequently repealed. *State ex rel. Crow, Attorney*

General v. Aetna Insurance Co. et al., 150 Mo. 113, 51 S. W. 413 (1898).

Application of Statutes.

In General.

A trust is a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly. *State ex rel., Crow, Attorney General v. Firemen's Fund Insurance Co. et al.*, supra.

For a monopoly to exist it is not necessary that prices be raised and competition destroyed, but only that the power exist to raise prices or destroy competition at pleasure. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al.*, 218 Mo. 1, 116 S. W. 902 (1909), aff'd. 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760 (1912).

The antitrust laws of this State are penal in their nature and should be strictly construed, but both the information and the facts should be reasonably construed. *Ibid.*

The fact that a livestock exchange is a voluntary association does not make the antitrust law inapplicable to its members acting in concert. *State ex rel. Attorney General v. Kansas City Livestock Exchange et al.*, 211 Mo. 181, 109 S. W. 675 (1908).

Labor unions are not unlawful combinations in restraint of trade. *Lohse Patent Door Co. v. Fuelle et al.*, 215 Mo. 421, 114 S. W. 997 (1908).

The antitrust laws apply to insurance companies. *State ex rel. Barker, Attorney General v. Assurance Co. of America et al.*, 251 Mo. 278, 158 S. W. 640 (1913).

The newspaper business is a personal service, and section 8701 does not apply to it. *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91 (1900).

A company which buys ice from codefendants and does a retail business in ice is not exempt from the antitrust statute on the ground that it is engaged in a personal service. *Dietrich v. Cape Brewery & Ice Co. et al.*, 315 Mo. 507, 286 S. W. 38 (1926).

A corporation, trading as a commission merchant at a stockyard, was held not to be engaged in the trade within meaning of the antitrust statutes. *Cooperative Live Stock Commission Co. v. Browning et al.*, 260 Mo. 324, 168 S. W. 934 (1914).

Where four packers controlled 65 to 80 percent of the dressed beef and 50 to 60 percent of the dressed pork sold in the three largest

cities in Missouri and combined to fix meat prices there, such combination was held in restraint of trade. *State ex rel. Crow, Attorney General v. Armour Packing Co., et al.*, 173 Mo. 356, 73 S. W. 645 (1903).

Five producers entered into contracts to deliver to plaintiff all the granite each produced for 5 years. The contracts worked serious public injury by raising prices and were therefore held invalid. *Finck et al. v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213 (1905).

The antitrust law is broad enough to cover cases where oil companies fix prices, limit trade, and prevent competition. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra.*

A combination of six harvester-manufacturing companies doing 80 to 90 percent of that business in the United States was held to be unlawful under the antitrust law. *State ex rel. Major, Attorney General v. International Harvester Co. of America, supra.*

The merger, with a view to lessening competition, of seven companies into one doing 50 to 60 percent of the wholesale and retail ice business in a city was held to violate section 8703. *State ex rel. Sager v. Polar Wave Ice & Fuel Co.*, 259 Mo. 578, 169 S. W. 126 (1914).

Rules of a hay dealers' association fixing a uniform rate of commission to be charged do not violate sections 8700 to 8703, because the labor is not a "product or commodity" that is the subject of "importation, transportation, manufacture, purchase, or sale" within the meaning of the statute; and where the only restriction on dealing with nonmembers of the association forbids it only as to former members suspended or expelled, the above sections are not violated. *Hareison v. Tyler et al.*, 281 Mo. 383, 219 S. W. 908 (1920).

An agreement between two telephone companies that each would route messages in the territory of the other over its lines for a period of 25 years was held not to violate the antitrust laws. *Home Telephone Co. v. Sarcoux Light & Telephone Co.*, 236 Mo. 114, 139 S. W. 108 (1911).

An agreement to fix prices and limit production of plumbers' supplies was held invalid under the antitrust laws. *Walsh v. Association of Master Plumbers of St. Louis, Missouri, et al.*, 97 Mo. App. 280, 71 S. W. 455 (1902).

A planing-mill listing bureau did not illegally restrain trade by furnishing members estimates on which to bid, supplying information on costs and credits, and cooperating in resisting the demands of labor. Where restraint of trade is merely incidental to the plan of an organization not otherwise illegal, the antitrust statute

is not violated. *State ex rel. Barrett, Attorney General v. Carondelet Planing Mill Co. et al.*, 309 Mo. 353, 274 S. W. 780 (1925).

Defendant's agents could not use a social club formed by them as an agency to fix insurance rates in violation of the antitrust law. *State ex rel. Crow, Attorney General v. Firemen's Fund Insurance Co. et al., supra.*

Where an association of undertakers met for social purposes and discussed the best methods of carrying on business, but adopted no regulations to fix prices or keep down competition, the antitrust laws were not violated. *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 101, 114 S. W. 1049 (1908).

An allegation that defendants, pursuant to agreement among themselves, refused to loan or hire carriages and hearses to undertakers not members of defendants' association, with the result that plaintiffs, nonmembers, could neither borrow nor hire from them, does not state a cause of action under the antitrust law. *Stephens et al. v. Mound City Liverymen and Undertakers Association of St. Louis et al.*, 295 Mo. 596, 246 S. W. 40 (1922).

A combination illegal under the antitrust laws cannot be operated under the cloak of a corporation by its constituent members or governing bodies. *National Lead Co. v. S. E. Grote Paint Store Co.*, 80 Mo. App. 247 (1899).

The right of one to buy from or sell to whom he pleases does not extend to concerted action by a group to destroy the business of another. *Deitrich v. Cape Brewery & Ice Co. et al., supra.*

Where a large body of men combine for a particular purpose, and in pursuance of the agreement, the men individually act in accordance with it in transacting their business, the law will hold those who entered into the agreement responsible. Refusal of members of an exchange to deal with outsiders is not justified by the fact that outsiders may join for a \$1,000 fee. *State ex rel. Attorney General v. Kansas City Live Stock Exchange et al., supra.*

But, an arrangement between members of a livestock exchange that they will not deal with plaintiff, a nonmember, or with anyone dealing with plaintiff, does not violate sections 8700, 8702, 8703, 8707, and 8715. *Cooperative Live Stock Commission Co. v. Browning et al., supra.*

The anti-trust laws were held not to apply to an agreement between competing insurance companies that none of them would reemploy within 2 years any person leaving or discharged from another company. *Cheek v. Prudential Insurance Co. of America*, 192 S. W. 387 (1917), aff'd 259 U. S. 530, 42 Sup. Ct. 516, 66 L. Ed. 1044 (1922).

A fire insurance association which did not limit its membership did not violate the antitrust laws by forbidding members to have business dealings with nonmembers or with insurance companies for which such nonmembers acted as agents. *Bersch v. Fire Underwriters' Association of St. Louis et al.*, 241 S. W. 428 (1922).

An agreement between brewers that none of them would sell beer to anyone in debt to any of the others violated the antitrust laws and operated as a defense in a suit for beer sold. *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691 (1908).

Members of a stock exchange do not violate the antitrust laws by refusing to deal with a person expelled from the exchange for wrongdoing provided this is the ground and not the fact of nonmembership. (*Heim Brewing Co. case, supra, distinguished.*) *Gladish v. Bridgeford et al.*, 113 Mo. App. 726, 89 S. W. 77 (1905).

Defenses.

It is no defense to an antitrust suit that power has been used with moderation or that the combination has been induced by good intentions or has had good effects. *State ex rel. Major, Attorney General v. International Harvester Co. of America, supra*; *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., et al.*, 246 Mo. 168, 151 S. W. 101 (1912); *State ex rel. Barrett, Attorney General v. Boeckeler Lumber Co. et al.*, 302 Mo. 187, 257 S. W. 453 (1924). Defendants in an antitrust case will not be "heard to say that a forbidden agreement is not injurious to the public." *Reisenbichler v. Marquette Cement Co., et al., supra*. The fact that price-fixing agreements are frequently broken is no defense to an anti-trust prosecution. *State ex rel. Crow, Attorney General v. Armour Packing Co. et al., supra*.

Liability and Remedies.

Under section 8700, the president of a corporation is liable for acts of the corporation bringing about an unlawful combination. *Dietrich v. Cape Brewery & Ice Co. et al., supra*.

A corporation against which an antitrust suit is pending cannot abate the suit by voluntarily withdrawing from the State. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra*.

An injunction will issue to dissolve an illegal combination between a plumbers' association and wholesalers and manufacturers to violate the antitrust law. *Walsh v. Ass'n. of Master Plumbers of St. Louis, Mo. et al., supra*.

Where a group of insurance companies were threatening to withdraw from the State in a body, the court had power to issue a tempo-

rary restraining order. *State ex rel. Barker, Attorney General v. Assurance Co. of America et al., supra.*

Jurisdiction and Venue.

In conviction of conspiracy to violate the antitrust law, it is immaterial that defendants had no mills in Missouri, if they conspired with others who had mills. *State ex rel. Attorney General v. Arkansas Lumber Co. et al.,* 260 Mo. 212, 169 S. W. 145 (1914).

For conviction under Missouri law, it is not necessary that the illegal agreement shall have been made in the State providing the companies are doing business in the State. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra.* The law also applies to an agreement made in Missouri to be partly performed there, although the corporation involved was chartered in Illinois. *Euston v. Edgar,* 207 Mo. 287, 105 S. W. 737 (1909).

Section 8709 does not apply to transactions outside Missouri relating to interstate commerce entering the State, even where one party is a company doing business in Missouri. *First National Bank of Jeannette, Pa. v. Missouri Glass Company,* 169 Mo. App. 374, 152 S. W. 378 (1912).

Section 8707 has been held to regulate venue and not service of process and so construed is not "special" legislation within the prohibition of the State constitution; the section has been construed to mean "may sue therefor in the circuit court of any county of this State," etc., the words "of any county" being supplied. *State ex rel. Mueller Baking Co. et al. v. Calvird, Judge, supra.*

Pleading and Burden of Proof.

Where defendant's answer alleged grounds on which antitrust act was unconstitutional and then closed with a general denial of all facts not admitted, this amounted to an admission that defendant had violated statute as charged. *State ex rel. Crow, Attorney General v. Firemen's Fund Insurance Co. et al., supra.*

An information in the nature of quo warranto, under sections 8700 and 8703, charging that railroads had fixed and regulated rates for transportation, but which failed to designate the rates agreed upon, the length of time they are to remain in effect, or the substance of the alleged agreement, is invalid on demurrer. *State ex rel. Major, Attorney General v. Missouri Pacific Railway Co.,* 240 Mo. 35, 144 S. W. 1088 (1912).

Despite the language of section 8712, the pleadings in quo warranto proceedings must conform to the general code of civil procedure. Whenever the purpose of an information in quo warranto is to have a corporate charter forfeited, the pleader must plead specifically the

acts of nonuser, misuser, or usurpation relied upon. If the act which the conspirators combine to perform is unlawful, it is unnecessary to set out in the indictment the means employed in accomplishing it. *State ex rel. Attorney General v. Arkansas Lumber Co. et al., supra.*

A pleading, though vague, charging a violation of the antitrust statutes in the language of those statutes is sufficient. *State ex rel. Barker, Attorney General v. Armour Packing Co. et al., supra.*

Petition alleging that defendants entered into a combination whereby they would sell cement to all retail dealers in the city of X except plaintiff, so that plaintiff could not obtain cement as cheaply as his competitors, is sufficient to state a cause of action under section 8700, and failure to point out when or where the acts complained of were committed does not vitiate it in view of section 8712. *Reisenbichler v. Marquette Cement Co. et al., supra.*

If violation of the antitrust law is relied on as a defense under section 8709 it must be affirmatively pleaded, and evidence of it cannot be offered under a general denial. *Dwyer Brick Works v. Flanagan Brothers et al., 87 Mo. App. 340 (1901).*

Proof in a civil action under the antitrust statute need be only by a preponderance of the evidence, this being a civil action. *Dietrich v. Cape Brewery & Ice Co. et al., supra.*

In a proceeding under the antitrust statute, the judgment sought should be rendered only upon clear and convincing proof. *State ex rel. Barker, Attorney General v. Armour Packing Co. et al., supra.*

Procedure and Evidence.

Quo warranto is available to punish violation of the antitrust statute, and two or more respondents can be joined in a single proceeding. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra; State ex rel. Attorney General v. Armour Packing Co. et al., supra.* But a petition under section 8728 does not have to be in quo warranto. *State ex rel. Jones v. Mallinckrodt Chemical Works, supra.*

Conviction of respondents in a court is not a condition precedent to filing of a quo warranto proceeding for ousting the corporation from business. *State ex rel. McAllister, Attorney General v. Blattner Brothers, 226 S. W. 253 (1920); State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra.* There is no right to jury trial in a quo warranto proceeding. *State ex rel. Attorney General v. Arkansas Lumber Co. et al., supra.*

The regular laws of the State relating to service of process govern service in a case under section 8707 and delivery of a copy of the summons and petition to the salesmen and truck drivers of defend-

ants is not a valid service in a case governed by the section. *State ex rel. Mueller Baking Co. et al. v. Calvird, Judge, supra.*

In an antitrust suit it was proper to consider an agreement between two oil companies providing for rebates and the division of the territory within a State between them. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra.*

Section 8713 is inapplicable to Grand Jury Proceedings. *Ex Parte Arvin*, 112 S. W. (2d) 113 (1937).

Application for production of witnesses under section 8735 may be made to the court or to the commissioner taking testimony, but before issuing process the court will ascertain that the testimony is material and that witnesses are competent. *State ex rel. Crow, Attorney General v. Continental Tobacco Co. et al., supra.*

A corporation has no right to refuse to produce its books and papers in court for examination in an antitrust proceeding against it by the State. *State ex rel. Hadley, Attorney General v. Standard Oil Co. of Indiana et al., supra.*

Miscellaneous Provisions.

Section 8720 purporting to grant the attorney general a fee proportional to the fines imposed in antitrust suits in which he prosecutes is unconstitutional. *State ex rel. Barrett, Attorney General v. Boeckeler Lumber Co. et al., supra.*

Where no dedication to public use has occurred, a terminal association may grant one taxicab company an exclusive franchise to solicit passengers on its premises. *Canary Taxicab Co. v. Terminal Railway Association of St. Louis*, 316 Mo. 709, 294 S. W. 88 (1927); *Red Top Taxicab Company v. Terminal Railway Association of St. Louis*, 322 Mo. 463, 15 S. W. (2d) 758 (1929).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. Ann. (1932)

Agriculture Cooperatives

Section 12702 provides that a nonprofit agricultural cooperative association organized under sections 12676 to 12705 shall not be deemed a conspiracy or combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra.* See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****CONSTITUTIONAL PROVISIONS****Railroads**

Const. (1875) art. 12, sec. 17 provides that no railroad or other corporation or the lessees, purchasers, or managers of any railroad corporation shall consolidate the stock, properties, or franchises of or in any way control any railroad owning or having under its control a parallel or competing line and that no officer of such a corporation shall act as an officer of any other railroad corporation owning or having control of a competing line. The question whether the lines are parallel or competing shall be decided by a jury when demanded.

STATUTORY PROVISIONS

Stat. Ann. (1932)

Railroads—Express Companies

Sections 4806 to 4808 provide that a railroad may not refuse facilities to an express company on the ground that it already furnishes facilities to another such company. The railroad commissioners are required to see that competition in the express business is not prevented by the refusal of a railroad company to provide facilities to more than one express company at the same time.

Telephone and Telegraph Companies

Section 4923 provides that no company shall have the power to contract with any owner of land for the right to erect or maintain a telephone or telegraph line over his land to the exclusion of the lines of other companies.

Common Carriers

Section 4798 provides that it shall be unlawful for a common carrier to enter into any contract, agreement, or understanding with another common carrier for the pooling of freight or to divide earnings.

Railroads

Section 4688 permits the consolidation of two or more railroad companies if the lines will be made continuous, provided the consolidation does not deprive the public of competition between the roads. A consolidation contrary to these provisions is void.

Commission Merchants—Farm Products

Section 12655 makes entry by a commission merchant into any combination to fix the prices of farm products a misdemeanor.

Livestock Markets

Sections 12725 to 12732 provide that any stockyards maintained for receiving cattle, hogs, or sheep to be bought, sold, or exchanged is a public market. Any rule of an association trading at such market which limits the right of a member to distribute his profits pro rata, according to shipments made among persons comprising his firm or who are coshareholders with him in a cooperative association, shall be unlawful. It is also unlawful to refuse or delay granting membership to any person because he will distribute his profits in such manner or to limit the numbers of the members trading. Persons violating these provisions may be permanently enjoined from maintaining such a market.

Stat. Ann. (Supp. 1939)**Liquor**

Section 4525g-31a provides that no person or corporation, or any employee, officer, agent, subsidiary, or affiliate thereof, shall have more than three licenses to sell liquor at retail for on-premises consumption, nor be directly or indirectly interested in any such business.

Section 4525g-33, as amended by L. 1939, H. B. 267, provides that conviction in any court of any violation of this act shall have the effect of automatically revoking the license of said violator.

Section 4525g-3, as revised by L. 1939, S. B. 256, section 1, provides that distillers, wholesalers, wine makers, brewers, or their employees, officers, or agents, shall not, under any circumstances, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly, loan, give away, or furnish equipment, money, credit, or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers.

Any distiller, wholesaler, wine maker, or brewer who shall violate the above provisions of this section, or permit his employees, officers, or agents to do so, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as follows: For the first offense by a fine of \$1,000; for a second offense, by a fine of \$5,000; and for a third offense, the license of said person shall be revoked.

Stat. Ann. (Supp. 1938)**Beer**

Section 13139-14 provides that brewers or manufacturers of beer or of nonintoxicating beer, or their employees, officers, agents, subsidiary, or affiliate shall, under no circumstances, directly or indirectly, have any financial interest in the retail business for the sale of such

beer, nor shall they, directly or indirectly, loan, give away, or furnish equipment, money, credit, or property of any kind, except ordinary commercial credit for such beer sold to such retail dealers.

Section 13139-20 provides that any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, except where the punishment is specifically prescribed by this act, and shall be punished by imprisonment in the county jail for a term of not more than one year, or by a fine not less than \$50 nor more than \$1,000, or by both. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

2. Public Contract Provisions

Stat. Ann. (1932)

Paper and Stationery

Section 13806 provides that bids for paper or stationery for the use of the state may be set aside by the Commissioners of Printing if they have reason to believe the bidding therefor is unfair, fraudulent, or exorbitant. See projected Vol., *Governmental Purchasing*.

Printing

Section 13792 provides that the Commissioners of Printing may set aside the bidding and relet a contract for printing if they believe that the bidding therefor is unfair, fraudulent, or exorbitant through combinations or otherwise. See projected Vol., *Governmental Purchasing*.

Construction Contracts

Section 4431 provides that any collusion or combination of persons or firms for the purpose of restricting bids or limiting the number of bidders on any contract for the construction of a state highway, levee, drainage ditch, or public building shall be punished by imprisonment of from two to five years or by a fine of not less than one thousand dollars or both. See projected Vol., *Governmental Purchasing*.

Textbooks

Section 9501 provides that a textbook publisher must file a sworn statement with the State Superintendent of Public Schools that he has no understanding or agreement with any other publisher or interest in the business of any other publisher, with the effect or intent to control the prices of school textbooks or to restrict competition in the adoption or sale thereof.

Section 9502 provides that before being licensed to sell school textbooks, a publisher shall file a sworn statement of the ownership of the publishing house. This must state whether the publisher or the owner of any interest in the establishment is also the owner of an interest in any other publishing house.

Section 9503 provides that, if a publisher enters into a combination or agreement to restrict competition in the adoption or sale of school books or if the statements required in sections 9501 and 9502 are untrue in any respect, the attorney general shall institute proceeding for the forfeiture of the publisher's bond and for the revocation of his authority to sell school books in the state and that all contracts made by the publisher under the statute shall become void at the option of the other party thereto. See projected Vol., *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Railroads.

Art. XII, sec. 17, of the Missouri Constitution is inapplicable to companies owning lines of railroads used only in a terminal business. *State ex rel. Attorney General v. Terminal Association of St. Louis*, 182 Mo. 284, 81 S. W. 395 (1904).

Under art. XII, sec. 17, of the Missouri Constitution and under section 4692 (repealed, L. 1939) a company owning, operating, or managing a railroad in Missouri is prohibited from leasing, purchasing, or exercising any control over any other railroad in the state that is substantially parallel to or a competitor of such railroad. And where the statute speaks of competing roads, it refers to substantial competition. Competition amounting to 1 percent of the traffic of one road is not sufficiently substantial so as to come within the purview of the Statute. *Kimball et al. v. Atchison, Topeka & Santa Fe Railroad Co. et al.*, 46 Fed. 888 (1891). There is dictum in *St. Louis, Kennett & Southern Railroad Co. et al. v. Wear, Judge*, 135 Mo. 230, 36 S. W. 357 (1896), to the effect that art. XII, sec. 17, of the State Constitution and sections 4692 and 4693 prevent the president of a railroad company from being named as receiver for a competing railroad.

Where the receiver of A Railroad did not desire to assume a contract by A with B because of a contract with C, the court would not

at the instance of B inquire whether the 14-year-old contract between A and C violated art. XII, sec. 17, and section 4692. *Kansas City Southern Railway Co. v. Lusk et al.*, 224 Fed. 704 (C. C. A. 8th 1915).

Interpreting a section similar to section 4688, the court stated that the failure of each of two railroads about to be consolidated to file with the secretary of state a resolution passed by a majority of its stockholders accepting the provisions of the act to consolidate railroads, does not render such consolidation void, and only the State can take advantage of such failure to file the resolution. *Leavenworth County Commissioners v. Chicago, Rock Island & Pacific Railway Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064 (1890).

Commission Merchants.

Section 12655, forbidding commission merchants from entering into combinations to fix prices of farm products, does not violate either the Federal or State constitution. *Arnold et al. v. Hanna et al.*, 315 Mo. 823, 290 S. W. 416 (1926), *aff'd.* 276 U. S. 591, 48 Sup. Ct. 212, 72 L. Ed. 721 (1927).

Public Contract Provisions

Any contract the necessary effect of which is to stifle competition in bidding on or letting of public contracts is void as in violation of public policy. *Engelman v. Skrainka et al.*, 14 Mo. App. 438 (1883); *Pendleton v. Asbury*, 104 Mo. App. 723, 78 S. W. 651 (1904); *Henry County v. Citizens Bank of Windsor*, 208 Mo. 209, 106 S. W. 622 (1907).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

I. Restrictive Covenants Ancillary to Sale of a Business.

In the sale of a dairy business, a covenant not to compete within the same county as long as the vendee should continue in business was held valid in *Lawson v. Edwards*, 293 S. W. 794 (1927). The vendee is estopped from enforcing the restrictive covenant where the vendor reenters the dairy business at the suggestion of the vendee. *Ibid.*

A covenant, ancillary to the sale of a glass business, not to compete with the vendee corporation within a radius of 25 miles of a city as long as the vendee remained in business there was held not unlawful as in restraint of trade. Failure to include a definite time limitation in a covenant does not invalidate it. A court may hear parol evidence as to the actual intent of the parties. *Kreger Glass Co. v. Kreger et al.*, 49 S. W. (2d), 260 (1932).

Where A sells his match factory to B, agreeing not to enter into the match manufacturing business at X or any other place for 5 years, the promise not to manufacture at X is severable from the promise not to compete at any other place. The former promise will be held binding. *Peltz et al. v. Eichele*, 62 Mo. 171 (1876).

A contract by defendant, manufacturer of jackets, not to compete with the vendee of her business for 9 years in the 33 States and Territories where she had done business was held valid and was enforced by injunction. *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S. W. 805 (1906).

Where defendant sold his produce business to plaintiff, agreeing not to engage in that business "at" the town of R for 5 years, "at" should be construed to mean "near or about" so as to prohibit defendant from purchasing produce for shipment at H, a town 1½ miles from R. *Counts v. Medley*, 163 Mo. App. 546, 146 S. W. 465 (1912).

An agreement, ancillary to the sale of an undertaking business, that the seller would not reenter business within 10 miles of the city of X was held to prohibit actively reentering business in the area

and not merely the reestablishment of an office there. *Hessel v. Hill*, 38 S. W. (2d), 490 (1931).

Restrictive Covenants Ancillary to Sale of a Professional Practice.

A physician selling the building containing his house and office to another physician and agreeing not to establish himself as a practicing physician within 5 miles of premises within 5 years cannot set up an office within the prohibited area, but is not prevented from attending patients within the area from an office outside it. A contract not to compete is one in restraint of trade, and the restraint of personal liberty should not be construed to extend beyond its proper import. *State ex rel. Youngman v. Calhoun*, 231 S. W. 647 (1921).

Where two physicians one of whom is a newcomer in the city form a partnership at will, the newcomer promising not to practice within 10 miles of the office for 10 years after dissolution of the partnership, the agreement is not void for lack of consideration. *Glover v. Shirley*, 169 Mo. App. 637, 155 S. W. 878 (1913).

A physician's covenant, ancillary to the sale of his practice, that he would not practice in the same county, unlimited as to time, was held valid in *Gordon v. Mansfield*, 84 Mo. App. 367 (1900).

Restrictive Covenants Ancillary to Employment.

A covenant by an ice-truck driver that he would not sell or deliver ice within a suitably limited area within one year after his employment with the ice company terminated was valid and enforceable by injunction, the employer's continuance of the driver in employment being sufficient consideration. If, however, the employer discharges the employee without cause, the covenant terminates. *City Ice & Fuel Co. v. Snell*, 57 S. W. (2d) 440 (1933); *City Ice & Fuel Co. v. McKee*, 57 S. W. (2d) 443 (1933).

Restrictive Covenants Not Ancillary to Sale of a Business Interest.

Where A contracts not to publish the X newspaper at Y as long as B is publishing his newspaper there, the contract is violated by a sale of A's paper to a vendee who continues its publication. *Vandiver v. Robertson et al.*, 125 Mo. App. 307, 102 S. W. 659 (1907).

A covenant not to compete with a partnership does not terminate when the partnership changes its name without taking in any new partners. *Gill et al. v. Ferris*, 82 Mo. 156 (1884).

Where A agreed with B for an adequate consideration not to cement any hams during the life of B's patent for cementing them, the hams being sold in a national market, the agreement was held valid and not in unlawful restraint of trade. *Billings v. Ames et al.*, 82 Mo. 265 (1862).

Remedies.

Specific enforcement will not be granted in case of a contract not to compete in drug manufacture for 6 years anywhere in the United States. *Mallinckrodt Chemical Works v. Nemnick*, 169 Mo. 388, 69 S. W. 355 (1902).

Where a business is sold with a covenant by the vendor not to compete, and liquidated damages are provided for breach, the vendee may nevertheless in a proper case obtain injunctive relief against the vendor's violating his covenant. *Wills et al. v. Forester et al.*, 140 Mo. App. 321, 124 S. W. 1090 (1910).

Where a physician sells his practice to another, covenanting not to practice again in the same county, the remedy at law is inadequate even where the vendor is solvent, and the vendee may have injunctive relief. *Gordon v. Mansfield, supra.*

But where the territory sought to be included in a restrictive covenant is not defined clearly and definitely, injunctive relief to enforce the covenant will be denied. *Athletic Tea Co. v. Cole*, 16 S. W. (2d) 735 (1929).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (Supp. 1938)

Liquor

Section 4525g-3 provides that all contracts entered into between distillers, brewers, and wine makers, or their officers or directors, in any way concerning any of their products, obligating such retail dealers who buy or sell only the products of any such distillers, brewers, or wine makers or obligating such retail dealers to buy or sell the major part of such products required by such retail vendors from any such distiller, brewer, or wine maker shall be void and unenforceable in any court in this State.

Section 13139z14 provides that all contracts entered into between brewers or manufacturers of nonintoxicating beer, or their officers, employees, directors, or agents, in any way concerning any of their products, obligating retail dealers in nonintoxicating beer to buy or sell only their products, or to buy or sell the major part of their products, required by any such retail vendors from any such brewer or manufacturer, shall be void and unenforceable in any court in this State, and proof of the execution of such contract shall forfeit the license of both vendor and the vendee. See *Special Antitrust Laws: Liquor*.

Stat. Ann. (1932)

Commodity Associations

Section 12712 provides that commodity associations organized under sections 12706 to 12721, composed of producers of the same agricultural commodity, are authorized to contract with their members for the entire or partial output of the commodity for the handling of which it is organized, for as long a period as its bylaws permit.

Grain and Poultry Exchanges

Sections 12733 to 12739 and 12740 to 12747 provide for exclusive dealing contracts in connection with the operation of trading rooms or exchanges for grain or other farm products and trading rooms or exchanges for poultry and eggs, which are declared to be public markets.

Cooperatives

Sections 12690 and 12702 provide that an agricultural nonprofit cooperative association organized under sections 12676 to 12705, may

make exclusive marketing agreements with its members for a period not exceeding ten years for all or any part of their agricultural commodities and that such marketing agreements shall not be considered illegal, as such, or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Pools, Trusts

The final allegation of the prescribed "antitrust affidavit" denies any arrangement to deal in any article or commodity to the exclusion in whole or in part of any competing article, product, or commodity. See section 8728, *General Antitrust Laws, supra*.

Judicial Decisions

Tying Contracts.

An agreement between the publishers and carriers of a newspaper that as a condition of being retained the carriers must agree not to carry papers for a named competitor did not violate the antitrust law. *Staroske v. Pulitzer Publishing Co.*, 235 Mo. 67, 138 S. W. 36 (1911).

Exclusive Dealing Arrangements.

Where plaintiff had been granted the exclusive right to sell automatic oil burners within an area, and the vendor had promised to "use due diligence to protect the territory covered by the said contract," plaintiff was entitled to injunctive relief to prevent others from selling oil burners made by the vendor. *Nokol Co. of Missouri v. Becker et al.*, 318 Mo. 292, 300 S. W. 1108 (1927).

A contract that A will provide B with all the ice cream he needs in his business for 3 years and that B will buy all his ice cream from A is a valid contract. *Banner Creamery Co. v. Judy*, 47 S. W. (2d) 129 (1932). A similar contract as to all petroleum products, unlimited as to time, is valid. *Cantrell v. Knight*, 72 S. W. (2d) 196 (1934).

Where a dealer was granted the sole right to vend a patented article in eight States and Territories during the life of the patent and agreed not to sell any similar articles during that period, the contract was upheld, the court saying: "Patented inventions and secrets of art or trade not patentable, are not within the purview

of the rule against restraint of trade." *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, 177 Mo. 559, 76 S. W. 1009 (1903).

An agreement by one learning a system of hair treatment from another to use only the latter's system of treatment and products, with no limitation as to time or place, is void as in restraint of trade. *Pope-Turnbo v. Bedford*, 147 Mo. App. 692, 127 S. W. 426 (1910).

A contract by a railroad with a ferry company that the latter should have the exclusive right to do all ferry business for the former at a given point without limit as to time was not invalid as a restraint on trade. *Wiggins Ferry Co. v. Chicago & Alton Railroad Co.*, 73 Mo. 389 (1881).

MONTANA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. Art. XV, Sec. 20. No corporation, stock company, person, or association of persons, in the State of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporation, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises or in case of foreign corporations, prohibiting them from carrying on business in the State.

STATUTORY PROVISIONS

Rev. Codes Ann. (Anderson & McFarland, 1935)

Sec. 10901. Unlawful trusts and monopolies—Penalty.—Every person, corporation, stock company, or association of persons in this State, who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporation, or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce—the phrase “articles of commerce,” as herein employed, shall and does include not only those articles which are generally, popularly, and legally known as articles of commerce, but also gas, water, water power; electric light and electric power for whatever purpose used or employed—or of the product of the soil for consumption by the people, or to create or carry out any restriction in

trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce, or product, intended for sale, use, or consumption, will be in any way controlled, or to create a monopoly in the manufacture, sale, or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such articles below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such article, so as to preclude unrestricted competition, is punishable by imprisonment in the county jail for a period not less than twenty-four hours or more than one year, or by fine not exceeding twenty-five thousand dollars, or both. History: En. sec. 1, ch. 97, L. 1909; re-en. sec. 10901, R. C. M. 1921.

Sec. 10902. Certain agreements between laborers excepted.—The provisions of this act do not apply to any arrangements, agreement, or combination between laborers, made with the object of lessening the number of hours of labor or increasing wages. History: En. sec. 2, ch. 97, L. 1909; re-en. sec. 10902, R. C. M. 1921.

Sec. 10903. Persons not to be excused from testifying.—No person shall be excused from testifying in any prosecution brought pursuant to the provisions of this act, but no person testifying for the prosecution shall be punished or prosecuted in any manner whatsoever for any act committed by him personally, as to which he is called upon to testify in a prosecution against any person or corporation, stock company, or association. History: En. sec. 3, ch. 97, L. 1909; re-en. sec. 10903, R. C. M. 1921.

Sec. 9254. Injunction against formation of trust.—Whenever any action, either civil or criminal, shall have been instituted in court in this State against any person or persons, corporation, or corporations, foreign or domestic, for the purpose of enforcing the provisions of section 20 of article XV of the constitution of the State of Montana, or any law or laws enacted pursuant to or for carrying out the same, the court in which such action is pending, if it be a court of record, or if not, then any court of record in this State, shall be and it is hereby authorized to issue an injunction to restrain any such person or persons, corporation, or corporations, foreign or domestic, from doing business in this State in violation of said section of the constitution, or in violation of any law or laws enacted pursuant to or for the purpose of enforcing said section of the constitution, pending the final determination of said action so instituted. History: En. sec. 1, ch. 93, L. 1905; re-en. sec. 6654, Rev. C. 1907; re-en. sec. 9254, R. C. M. 1921.

Sec. 9255. Injunction may issue without bond.—Said injunction shall issue as in cases of equity, without bond, upon the application of the county attorney of the county in which such action is pending, or upon the application of the attorney general, in the name of the State of Montana, upon a prima facie showing that an action, civil or criminal, has been so instituted and is so pending, charging such person or persons, corporation, or corporations, foreign or domestic, with a violation of said section of the constitution, or of any law or laws enacted thereunder. History: En. sec. 2, ch. 93, L. 1905; re-en. sec. 6655, Rev. C. 1907; re-en. sec. 9255, R. C. M. 1921.

Discrimination

Sections 10904 to 10911 provide that any person who, for the purpose of creating a monopoly, shall purchase or sell any commodity at different rates in different sections of the State, after allowance has been made for differences in the cost of transportation and for differing grades and quality, shall be guilty of unfair discrimination and upon conviction may be fined not less than \$200 nor more than \$10,000. Foreign corporations violating these provisions are subject to forfeiture of their right to do business and domestic corporations to revocation of their franchises. See Vol., *State Price Control*.

Section 2620.58 makes the provisions of sections 10904 to 10911 expressly applicable to persons engaged in the dairy business.

Rev. Codes Ann. (Anderson & Wertz Supp. 1939)

Sections 3946.1 to 3946.20, constituting the Unfair Practices Act, prohibit discrimination between different communities in the sale of any commodity or service with the intent to destroy competition. Selling below cost is also prohibited. Whenever 75 percent of the producers of agricultural commodities marketing the same within any trade area or city shall determine what is a fair price and file such price with the Montana Trade Commission, a hearing shall be held to establish fair prices to jobbers, wholesalers, and retailers. After the establishment of such fair prices, it is a violation of the act for any producer, jobber, wholesaler, or retailer to sell below them. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Judicial Decisions

Application of Constitutional Provisions.

The terms "combine" and "form a trust," as used in Const. art. XV, sec. 20 and Penal Code sec. 321 (Rev. Codes Ann. (Anderson & McFar-

land, 1935), sec. 10901) must be read in connection with the expression "for the purpose of," etc. Hence, to subject alleged offenders to penalties for violation of the antitrust laws a specific intent to do the prohibited acts or a necessary tendency to accomplish the same results must be shown. *MacGinniss v. Boston & Montana Consolidated Copper & Silver Mining Co. et al.*, 29 Mont. 428, 75 Pac. 89 (1904). Under this test, the evidence of an arrangement whereby the Amalgamated Copper Company obtained control over a majority of the stock of the Boston & Montana Consolidated Copper & Silver Mining Company and other copper companies was held not to justify the conclusion that the combination was for the specified illegal purposes. *Ibid.*

A statute (secs. 3890-3913) giving the Public Service Commission the power to fix minimum as well as maximum rates, does not violate Const. art. 15, sec 20, its purpose being to determine a price just and reasonable to the utilities and to the consumer. *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 293 Pac. 294 (1930).

It has been held that section 10901 does not make illegal a requirement in a lease by a chain filling station company, that its lessee maintain the same prices as are maintained at other stations of the lessor in the same town, since the lessor is merely protecting the sale price of its own product sold by its own lessee through its own station, and not controlling prices generally, so that there is no stifling of competition. *Quintivan v. Brown Oil Co. et al.*, 96 Mont. 147, 29 Pac. (2d) 374 (1934).

A provision in a fraternal benefit insurance policy specifying that the policy shall become inoperative if the insured engages in the business of a saloonkeeper or works as a bartender has been held not to be within the terms of section 7559, since it does not prevent the insured from following these callings but merely avoids the policy if he does. *Schwanekamp v. Modern Woodmen of America*, 44 Mont. 526, 120 Pac. 806 (1912).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

L. 1937, c. 42

Resale Price Maintenance

Sections 1 to 11 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers, between distributors, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Rev. Codes Ann. (Anderson & McFarland, 1935)
Labor

Section 10902 provides that arrangements, agreements, or combinations between laborers, made with the object of lessening hours of labor or increasing wages, shall be exempt from the provisions of the general Antitrust Act. See *General Antitrust Laws, supra*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS Transportation Companies

Const. art. XV, sec. 6, provides that no railroad corporation, express, or other transportation company, or the lessees or managers thereof, shall consolidate its stock, property, or franchises, with any other railroad corporation, express, or other transportation company, owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation; nor shall any officer of such railroad, express, or other transportation company act as an officer of any other railroad, express, or other transportation company owning or having control of a parallel or competing line.

Telegraph and Telephone Companies

Const. art. XV, sec. 14, provides that any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this State, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section. No telegraph or telephone company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph or telephone company owning or having the control of a competing line, or acquire by purchase or otherwise, any other competing line of telegraph or telephone.

STATUTORY PROVISIONS Rev. Codes Ann. (Anderson & McFarland, 1935) Railroads

Sections 6524 and 6525 provide for the consolidation of two railroads if they are not parallel or competing lines, and for the lease or purchase of one railroad by another provided the lines will connect but are not parallel or competing. Section 6531 provides, with-

out reference to parallel or competing lines, that one railroad may consolidate with, lease, or purchase another railroad.

Telegraph and Telephone Companies

Section 6647 provides that no telegraph or telephone company may consolidate with, acquire control through stock or bond ownership of, or acquire by purchase or otherwise, any other such company owning or controlling a competing line.

Insurance

Section 6126 provides that the Commissioner of Insurance, as often as he deems it expedient, shall investigate any Company holding the capital stock of one or more insurance corporations as voting trustee or otherwise for the purpose of controlling the management.

Corporations

Section 5971 provides that one corporation may acquire, buy, or hold the securities of another, but expressly states that this is not intended to give the power to do so where such action is forbidden by the constitution or statutes of the United States or of the State of Montana.

Food

Sections 10914 and 10915 provide that it shall be unlawful to destroy or to withhold from sale for a period of time which makes it necessary to destroy, in restraint of trade, any customary article of food proper for human consumption and in fit sanitary condition to be used. The penalty for violation shall be a fine or jail sentence or both.

Grain

Sections 10912 and 10913 provide that it shall be unlawful for any person buying, selling, or handling grain at a public local warehouse in this State to enter into an agreement with any other person owning or operating a public warehouse at a railway station, by which the grain handled by said warehouses at such station or the profits derived by said warehouses are pooled, or the price of grain at the station is fixed or affected in any way. Violation constitutes a misdemeanor punishable by fine or jail sentence or both. On conviction it is the duty of the chief grain inspector to revoke the warehouseman's license. Such license cannot be reissued for at least one year.

Rev. Codes Ann. (Anderson and McFarland, 1935)

Liquor

Section 2815.20 provides that it shall be unlawful for any brewer to have or own any permit to sell or retail beer at any place or

premises; it being the declared intention to prohibit brewers from engaging in the retail dispensation of beer: *Provided, however*, That this shall not be so construed as to prohibit breweries from making sale and delivery of beer manufactured by them in original packages at either wholesale or retail.

Section 2815.51 provides that it shall be unlawful for any brewer or wholesaler to lease, furnish, give, or pay for any premises, furniture, fixtures, equipment, or other property to any retail licensee, used or to be used in the dispensation of beer; or to advance, furnish money for, or pay for any license or tax which may be required to be paid for any retailer; or to be financially interested, either directly or indirectly, in the conduct or operation of the business of a retailer.

Section 2815.47 provides that any person who shall violate any of the provisions of this act for which no penalty has been specifically provided shall be liable to imprisonment in the county jail for not more than six months or to a fine of not more than \$500, or both.

**Rev. Code Ann. (Anderson & Wertz Supp. 1939)
Musical Compositions**

Sections 4285.4 et seq. repeal L. 1937, c. 90, secs. 1 to 14, enacted to prevent monopolistic practices in the licensing of radio stations and clubs with respect to the use of musical compositions, provide that an association of authors, composers, or publishers of copyrighted musical works fixing license fees or fees which any copyright owner must charge, or dividing among themselves their aggregate earnings, is in restraint of trade and is prohibited. The new law also forbids licensing the use of compositions until certain required information as to ownership of the copyright has been registered, and contains prohibitions against financial charges and other arrangements between copyright owners.

**Rev. Codes Ann. (Anderson & McFarland, 1935)
Dairy Products—Discrimination**

Section 2620.58 provides that sections 10904 to 10911, prohibiting locality discrimination in the purchase and sale of commodities, shall apply to those engaged in the production of dairy products. See *General Antitrust Laws, sections 10904 to 10911, page 421; vol. State Price Control Legislation: Antidiscrimination Legislation.*

Petroleum Products—Discrimination

Sections 4193.1 to 4193.7 provide that it shall be unlawful for any person or corporation engaged in selling standard petroleum products to discriminate in price between different localities in the State or the nearest adjoining State, after making due allowances for trans-

portation costs, quantities purchased, and costs of doing business. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

2. Public Contract Provisions

Rev. Codes Ann. (Anderson & McFarland, 1935)

General

Section 293.12 provides that collusion or secret agreements between bidders on public contracts for the purpose of securing an advantage to such bidders as against the State is forbidden. Contracts made under such circumstances are voidable at the option of the State Purchasing Agent and the State Board of Examiners. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

Rev. Codes Ann. (Anderson & Wertz Supp. 1939)

L. 1937, c. 144

Sec. 1759.8. Policy declared.—It is hereby declared to be the policy of this State that free and unrestrained competition shall prevail in the business of financing the purchase or sale of motor vehicles.

Sec. 1759.9. Definitions.—The term "person" as used in this act means any individual, firm, corporation, partnership, association, trustee, receiver, or assignee for the benefit of creditors.

(b) The terms "sell," "sold," "buy," and "purchase" as used in this act, include exchange, barter, gift, and offer or contract to sell or buy.

(c) The term "manufacturer" shall mean any person, firm, corporation, partnership, or association engaged either directly or indirectly in the manufacture or wholesale distribution of motor vehicles.

(d) The term "wholesale distributor" shall mean any person, firm, association, corporation, or other organization engaged directly or indirectly in the sale or distribution of motor vehicles to agents or to dealers.

(e) The term "dealer" shall mean any person, firm, association, or corporation or other organization of any kind, character or nature regularly engaged or intending to engage in the business of selling motor vehicles at retail within this State.

(f) "Finance company" or "finance agency" shall mean any person, firm, association, corporation, or other organization engaged in the business of buying, selling, assigning, dealing, financing, or acquiring conditional contracts of sale or engaged in the business of purchasing or acquiring promissory notes or any other form or evidences of

indebtedness of sale, either secured by vendor's lien, conditional bill of sale, chattel mortgage, or leases arising out of the sale of motor vehicles in this State.

(g) The term "motor vehicle" shall mean every self-propelled vehicle moving over the highways of this State, whether patented or unpatented.

Sec. 1759.10. Agreements as to financing motor-vehicle purchases or sales void, when.—It shall be unlawful for any manufacturer or wholesale distributor of motor vehicles to sell or enter into a contract for the sale of motor vehicles to any motor vehicle dealer on the condition or under an agreement, expressed or implied, that such dealer shall finance the purchase or sale of any motor vehicle or vehicles only through a designated finance company or finance agency. Any such condition, agreement, or understanding is hereby declared to be against the public policy of the State and such condition, agreement, or understanding shall be unlawful, void, and unenforceable, either as law or equity.

Sec. 1759.11. Threat as prima facie evidence.—Any threat, expressed or implied, made directly or indirectly to any dealer by any manufacturer, or by any person who is engaged in the business of financing the purchase or sale of motor vehicles and is affiliated with or controlled by any manufacturer, that such manufacturer will cease to sell, or will terminate or refuse to enter into a contract to sell motor vehicles to such dealer unless such dealer finances the purchase or sale of any such motor vehicle or vehicles only with or through a designated person, shall be presumed to be made at the direction of and with the authority of such manufacturer and shall be prima facie evidence of the fact that such manufacturer has sold or intends to sell such motor vehicle or vehicles on the condition or under the agreement prohibited by the provisions of this act.

Sec. 1759.12. Penalty for violations.—Any person who shall violate any of the provisions of this act, and any employee, agent, or officer of any such person who shall participate, in any manner, in making, enforcing, or performing, or in aiding or abetting in the performance of any such contract, condition, agreement, or understanding shall be deemed guilty of a crime and, upon conviction thereof, shall be punished for each offense by a fine of not more than five thousand dollars (\$5,000.00) or by imprisonment in the penitentiary for not more than five years or in the county jail for not more than one year, or by both such fine and imprisonment.

Sec. 1759.13. Suit for injury to business or property authorized.—In addition to the criminal and civil penalties herein provided,

any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending or not.

Judicial Decisions

Public Contract Provisions

Public policy forbids all contracts or combinations between bidders on public contracts, which stifle competition, so that any agreement which, in its object and nature, is calculated to diminish competition for the securing of a public contract, is detrimental to the public. *Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934 (1902). Where some of a group of bidders on a contract for a school building, after rejection of their separate bids, withdrew to let the others procure the contract without readvertisement, it has been held that such agreement is void as against public policy, since it prevented competition. *Ibid.*

II. CONTRACTS NOT TO COMPETE.

Rev. Codes Ann. (Anderson & McFarland, 1935)

Sec. 7559. Contract in restraint of trade void.—Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by the next two sections, is to that extent void. History: En. sec. 2246, Civ. C. 1895; re-en. sec. 5057, Rev. C. 1907; re-en. sec. 7559, R. C. M. 1921.

Sec. 7560. Exception in favor of sale of goodwill.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the

goodwill from him carries on a like business therein. History: En. sec. 2247, Civ. C. 1895; re-en. sec. 5058, Rev. C. 1907; re-en. sec. 7560, R. C. M. 1921.

Sec. 7561. Exception in favor of partnership agreements.—Partners may upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof. History: En. sec. 2248, Civ. C. 1895; re-en. sec. 5059, Rev. C. 1907; re-en. sec. 7561, R. C. M. 1921.

Sec. 7619. Warranty on sale of goodwill.—One who sells the goodwill of a business thereby warrants that he will not endeavor to draw off any of the customers. History: En. sec. 2383, Civ. C. 1895; re-en, sec. 5116, Rev. C. 1907; re-en. sec. 7619, R. C. M. 1921.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Codes Ann. (Anderson & McFarland, 1935)
Cooperatives

Section 6444 provides that agricultural cooperative associations organized under sections 6428 to 6449.7 may enter into agreements with their members requiring them to market all or a specified part of their agricultural products exclusively to or through the association for periods of not more than ten years. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Application of Common Law.

A contract providing that the vendor would not sell a particular brand of cigars to anyone in the State but the other contracting party has been held not to be an unreasonable restraint of trade. *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333 (1890). The restraint here was limited as to place and person and did not deprive the public of the industry of the restricted party, the contract simply being for the enlistment of the services of an agent.

NEBRASKA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. XV, sec. 9. Controversies between employers and employees, Industrial Commission, appeal to Supreme Court.—Laws may be enacted providing for the investigation, submission, and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission. (Adopted, 1920.)

STATUTORY PROVISIONS

Comp. Stat. (1929)

Sec. 59-101. "Trust," defined.—A "trust" is a combination of capital, skill, or acts, by any person or persons, to fix the price of any article or commodity of trade, use, or merchandise, with the intent to prevent others from conducting or carrying on the same business, or selling or trafficking in the same article, use, or merchandise, or a combination of capital, skill, or acts by two or more persons or two of them for either any or all of the following purposes:

First: To create or carry out restrictions in trade:

Second: To limit or reduce the production or increase or reduce the price of merchandise or commodities;

Third: To prevent competition in insurance, either life, fire, accident, or any other kind, or in manufacture, making, constructing, transportation, sale, or purchase of merchandise, produce, or commodities;

Fourth: To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any

article of merchandise, produce, or manufacture of any kind intended for sale, use, or consumption in this State; to establish any pretended agency whereby the sale of any such article, commodity, merchandise, or product shall be covered up, concealed, or made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor, producer, or manufacturer to control the wholesale or retail price of any such article of merchandise, produce, or commodity after the title to the same shall have passed from such vendor or manufacturer;

Fifth: To make or enter into, carry on, or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have heretofore bound themselves not to sell, dispose of, traffic in, or transport any article of merchandise or commodity, or article of trade, product, use, merchandise, consumption, or commerce, below a common standard figure, card, or list price, or by which they shall agree in any manner to keep the price of such article, product, commodity, or transportation, at a fixed or graduated figure, or price, or by which they shall in any manner establish or settle the price of any article of merchandise, commodity, or of insurance, fire, life, or accident, or transportation between them or between themselves and others, or with the intent to preclude, or the tendency of which is to prevent or preclude a free and unrestricted competition among themselves or others, or the people generally in the production, sale, traffic, or transportation of any such article of merchandise, product, or commodity, or conducting a like business, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale, production, or transportation of any such article or merchandise, product, or commodity, or the carrying on of any such business that its price might in any manner be affected thereby. (1897, p. 347; Ann. 12000; Comp. 6281; R. S. 1913, 4017; C. S. 1922, 3420.)

Comp. Stat. (Kyle, Supp. 1939)

Sec. 59-801. Restraint of trade or commerce, unlawful, penalty.—Except as to any contract executed pursuant to or under the authority of the provisions of the Fair Trade Act,¹ every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding Five Thousand Dollars (\$5,000.00), or by im-

¹ See *Exceptions to General Antitrust Laws*, secs. 59-1101 to 59-1110.

prisonment not exceeding one year, or by both. (1905 p. 636; Ann. 12028; Comp. 6302a, R. S. 1913, 4045; C. S. 1922, 3448; C. S. 1929, 59-801; 1937 p. 481.)

Comp. Stat. (1929)

Sec. 59-802. Monopolizing trade or commerce, unlawful, penalty.—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, within this State, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both. (1905 p. 636; Ann. 12029; Comp. 6302b; R. S. 1913, 4046; C. S. 1922, 3449.)

Sec. 59-803. Same, conspiracy, property under contract forfeited.—Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in the two next preceding sections (59-801, 59-802), shall be forfeited to the State. (1905 p. 636; Ann. 12030; Comp. 6302c; R. S. 1913, 4047; C. S. 1922, 3450.)

(Sec. 59-804 repealed L. 1939, Bill No. 106.)

Sec. 59-805. Same, attorney general may require statement.—The attorney general of this State may at any time require of any corporation, joint stock company, or other association engaged in business within this State, any statement he may think fit in regard to the conduct of its business; and he may especially require any such corporation, joint stock company or other association, to give a list of all contracts or transactions entered into within the twelve months preceding such requisition, in which it has sold any article or product, or carried any article or product within this State at a rate less than the ordinary market price, if such article or product has been sold or carried by any other person than the party to such transaction; and he may further require the reasons for such distinction and the circumstances attending the same. (1905 p. 638; Ann. 12032; Comp. 6302e; R. S. 1913, 4049; C. S. 1922, 3452. Amended May 29, 1939, by Bill No. 106, regular session 1939.)

Sec. 59-806. Same, prices to be uniform and fair.—Every person, corporation, joint stock company, or other association engaged in business within this State, who shall enter into any contract, combination, or conspiracy, or who shall give any direction or authority to do any act for the purpose of driving out of business any other person engaged therein, or who for such purpose shall in the course of such business sell any article or product at less than its fair market value, or at a less price than it is accustomed to demand or receive therefor in any other place under like conditions; or who shall sell any article upon a condition, contract, or understanding that it shall

not be sold again by the purchaser, or restrain such sale by the purchaser, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments. (1905 p. 638; Ann. 12033; Comp. 6302f; R. S. 1913, 4050; C. S. 1922, 3453.)²

Sec. 59-807. Same, holding companies illegal, when.—No corporation, joint stock company, or other association shall engage in business within this State, a majority of whose stock is owned by or controlled or held in trust for any manufacturing or other corporation, which, in the course of its manufacture or production, conducts its business, or any part thereof, in a manner which would be prohibited by this article, if it were so conducted in the course of such business within this State. (1905 p. 639; Ann. 12034; Comp. 6302g; R. S. 1913; 4501; C. S. 1922, 3454.)

Sec. 59-808. Same, books, papers, records, open to inspection.—All the books of record and papers of every such corporation, joint stock company, or other association engaged in business within this State, shall be subject to inspection by the attorney general of this State, or by any agent he may designate for that purpose, and such corporation, joint stock company, or other association shall, at such times as he shall prescribe, make such further returns, verified as aforesaid, as shall be by him, prescribed, either by general regulations or by special direction. (1905 p. 639; Ann. 12035; Comp. 6302h; R. S. 1913, 4052; C. S. 1922, 3455.)

Sec. 59-809. Same, malfeasance of corporation officer, unlawful.—Any president, director, treasurer, officer, corporator, copartner, associate, or agent of such corporation, joint stock company, or other association, who shall in its behalf do anything by this article prohibited to such corporation, joint stock company, or other association, or who shall support, vote for, aid and abet, or take part in doing such action by said corporation, joint stock company, or other association, or any instrumentality thereof, shall be liable to the penalties by law provided. (1905 p. 639; Ann. 12036; Comp. 6302i; R. S. 1913, 4053; C. S. 1922, 3456.)

Sec. 59-810. Same, violation, ouster.—No corporation, joint stock company, or other association which shall manufacture or produce any article for sale or transportation within this State and which shall do any of the acts or things prohibited to be done by this article (59-801 to 59-809), shall engage in business within this State. (1905 p. 640; Ann. 12037; Comp. 6302j; R. S. 1913, 4054; C. S. 1922, 3457.)

² For further treatment of secs. 59-805 and 59-806 see Vol. *State Price Control Legislation: Predatory Price Practices, Sales Below Cost.*

Sec. 59-811. Same, second, or subsequent violations, penalty.— Any corporation, joint stock company, or other association, that shall have been twice adjudged to have violated the provisions of this article by the final judgment of any court having jurisdiction of the question, in any civil suit or proceeding in which said corporation, joint stock company, or other association shall have been a party, who shall thereafter violate this article, or who shall fail to make the returns herein required at the times specified, shall no longer be allowed to engage in business within this State: *Provided*, Such prohibition shall only be enforced after such corporation, joint stock company, or other association shall have been enjoined against further engaging in such business on an information or suit brought in a court of competent jurisdiction by the attorney general in behalf of this State. It shall be the duty of the attorney general in such case, unless he shall be satisfied that such corporation, joint stock company, or other association has desisted and abstained and will in future desist and abstain from such violation, to enforce the provision by proceeding, either by information or by indictment, as he may in his discretion think best. Any corporation, joint stock company, or other association which shall be charged with violating this article, and any president, director, treasurer, officer, or agent thereof may be joined as a party in any proceeding, civil or criminal, to enforce this article. If, in the judgment of the attorney general, such corporation, joint stock company, or other association against which any civil proceeding may be instituted be one on which the public is so depending that the interruption of its business will cause serious public loss or inconvenience, he may, in his discretion, refrain from proceeding to obtain a decree which will absolutely prevent the continuance of such business, and may apply for a limited or conditional decree, or one to take effect a future day, as the public interests shall seem to require. If, in the judgment of the court before whom such proceeding may be pending, the interruption of the business of the defendant corporation, joint stock company, or other association will cause such serious public loss or inconvenience, the court may decline to enter an absolute decree enjoining it against proceeding with its business, and may enter a modified or conditional decree, or such decree to take effect at a future time as justice shall require. The court may also, in its discretion, enjoin such officers, or agents, or servants of such corporation, joint stock company, or other association from continuing in its service, and enjoin any such corporation, joint stock company, or other association from continuing their employment therein, as the case shall seem to require. (1905 p. 640; Ann. 12038; Comp. 6302k; R. S. 1913, 4055; C. S. 1922, 3458.)

Sec. 59-812. Same, corporation, additional penalty for violation.—Any corporation, joint stock company, or other association, and any president, director, treasurer, officer, corporator, copartner, associate, or agent thereof, who shall in its behalf engage in such business in violation of this article, shall for each offense, in addition to such penalty for contempt as the court in case of disobedience to its lawful order may impose, be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both. (1905 p. 641; Ann. 12039; Comp. 63021; R. S. 1913, 4056; C. S. 1922, 3459.)

Sec. 59-813. Same, when corporation officers personally liable for violation.—Every president, treasurer, general manager, agent, or other person usually exercising the powers of such officers of any corporation, joint stock company, or other association, who has himself, in its behalf, violated, united to violate, or voted for or consented to the violation of any of the provisions of this article, shall thereafter be personally liable for all the debts and obligations of any such corporation, joint stock company, or other association created while such person holds such office or agency, whether under the same or subsequent elections or appointments. (1905 p. 641; Ann. 12040; Comp. 6302m; R. S. 1913, 4057; C. S. 1922, 3460.)

Sec. 59-814. Same, common carriers, granting rebates, unlawful, penalties.—It shall be unlawful for any person or persons to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or service in respect of the transportation of any property within this State by any common carrier, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by law or charged others for like service. Every person who shall offer, grant, or give or solicit, accept, or receive any such rebate, concession, or service, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than five thousand dollars. (1905 p. 642; Ann. 12041; Comp. 6302n; R. S. 1913, 4058; C. S. 1922, 3461.)

Sec. 59-815. Same, seeking or receiving special advantages, unlawful, penalty.—If any joint stock company, corporation, or combination, or any agent thereof shall solicit, accept, or receive any such rebate, concession, or service as is hereinbefore declared to be unlawful, it shall be unlawful thereafter to transport within this state any article owned or controlled by such company, corporation, or combination, or produced or manufactured by it, by whomsoever the same may be owned or controlled. If any such joint stock com-

pany, corporation, or combination shall offer, grant, or give any special prices, inducements, or advantages for the sale of articles produced, manufactured, owned, or controlled by it to purchasers in any particular locality in order to restrict or destroy competition in that locality in the sale of such articles, it shall be unlawful thereafter to transport within this state any article owned or controlled by it, or produced or manufactured by it, by whomsoever the same may be owned or controlled: *Provided, however,* The prohibition imposed under this section shall not apply to any article purchased bona fide before decree made in pursuance thereof against the joint stock company, corporation, or combination producing, manufacturing, or theretofore owning or controlling the same; and provided, further, even after decree, any such article may be relieved from the prohibition imposed under this section if the owner thereof shall show to the satisfaction of the court having jurisdiction of the matter hereinafter provided that such article was purchased bona fide, without notice, and within thirty days after the entry of such decree. Any transportation company, and any officer, agent, or representative thereof, knowingly concerned in the transportation of articles within this state, contrary to the prohibitions of this section, shall be punished by a fine of not less than five thousand dollars. (1905 p. 642; Ann. 12042; Comp. 63020; R. S. 1913, 4059; C. S. 1922, 3462.)³

Sec. 59-816. Same, what courts have jurisdiction to restrain or prevent violations.—The several courts of record of this State having equity jurisdiction are hereby invested with jurisdiction to prevent and restrain all violations of this article, and especially the offering, granting, giving, soliciting, accepting, or receiving any such rebate, concession, or service by any person or persons, and to prevent or restrain any such joint stock company, corporation, or combination, who shall have solicited, accepted, or received any such rebate, concession, or service, or who shall have offered, granted, or given any special prices, inducements, or advantages in order to restrict or destroy competition in particular localities from engaging in commerce within this State. Such proceedings may be by way of petition setting forth the cause of action and praying that the acts hereby made unlawful shall be enjoined or otherwise prohibited. When the parties complained of shall be duly notified of such petition the court shall proceed as soon as may be to the hearing and determination of the case, and upon such petition and before final decree the court

³ For further treatment of secs. 59-814 and 59-815 see Vol. *State Price Control Legislation: Rebates, Secret Discounts, etc., Predatory Price Practices.*

may at any time make such temporary restraining order or prohibition as shall be deemed just. The court may retain jurisdiction of the cause after the decree for the purpose of such subsequent modification of the same as may be made to appear equitable and just in the premises. (1905, p. 643; Ann. 12043; Comp. 6302p; R. S. 1913, 4060; C. S. 1922, 3463.)

Sec. 59-817. Same, trial court's power to subpoena, State-wide.—Whenever it shall appear to the court before which any civil proceedings under this article shall be pending that the ends of justice require that other parties shall be brought before the court, the court may cause them to be summoned whether they reside in the county where the court is held or not, and subpoenas to that end may be served in any county by the sheriff thereof. (1905, p. 644; Ann. 12044; Comp. 6302q; R. S. 1913, 4061; C. S. 1922, 3464.)

Sec. 59-818. Same, damages, threefold to injured parties.—Any person who shall be injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this article may sue therefor in any court of record in this State, in the county in which the defendant or defendants reside or are found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. (1905, p. 644; Ann. 12045; Comp. 6302r; R. S. 1913, 4062; C. S. 1922, 3465.)

Sec. 59-819. Same, "persons," defined.—The word "person" or "persons" as used in this article, shall be deemed to include all corporations, associations, combinations, or concerns whatsoever. (1905, p. 644; Ann. 12046; Comp. 6302s; R. S. 1913, 4063; C. S. 1922, 3466.)

Sec. 59-820. Same, appeal, advancement of cause.—When any suit in equity is brought in any court under this article, wherein the State is complainant, the attorney general may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to the judge of the court in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day. An appeal from the final decree of the court will lie only to the supreme court and must be taken within sixty days from the entry thereof. (1905, p. 644; Ann. 12047; Comp. 6302t; R. S. 1913, 4064; C. S. 1922, 3467.)

Sec. 59-821. Same, witnesses, production of evidence, perjury, subornation of perjury, penalties.—In all prosecutions, hearings, and proceedings under the provisions of this article, whether civil or criminal, no person shall be excused from attending and testifying,

or from producing books, papers, contracts, agreements, and documents before the courts of this State, or in obedience to the subpoena of the same, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. Any person who shall neglect or refuse to make returns, attend and testify or answer any lawful requirement hereinbefore provided for or produce books, papers, contracts, agreements, and documents, if in his custody, control, or power to do so, in obedience to the subpoenas of the courts or lawful requirements of the attorney general, shall be deemed guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars. Whoever knowingly swears to a return or report required by this article that is false in any material particular, or knowingly swears to an answer to any of the requirements of this article, that is false in any material particular, shall be deemed guilty of perjury and punished as provided by the laws of this State in reference to perjury. Whoever shall knowingly prepare, or cause to be prepared, a report, return, or answer required by this article that is false, as aforesaid, shall be guilty of subornation of perjury and punished by law. (1905 p. 644; Ann. 12048; Comp. 6302u; R. S. 1913, 4065; C. S. 1922, 3468.)

Sec. 59-822. Same, attorney general and county attorney to prosecute suits, immunity from prosecution, exceptions.—It is hereby made the duty of the attorney general and the county attorney of each county under the direction of the attorney general to institute and prosecute such proceedings as may be necessary to carry into effect all of the provisions of this article: *Provided*, No person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under this article: *Provided, further*, No person testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (1905 p. 645; Ann. 12049; Comp. 6302v; R. S. 1913, 4066; C. S. 1922, 3469.)

Discriminations

Sections 59-501 to 59-509 provide that any person, company, or association engaged in the production, manufacture, distribution, collecting, or buying of any commodity in general use that intentionally, for the purpose of destroying the business of a competitor engages in locality discrimination, shall be deemed guilty of unfair discrimination. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*. MARKETING LAWS SURVEY Series.

Judicial Decisions

GENERAL ANTITRUST LAWS

Application of the Common Law.

The court granted quo warranto for the forfeiture of the corporate charter of the defendant company on the ground that it contracted to transfer all of its assets to the Distillers' and Cattle Feeders' Trust, a combination engaged to restrict production and control prices of alcoholic beverages. *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155 (1890).

In restraining a labor union, the court held that labor unions may combine for purposes of procuring shorter hours or higher wages but are subject to the laws involving conspiracies in restraint of trade. Such suits may be maintained against any and all persons, regardless of the class to which they may belong or the motive for their acts. *State v. Employers of Labor*, 102 Neb. 768, 169 N. W. 717, 170 N. W. 185 (1918). Note that the court failed to apply the statute (§ 59-801), then in force, and decided the case under the common law. (Ed.)

Application of Constitutional Provisions.

Const. art. XV, sec. 9, authorizes legislation for the "prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare." Operating under a "home rule charter" the city exercised proper authority in setting up a municipal gasoline department to sell gasoline and oil to the inhabitants of the city, both at wholesale and retail. The court pointed out that the selling of gasoline and oil is a business "affecting the public welfare" sufficient to bring it within the meaning of the constitutional provision cited above, regardless of its competitive effect on private sales of gasoline and oil. *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N. W. 172 (1926). See dissenting opinion in 208 N. W. 962 (1926). Case aff'd 275 U. S. 504, 48 Sup. Ct. 155, 72 L. Ed. 395 (1927).

Application of Statutes.

The Antitrust Act of 1897 known as the Gondring Act, except as to the first section defining "trusts," section 59-101, was repealed by implication by the Antitrust Act of 1905 known as the Junkin Act, sections 59-801 to 59-822. *State v. Omaha Elevator Co.*, 75 Neb. 637, 106 N. W. 979, 110 N. W. 874 (1906); *State v. American Surety Co.*, 91 Neb. 22, 135 N. W. 365 (1912).

The Nebraska Retail Lumber Dealers' Association levied a penalty on wholesalers selling direct to consumers or other than "regular" dealers. Members of the association and two others who signed a circular warning wholesalers not to deal with plaintiff, an "other than regular" wholesale and retail lumber dealer, were held liable in damages to plaintiff who, as a result of the boycott, was forced to retire from business. The court held the Nebraska Retail Dealers' Association to be an unlawful combination, and the members and those united with them in the furtherance of their object were subject to suit under the Gondring Act, 1897, section 11. *Cleland v. Anderson*, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212 (1902).

The Nebraska Retail Dealers Association controlling 90 percent of the retail lumber, cement, and building-material business, published a list of regular dealers in order to discourage direct sales to customers and members of the association, divided the territory (confining the sales of each of its members exclusively within its limits) and fixed prices. The court held the association itself not illegal, but enjoined its members from continuing with such practices in violation of section 59-101. *State v. Adams Lumber Co.*, 81 Neb. 392, 116 N. W. 302 (1908).

In an indictment returned under the Junkin Act of 1905, section 59-801, against the Omaha Coal Exchange, a bylaw of the exchange to the effect that the exchange should not interfere with wholesale or retail resale prices agreed upon between its members was held not in itself a violation of the antitrust laws, but only some evidence of a combination to fix and control prices. *Howell v. State*, 83 Neb. 448, 120 N. W. 139 (1909).

Defendant and others, combined to enforce certain agreements between them, refused to deal with plaintiff, who was engaged as a dealer selling coal in carload lots. Plaintiff, as a result, was forced out of business, and brought this action for damages under the Junkin Act, sections 59-801, 59-802, and 59-818. The court found the sections violated and held for the plaintiff. *Marsh-Burke Co. v. Yost*, 98 Neb. 523, 153 N. W. 573 (1915). Treble damages under section 59-818 must be claimed at the outset of the action or they are deemed waived. *Id.* 102 Neb. 814, 170 N. W. 172 (1918).

A combination of insurance companies to fix rates and commissions is in violation of the Junkin Act; the business of fire-insurance companies having been construed to come within the meaning of the "trade and commerce" clause of the act. *State v. American Surety Co.*, 91 Neb. 22, 135 N. W. 365 (1912) reversing 90 Neb. 154. 133 N. W. 235 (1911).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Comp. Stat. (Kyle, Supp. 1939)

Resale Price Maintenance

Sections 59-1101 to 59-1110 validate contracts fixing the resale price of branded articles. The statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers. See *State Price Control Legislation: Resale Price Maintenance*.

Section 59-801 exempts contracts made pursuant to the above act, sections 59-1101 to 59-1110, from the provisions of the antitrust law. See *General Antitrust Laws, supra*.

Judicial Decisions

Cooperatives.

A contract whereby a member of a cooperative marketing association agrees to market his wheat exclusively through the association does not contravene section 59-101. Such a contract is not within the evils aimed at by the antitrust laws as the marketing association is open to all growers of wheat, and its profits are equitably divided among its members. *Nebraska Wheat Growers' Assn. v. Norquest*, 113 Neb. 731, 204 N. W. 798 (1925). See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Laundry Business.

The operation of a laundry is not within the purview of section 59-101 (L. 1889, c. 69, p. 516) since laundries are not manufacturing establishments and do not deal in manufactured or natural products as provided for in the enactment. *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900 (1898). See *Contracts Not to Compete, infra*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Comp. Stat. (Kyle, Supp. 1939)

Copyrighted Musical Compositions

Sections 59-1201 to 59-1213 provide that any society, association, or combination of a substantial number of authors, composers, or publishers of copyrighted musical compositions within the United States, to fix license fees directly or indirectly for the use of such

compositions for profit for the purpose of preventing competition, or to divide among themselves their aggregate earnings, or to fix fees which any copyright owner must charge is an unlawful monopoly and in restraint of trade and prohibited. Authors, composers, or publishers shall determine fees and other rights independently of each other and of any combination, and shall specify, upon the musical composition, the selling price for all purposes, including public performances for profit. Existing contracts in violation of this act are void; and radio stations and theaters may use musical compositions controlled by a monopoly without payment of the license fees which are declared to be illegal under this act.

Insurance Companies

Section 44-321 provides that any contract, understanding, or combination of insurance companies or agents to control premium rates directly or indirectly, within or without this State, shall be grounds for revocation of their license to do business and no renewal shall be granted for a year.

Motor Carriers

Section 75-233 provides that motor carriers may consolidate or merge on condition that the State Railway Commission finds such action is consistent with the public interest and does not unduly restrict competition.

Comp. Stat. (1929)

Sections 59-301 to 59-304 provide that any agreement or combination of fire insurance companies transacting business within this State to regulate premium rates, commissions, or manner of doing business is unlawful. Violation of these sections shall be grounds for revocation of their authority to transact business.

Grain Dealers

Sections 59-201 to 59-204 prohibit any agreement, trust, pool, combination, or association of grain dealers, elevator operators, or shippers to prevent or hinder competition in the purchase, sale, or dealing in grain or to prevent the fullest competition in such transactions by any person not a member of, or not doing business through, such trust, pool, combination, or association; or to prevent its members from dealing with nonmembers, or with other persons who deal with nonmembers; or to prevent persons not shipping grain through grain elevators from finding purchasers for their grain by boycotting or threatening to boycott such purchasers.

Grain and Stock Dealers

Sections 28-1112 to 28-1114 provide that agreements, contracts, and combinations of competing grain dealers directly or indirectly to pool prices, to divide between themselves their aggregate earnings, or to fix the purchase price of grain, cattle, or any other stock are prohibited.

Lumber and Coal Dealers

Sections 59-401 to 59-403 provide that agreements, contracts, or combinations of competing lumber or coal dealers directly or indirectly to pool or fix prices, to divide between themselves their aggregate earnings, or to fix the purchase price of coal or lumber are prohibited.

Public Markets

Sections 59-901 to 59-904 provide that any exchange, known as a public market, where grain and farm produce are regularly dealt in by members only, which does not admit to membership any person or corporation who applies and whose methods of business operation do not conflict with any reasonable rule or bylaw of such exchange; refuses to deal on an equal basis with all members; or adopts bylaws in violation of this act, shall constitute a monopoly in restraint of trade and be subject to injunction or quo warranto proceedings.

Comp. Stat. (Kyle, Supp. 1939)**Liquor**

Section 53-329 provides that it shall be unlawful for any person having a retailer's license to sell intoxicating liquor, or any officer, associate, member, representative, or agent of such licensee, to accept, receive, or borrow money, or anything else of value, or to accept or to receive credit other than merchandising credit in the ordinary course of business for a period not to exceed ninety days, directly or indirectly from any person, partnership, or corporation engaged in the manufacturing, distributing, or wholesaling of such liquor, or from any person connected with or in any way representing, or from any member of the family of such manufacturer, distributor, or wholesaler, or from any stockholders in any corporation engaged in manufacturing, distributing, or wholesaling of such liquor, or from any officer, manager, agent, or representative of said manufacturer, distributor, or wholesaler. It shall be unlawful for any manufacturer, distributor, or wholesaler to give or lend money or anything of value or otherwise loan or extend credit (except such merchandising credit) directly or indirectly to any such licensee or to the manager, representative, agent, officer, or director of such licensee.

Section 53-330 provides that no manufacturer, distributor, or wholesaler shall, directly or indirectly, sell, supply, furnish, give, or pay for, or loan or lease, any furnishing, fixture, or equipment on the premises of a place of business of another licensee authorized under this act to sell alcoholic liquor at retail, either for consumption on or off the premises; nor shall he, directly or indirectly, pay for any such license, or advance, furnish, lend, or give money for payment of such license, or purchase or become the owner of any note, mortgage, or other evidence of indebtedness of such licensee or any form of security therefor, nor shall such manufacturer, distributor, or wholesaler, directly or indirectly, be interested in the ownership, conduct, or operation of the business of any licensee authorized to sell alcoholic liquor at retail; nor shall any manufacturer, distributor, or wholesaler be interested directly or indirectly, or as owner or part owner of said premises or as lessee or lessor thereof, in any premises upon which alcoholic liquor is sold at retail. No manufacturer, distributor, or wholesaler shall, directly or indirectly or through a subsidiary or affiliate, or by any officer, director, or firm of such manufacturer, distributor, or wholesaler, furnish, give, lend, or rent any interior decorations other than signs, or furnish, give, lend, or rent any signs, for inside or outside use, costing in the aggregate more than \$100 in any one calendar year for use in or about or in connection with any one establishment on which products of the manufacturer, distributor, or wholesaler are sold: *Provided*, Nothing in this act contained shall be construed as affecting existing signs. No person, engaged in the business of manufacturing, distributing, or wholesaling alcoholic liquors, shall, directly or indirectly, pay for, or advance, furnish, or lend money for the payment of any licenses for another. Any licensee who shall permit or assent, or be a party in any way to any violation or infringement of the provisions of this section shall be deemed guilty of a violation of this act; and any money loaned contrary to a provision of this act shall not be recovered back; and any note, mortgage, or other evidence of indebtedness, or security, or any lease or contract obtained or made contrary to this act shall be unenforceable and void. No person having been licensed as a manufacturer or distributor of alcoholic liquors shall be permitted to receive any retailer's license, and vice versa.

Section 53-363 provides that any person who shall violate any other provisions of this act for which a penalty is not otherwise provided shall for a first offense be fined not more than \$500, and for a second or subsequent offense not more than \$1,000 or be imprisoned in the county jail not more than six months, or both. See *Tying Contracts and Exclusive Dealing Arrangements*.

Comp. Stat. (Kyle, Supp. 1937)

Section 53-342 provides that no manufacturer, distributor, or wholesaler shall enter into any contract with any person licensed to sell at retail whereby such licensee agrees not to sell any alcoholic liquors manufactured or distributed by any other manufacturer, distributor, or wholesaler, and any provision in any contract violative of this section shall render the whole of such contract void and no action shall be brought thereon in any court.

Comp. Stat. (Kyle, Supp. 1937)**Dairy Industry—Discrimination**

Sections 59-1001 to 59-1003 prohibit any unfair methods of competition and unfair acts in the buying of milk or cream on the basis of butterfats, which destroy, tend to destroy, or substantially lessen competition or create a monopoly. See *MARKETING LAWS SURVEY* Vol. *State Price Control Legislation: Antidiscrimination Legislation.*

Motor Vehicle Dealers—Discrimination

Sections 60-912 and 60-913 provide for denial or revocation of licenses of motor-vehicle dealers who willfully discriminate in price between different purchasers, where the effect of such discrimination may be to substantially lessen competition or to create a monopoly or to injure or destroy the business of a competitor. See vol. *State Price Control Legislation: Antidiscrimination Legislation.*

2. Public Contract Provisions**Comp. Stat. (1929)****Bridge Contractors**

Sections 59-601 to 59-603 provide that agreements, contracts, or combinations of bridge contractors directly or indirectly to pool prices, or divide between themselves their aggregate earnings, or fix the price to be charged for building, repairing, or furnishing bridge materials, or to allot exclusive territories are prohibited. See *Tying Contracts and Exclusive Dealing Arrangements, infra.*

Textbooks

Section 79-1805 provides that any contract for the purchase of textbooks, entered into by a district school board, shall become null and void at the option of such school board, if the publisher thereof becomes a party to any combination or trust for the purpose of raising the price of school textbooks. See Vol. *Governmental Purchasing* in projected study, *MARKETING LAWS SURVEY.*

General

Section 28-301 (in part) prohibits conspiracies to defraud the State.

3. Anticoercive Financing Statutes

No provisions.

*Judicial Decisions***Grain Dealers.**

Grain dealers found guilty of violating sections 28-1112 to 28-1114 and 59-201 to 59-204 prohibiting combinations of grain dealers and others to fix the price of grain are also liable and not exempted from the operation of the general antitrust laws, sections 50-101 and 59-801 to 59-822, applicable to all combinations created for the purposes of price fixing. *State v. Omaha Elevator Co.*, 75 Neb. 637, 106 N. W. 979 (1906), and 110 N. W. 874 (1906).

Fire Insurance Companies.

Fire insurance companies are not exempted from the operation of the general antitrust laws, sections 59-101 and 59-801 to 59-822. *State v. American Surety Co.*, 91 Neb. 22, 135 N. W. 365 (1912), reversing 90 Neb. 154, 133 N. W. 235 (1911).

Public Contract Provisions

In an action for an accounting between two parties who received a subcontract from a successful bidder, the validity of the bid was challenged on the ground that one of two bidders on a municipal curbing contract agreed that he would use his influence to procure the bid for the other in consideration of the other's agreement to sublet a certain portion of the contract to the former. The agreement was held invalid. *Whalen v. Brennan*, 34 Neb. 129, 51 N. W. 759 (1893).

II. CONTRACTS NOT TO COMPETE

No provisions.

*Judicial Decisions***Restrictive Covenant Ancillary to the Sale of a Business.**

The vendor of a coal and lumber business and owner of the realty covenanted not to engage in the same business in the same town during the duration of the lease of the premises. The covenant was held valid as the lease was for 5 years with an option for an additional 5 years. *Engles v. Morgenstern*, 85 Neb. 51, 122 N. W. 688 (1909).

A covenant not to compete in the laundry business in a certain city for 5 years made ancillary to the sale of such business is valid under the common law; the time and space limitations are reasonably restrictive. *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900 (1898). See *General Antitrust Laws; Exceptions, supra*.

A covenant contained in a deed for the exchange of hotel properties, by which the grantee in one deed agreed not to use the property acquired by him for hotel purposes for 2 years, was upheld. *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842 (1900).

A provision in a contract for the sale of the "stock of plumbing goods, supplies, tools, and fixtures" whereby the vendor agreed "not to engage or conduct, directly or indirectly, a plumbing, tinwork, or heating business within the county for 10 years" was upheld. The vendor was restrained from taking employment as a skilled workman with one of vendee's competitors by injunction. *Ammon v. Keill*, 95 Neb. 695, 146 N. W. 1009 (1914).

A covenant ancillary to the sale of office furniture and insurance business that the vendor will not compete in such business is void as in restraint of trade because unlimited as to time or space. *Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770 (1905).

An agreement not to engage in a similar business will not be implied from the inclusion of the seller's goodwill in a contract for the sale of stock and general merchandise. *Wessell v. Havens*, 91 Neb. 426, 136 N. W. 70 (1912).

A verbal agreement not to engage in the banking business in the same town ancillary to the sale of the majority of the capital stock of a bank will be enforced. *Farmers State Bank v. Petersburg State Bank*, 108 Neb. 54, 187 N. W. 117 (1922).

Restrictive Covenants Ancillary to Employment.

A covenant not to solicit from employer's customers over a certain route for a period of 5 years after termination of employment will not be enforced where the employer first breached the agreement by lowering employee's wages, even though the employee continued work at reduced wages and where the contract was terminable at the will of the employer. *Smith Baking Co. v. Behrens*, 125 Neb. 718, 251 N. W. 826 (1933).

Defendant doctor, formerly an employee of the sanitarium, purchased it and agreed, if forced to vacate the premises for default on any of the payments of the purchase price due, not to practice medicine within a radius of 150 miles of the sanitarium. In an action for the unpaid balance and an order to restrain defendant from engaging in the practice as agreed upon, the court held that the reasonableness of the restraint is measured by the need for protection, and that in this case the restriction was not unreasonable. *Tarry v. Johnson*, 114 Neb. 496, 208 N. W. 615 (1926).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Comp. Stat. (1929) Cooperatives

Section 24-1303 (11) provides that any cooperative organized under sections 24-1301 to 24-1329, as amended (Kyle Supp. 1939) permitting the organization of a cooperative association for the transaction of any lawful business, may contract with its members to buy or sell exclusively through the association, all or a stipulated part of their specifically enumerated products, for any period up to five years, but in such case a reasonable period during each year after the first two years of the contract, shall be specified during which the member, by giving notice, may be released from such obligation. See Vol. *Cooperatives* in projected **MARKETING LAWS SURVEY** study.

Agricultural Marketing Cooperatives

Section 24-1405 (4) provides that nonstock agricultural cooperative marketing associations organized under sections 24-1401 to 24-1414, may enter into contracts with their members for periods not over five years, requiring them to sell or market all or a specified part of

their livestock or other products to or through the association. See Vol. *Cooperatives* in projected study.

Comp. Stat. (Kyle, Supp. 1937)

Liquor

Section 53-342 provides that no manufacturer, distributor, or wholesaler shall enter into any contract with any person licensed to sell at retail whereby such licensee agrees not to sell any alcoholic liquors manufactured or distributed by any other manufacturer, distributor, or wholesaler, and any provision in any contract violative of this section shall render the whole of such contract void and no action shall be brought thereon in any court. See *Special Antitrust Laws: Liquor, supra*.

Judicial Decisions

Exclusive Dealing Arrangements.

The exclusive dealing contract of a member to sell wheat exclusively through the cooperative association will be specifically enforced even though the contract provides for liquidated damages. *Nebraska Wheat Growers' Association v. Norquest*, 113 Neb. 731, 204 N. W. 798 (1925).

The defendant dairy corporation refused to buy milk from farmers unless hauled by three designated truckers (codefendants), thereby forcing the plaintiff trucker out of business in which he had been engaged under contract with the defendant company for 2 years. In an action for damages, for breach of the contract, the court held that as the contract between the plaintiff and defending corporation was terminable at will of either party the cause of action was denied. As to the question of a conspiracy in violation of the antitrust laws the court stated that while the aim of the antitrust laws is to preserve free and open competition, the law must serve equally well to protect the consumer so that he may purchase commodities in a free and open market at the best prices possible. *Ploog v. Roberts Dairy Co., et al.*, 122 Neb. 540, 240 N. W. 764 (1932).

A covenant prohibiting the lessee from selling beer other than that manufactured and furnished by the lessor during the duration of the lease is not unreasonable, and is enforceable. *Jos. Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746 (1906).

NEVADA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Comp. Laws (1929) (Hillyer)

Conspiracy Statute

Section 10061 provides (in part) that it is illegal for two or more persons to conspire to prevent another from exercising a lawful trade or calling by force, threats or intimidation, or by interfering or threatening to interfere with property belonging to another, or to conspire to commit any act injurious to trade or commerce.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Comp. Laws (Hillyer, Supp. 1938)

Resale Price Maintenance

Sections 1470.21 to 1470.29 validate agreements to maintain resale prices of branded articles sold in fair and open competition. The statute is expressly inapplicable to agreements between wholesalers, between distributors, or between retailers. Sec. 1470.23. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

C. SPECIAL ANTITRUST LAWS

I. Special Industry Antitrust Acts

Comp. Laws (Hillyer, 1929)

Railroads

Sections 6303 and 6305 provide that combinations, contracts, or agreements of any persons engaged in carrying, receiving, storing, or

handling property with the intent to prevent its continuous carriage by railroad within Nevada (by means of change of schedule, carriage in different cars, breaking carloads into less than carloads, or any other means), or to pool freight, or to divide among themselves their aggregate net earnings, are unlawful.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Comp. Laws (Hillyer, Supp. 1938) Cooperatives

Section 1588 provides that cooperatives organized under sections 1575 to 1595 shall have the power to enter into all contracts deemed advisable with members or others requiring them to market their products or the byproducts thereof to or through the association, authorizing it to act as sole agent for members, or authorizing it to purchase said products or the byproducts thereof, and pool them. See *Cooperatives* in projected **MARKETING LAWS SURVEY** study.

NEW HAMPSHIRE

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (of 1784 as amended in 1903) pt. II, art. 83. Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

STATUTORY PROVISIONS

Pub. Laws (1926), c. 168

Sec. 1. Trusts.—A trust is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

I. To create or carry out restrictions in trade or commerce.

II. To limit or reduce the production, or increase, reduce, or maintain the price of merchandise or a commodity.

III. To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce or a commodity.

IV. To fix a standard or figure, whereby the price to the public or consumer is in any manner controlled or established, of an article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

V. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind, or have bound themselves, not to sell, dispose of or transport an article or commodity, or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value; or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure; or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others so as to directly or indirectly preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such articles or commodity; or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity that its price may in any manner be affected. (1917, 177:2; 1919, Ex., 2:1.)

Sec. 2. ———, Unlawful.—A trust as defined herein is unlawful, against public policy, and void. (1917, 177:2; 1919, Ex., 2:1.)

Sec. 3. ———, Entering Into.—It shall not be lawful for a person or his agent to issue or own certificates of such a trust, or to enter into a combination, contract, or agreement, the purpose and effect of which is to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of a trustee or trustees with the intent to limit or fix the price or lessen the production and sale of an article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of such article. (1917, 177:3.)

Sec. 4. Penalty.—A violation of any provision of this chapter is a conspiracy against trade, and a person engaged in such conspiracy or taking part therein, or aiding or advising in its commission, or, as principal, agent or in any other capacity, knowingly carrying out any of the stipulations, purposes, prices or rates, or furnishing any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violating a provision of this chapter, shall be fined not less than fifty nor more than five thousand dollars, or imprisoned not less than six months nor more than one year, or both; provided, that when the offense consists of a combination to control the price or supply, or to prevent competition in the sale, of bread, butter, eggs, flour, meat, vegetables, or

coal, the person thus engaged shall be fined not less than five hundred dollars, and imprisoned not less than one nor more than five years. Each day's violation of any provision of this chapter shall constitute a separate offense. (1917, 177:4.)

Sec. 5. Procedure.—A complaint or indictment under this chapter shall proceed to judgment according to the regular course of criminal proceedings. It shall be otherwise disposed of only upon motion in writing stating specifically the reasons therefor and verified by affidavit if facts are relied on. If the court or magistrate certifies in writing that he is satisfied that the cause relied on exists, and that the interests of public justice require the allowance thereof, such motion shall be allowed and said certificate filed in the case. (1917, 177:5.)

Sec. 6. Testimonial Privilege.—No person called as a witness to testify at any proceedings under this chapter shall be excused from testifying, or from producing any books, papers, or documents which are material, on the ground that his testimony will tend to incriminate him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any such proceeding. (1917, 177:6.)

Sec. 7. Labor Organizations, etc.—Nothing contained in this chapter shall forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations be illegal trusts or conspiracies against trade, under this chapter. (1917, 177:7.)

Sec. 8. Agricultural Producers.—No organization enumerated in section 7, or the members thereof, if they have a capital stock, shall be held or considered to be an illegal trust or conspiracy against trade, under this chapter, if they are operating in conformity with chapter 57 of the Laws of the Second Session of the Sixty-Seventh Congress, entitled, "An Act to authorize association of producers of agricultural products." (1917, 177:8; 1923, 120:1.)

Sec. 9. Prosecutions.—Prosecutions under this chapter shall be under the control of, and shall be conducted by, the attorney-general of the state, or by an assistant designated by him for the purpose. (1919, Ex., 2:2.)

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**L (1937) c. 184
Resale Price Maintenance**

Sections 1 to 6 validate contracts to maintain the resale prices of trade marked or brand named articles. This act, however, does not apply to contracts between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation*.

**Pub. Laws (1926) c. 224 as amended by L. 1933, c. 73, § 1
Cooperatives**

Section 46 provides that no agricultural cooperative marketing association organized under chapter 224, sections 1 to 50, shall be deemed to be a conspiracy or a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or to fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

**Pub. Laws (1926), c. 168
Labor, Agricultural, and Horticultural Associations**

Sections 7 and 8 provide that nothing in the antitrust law, chapter 168, shall be considered to forbid the existence of nonprofit labor, agricultural, or horticultural organizations instituted for the purposes of mutual help, and that any such organization shall not be deemed to be an illegal trust or conspiracy against trade, under such chapter. See *General Antitrust Laws, supra*.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****Pub. Laws (1926), c. 240
Public Utilities**

Section 22 et seq. provides that a public utility may not transfer or lease its franchises, works, or system, or contract for the operation of its works and system to or with any foreign corporation.

**Pub. Laws (1926), c. 275
Foreign Insurance Companies**

Section 14 provides that any contract or combination between a foreign insurance company and any other insurance company to control rates of property insurance shall be ground for revocation of its license and those of its agents, and no renewals shall be granted within three years of such revocation.

L. 1937, c. 107

Milk

Section 6 provides that nothing in chapter 107, sections 1 to 38, providing for regulation of the milk industry and the fixing of minimum or maximum prices by the Milk Control Board, shall be construed to prohibit a producers' cooperative organized under Public Laws (1926), chapter 224, from blending the proceeds from the sale of its milk in all markets, and distributing them to its members pursuant to contract. See vol. *State Price Control Legislation: Administrative Price Control*. See also *Cooperatives* in projected study.

Pub. Laws (1926), c. 168

Food and Coal

Section 4 provides that any combination to control the price or supply, or to prevent competition in the sale of bread, butter, eggs, flour, meat, vegetables, or coal is a conspiracy against trade and prohibited. See *General Antitrust Laws, supra*.

L. 1933, c. 99

Liquor

Section 19 provides that before a permit is issued the commissioners shall satisfy themselves that in the case of an applicant for an on-sale or an off-sale permit, no manufacturer or wholesaler has a substantial financial interest, direct or indirect, in the business for which the permit is requested or in the premises in respect of which such permit is to be issued and that such business will not be conducted with any money, equipment, furniture, fixtures, or property rented from or loaned or given by any manufacturer or wholesaler.

Section 24 provides that if any manufacturer or wholesaler shall have any substantial financial interest, either direct or indirect, in the business of any other on-sale or off-sale permittee or in the premises on which said business is conducted, the commissioners shall in their discretion revoke the permit issued in respect of the business in which such manufacturer or wholesaler is so interested. No manufacturer or wholesaler shall rent, lend, or give to any on-sale or off-sale permittee or to the owner of the premises any money, equipment, furniture, fixtures, or property with which the business of said permittee is to be conducted. No person shall directly or indirectly hold more than two off-sale permits at one time and no holder of an off-sale or on-sale permit shall have in his employ, in any capacity, any person who is the holder of any form of permit provided in this act.

Section 35 provides that whoever violates any of the provisions of this act or any of the rules and regulations pursuant thereto shall,

upon conviction, be punished by a fine of not more than \$500 or by imprisonment for not longer than six months or by both, in the discretion of the court. Upon conviction of any permittee the court shall immediately declare his permit revoked and no permit shall thereafter be granted to him within the period of three years thereafter.

2. Public Contract Provisions

No statutory provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Consolidation and merger of competing and parallel railroad lines for the purpose of reducing competition was invalid at common law and prohibited by the statute enacted in 1867. Plaintiff and defendant lines merged in 1856 and plaintiff brought this suit for accounting. The court held that although both were parties to an illegal agreement, one of them was being unjustly enriched and equity will enforce restitution. *Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 20 Atl. 383 (1889).

A separate plea averring that a consolidation agreement between two railroad companies was made for the purpose of reducing competition but without stating that the public was injured thereby is demurrable. *Ibid.*

Other Utilities.

Consolidation of public utilities by purchase will be permitted provided the public interest will be benefited thereby. The fact that the capitalization of the consolidated company will be increased without a proportionate increase in assets is not conclusive evidence that such purchase is contrary to public policy or Public Laws (1926), chapter 240, section 28. Proper notice and hearing is an essential prerequisite to determine the effect of the merger on rates and services to the public. *Grafton County Electric Light & Power Co. v. State*, 77 N. H. 490, 93 Atl. 1028 (1915).

A contract, whereby a utility agrees to pay a certain percent of its gross earnings to an affiliated corporation of a utility trust for "managerial services" and at the same times agrees to abandon a profitable appliance subsidiary in favor of such affiliated corporation was held to be in violation of Public Laws (1926), chapter 240, sections 28 and 29 and therefore void. *State v. New Hampshire Gas & Electric Co.*, 86 N. H. 16, 163 Atl. 724 (1932).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

The vendor of a newspaper business together with its good-will subsequently reengaged in the same business in competition with the vendee. The court held that the contract of sale was not breached on the ground that a contract not to compete cannot be implied from the sale of a business or its goodwill. Contracts in restraint of trade are not favored in the law, and they are not to be extended by construction beyond the fair and natural import of the language used. Parol evidence to the effect that at the time of sale vendor verbally agreed that he would not compete with vendee is inadmissible to vary the written contract purported to be complete. *Smith v. Gibbs*, 44 N. H. 335 (1862).

A contract whereby a butcher sold his cart and business and agreed not to carry on the same business over the same route so long as the purchaser was engaged in the business is valid. *Perkins v. Clay*, 54 N. H. 518 (1874).

A covenant that the vendor of a teaming business will not engage in the same business in the vicinity and over the route theretofore occupied by him and in no way directly or indirectly to interfere with such business was held valid even without a limitation on time. *Webster v. Buss*, 61 N. H. 40 (1881).

An agreement not to open, or cause to be opened, a grocery, billiard saloon, or eating place for trade, in the village of Woodsville, ancillary to the sale of a saloon business is not violated by the seller taking charge of a saloon business as agent and servant of his wife. *Tabor v. Blake*, 61 N. H. 83 (1881).

An agreement not to "in any way or manner deal in grain within a radius of 10 miles of the gristmill for 10 years" ancillary to the sale of the gristmill was held valid. Defendant breached his covenant by selling grain on commission as a traveling salesman within the restricted territory. *Clark v. Britton*, 76 N. H. 64, 79 Atl. 494 (1911).

Restrictive Covenants Ancillary to the Sale of Professional Practice.

A contract ancillary to the sale of a physician's practice contained a provision that the vendor will not compete with the vendee in the town of "Fisherville." The court held that the question of the existence and territorial limits of the village is one of fact for the jury to decide. A demurrer to an action for damages for breach of the contract was overruled. *Blanding v. Sargent*, 33 N. H. 239 (1856).

Restrictive Covenants Ancillary to Employment.

A covenant by an employee dentist not to engage in the practice of dentistry in a certain town so long as plaintiff employer was engaged in such practice in that town was not violated when he accepted employment as an agent for a competing dentist in town. *Bowers v. Whittle*, 63 N. H. 147 (1884).

A contract ancillary to employment not to engage in the undertaking business in the same city in competition with the plaintiff employer is reasonably restrictive and is enforceable. *Spaulding v. Mayo*, 81 N. H. 85, 122 Atl. 899 (1923).

Restrictive Covenants not Ancillary to Sale of a Business Interest.

Where the owners of embossing machines entered into a contract granting exclusive rights to manufacture such machines for a period of 20 years, their covenants not to make, vend, or use any embossing machines during this period were held valid as not being an unreasonable restraint of trade. *Bancroft & Rich v. Union Embossing Co.*, 72 N. H. 402, 57 Atl. 97 (1903). See *Tying Contracts and Exclusive Dealing Arrangements*, *infra*.

In consideration of \$800, defendant agreed to withdraw as expressman from certain railroad depots and "to do no business in any way or be interested in any express business running to such railroads or to connect with any express company running to such railroads." This agreement was held not violated when defendant was engaged as agent and worked for daily wages for another express company.

Defendant did not in any way share in the profits or become an expressman, but acted only in the capacity of agent. *Eastern Express Co. v. Meserve*, 60 N. H. 198 (1880).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Pub. Laws (1926), c. 224 Cooperatives

Sections 31 and 46 provide that an agricultural cooperative marketing association organized under chapter 224, sections 1 to 50, may make marketing contracts, with its members, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association, and that such marketing contracts shall not be deemed illegal, as such, or in unlawful restraint of trade, or as part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

An agreement by a manufacturer, selling blankets to a retailer, that he will not sell to anyone else in the same city, there being no agreement as to further purchases or any limitations as to time, will continue only for such length of time as will afford the buyer a reasonable opportunity to sell, in the usual course of trade, the merchandise purchased on the faith of the contract. *Saddlery Hardware Co. v. Hillsboro Mills*, 68 N. H. 216, 44 Atl. 300 (1894).

An exclusive privilege granted to a teamster to solicit the patronage of passengers on the railroad property is valid. The rival teamsters were enjoined. *Hedding et al. v. Gallagher et al.*, 74 N. H. 377, 57 Atl. 225 (1903). Reversing 69 N. H. 650, 45 Atl. 96 (1899), and 70 N. H. 631, 47 Atl. 614 (1900). See also *Bancroft & Rich v. Union Embossing Co.*, 72 N. H. 402, 57 Atl. 97 (1903).

In an action for damages for breach of a contract granting a dealer the exclusive agency for sale of taxicabs, recovery was denied on the ground that the question of whether the exclusive agency feature of the original written contract continued after the expiration thereof was one of fact. The presumption that the relations would be governed by the expired written contract was rebutted by oral evidence to the effect that the provisions relating to the exclusive arrangements would not be carried over in the new agreement. *Park Auto Station v. American Locomotive Co.*, 79 N. H. 497, 111 Atl. 689 (1920).

Specific performance will be granted to enforce an exclusive dealing contract between a milk producer and a cooperative marketing association although liquidated damages are provided for in the contract. There was evidence that milk could be procured on the open market. *Manchester Dairy System v. Hayward*, 82 N. H. 193, 132 Atl. 12 (1926).

NEW JERSEY

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. Ann. (1940)
Corporations

Section 14: 3-10 provides that no domestic corporation engaged in trade or commerce shall acquire any part of the capital stock of one or more corporations also engaged in trade or commerce where the effect of such acquisition or the use of such stock may be to substantially lessen competition between them, or to restrain trade or commerce in any section or community, or tend to create a monopoly in any line of trade or commerce. This section does not apply to public utilities, corporations purchasing stock solely for investment purposes or holding stock of subsidiaries or branches, provided that there is no substantial lessening of competition.

Judicial Decisions

Application of the Common Law.

In General.

A railroad company of New Jersey leased its franchises and roads to a railway corporation of another State for a period of 999 years. Both roads were extensive producers and carriers of anthracite coal. The lessee controlled three of the six great coal carriers of the State and nearby States, and through stock holding in coal companies, also controlled more than one-half of all the anthracite coal fields of

Pennsylvania. In a suit brought by the attorney general to restrain defendant railway company from executing the provisions of this lease, the court in granting the restraining order held that this combination tended to create a monopoly of the anthracite coal trade, a staple commodity, within the State. And, as it tended to stifle competition by increasing the price of such product to the public, the agreement was invalid and unenforceable. *Stockton v. Central Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964 (1892).

Two rival mining corporations interested in the same mineral deposits, entered into a contract to consolidate their respective interests. In an action by a stockholder of one of the corporations to enjoin the execution of such proposed consolidation, the court held that as the corporations exercised no public franchises and were simply owners of a species of property, certain limonite and zinc ores, "which, in its natural state, was of no use to mankind," and as their entire output comprised of but a small fraction of the production in the United States, such contract did not tend to create a monopoly and was therefore valid. *Meredith v. N. J. Zinc & Iron Co.*, 55 N. J. Eq. 211, 37 Atl. 539 (1897), aff'd 56 N. J. Eq. 454, 41 Atl. 1116 (E. & App., 1897).

Eight manufacturers of sanitary pottery ware, who produced nearly all of the ware manufactured in the United States, formed an association and agreed to regulate the price of such ware according to the vote of the majority of the members. The complainant purchased five of the companies from persons, who were members of the association, in an attempt to acquire control of the industry. In an action by the purchaser to enforce the covenant against one of the vendors, the court in passing on the validity of the entire contract held that the agreement, insofar as it permitted complainant to acquire control of the association, thereby being empowered to fix all prices, is void and unenforceable. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899), modifying *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923 (1898). Cited with approval in *U. S. v. Trenton Potteries Co.*, 273 U. S. 392, 47 Sup. Ct. 360, 71 L. Ed. 706 (1926). For validity of the remaining provisions of this agreement see, *Contracts not to Compete, infra*, page 474.

Eight domestic and one hundred and thirteen foreign fire insurance companies, by contract, formed an association with power to fix rates for all insurance policies to be sold by members within the city of Newark and adjacent districts in Essex and Hudson Counties. In a suit by the attorney general, the court in restraining the defendant insurance company from enforcing the terms of this agreement held that the contract was an illegal restraint on trade. The necessary effect and actual result of such agreement was to control business within a certain area, to fix and regulate prices, and to

limit or eliminate competition. *McCarter v. Firemen's Insurance Co.*, 74 N. J. Eq. 372, 73 Atl. 80 (E. & App., 1909), rev'g. *McCarter v. Firemen's Insurance Co.*, 70 N. J. Eq. 291, 61 Atl. 705 (1905).

A number of Camden County laundries, controlling about 82 percent of the business in that area, entered into price-fixing agreements. They also agreed that after a certain date, each of the parties would not transact business with independent solicitors unless they already had business dealings with them. The contract provided for liquidated damages in event of breach, and each of the parties to secure payment of such damages gave a note in sum of \$1,000 to a trustee. In an action by the trustee on such a note against one of the parties to the agreement for breach of the contract, it was held that there could be no recovery, as all price-fixing agreements between independent firms are void at common law. The contract was an illegal restraint on trade, and therefore was unenforceable. *Buckelew v. Martens*, 108 N. J. L. 339, 156 Atl. 436 (E. & App., 1931).

An agreement between certain rolling-chair proprietors in Atlantic City to charge maximum rates fixed in a city ordinance, was upheld in that it was entered into by a small number of proprietors. An agreement to charge a rate fixed by law is not a combination in restraint of trade. It does not tend to create a monopoly, and is enforceable. *Reed v. Saslaff*, 78 N. J. L. 158, 73 Atl. 1044 (1909). See also, *Raritan River R. Co. v. Middlesex & S. Traction Co.*, 70 N. J. L. 732, 58 Atl. 332 (E. & App., 1904); *East Jersey Water Co. v. Newark*, 96 N. J. Eq. 231, 125 Atl. 578 (1924), aff'd 98 N. J. Eq. 672, 130 Atl. 557 (E. & App., 1925).

Several independent firms, engaged in the business of manufacturing cigarettes, combined to form one company. This combination, controlling about 95 percent of the industry, fixed prices and terms of sale applicable to its dealers, and refused to ship cigarettes and tobacco unless such terms were met. In a suit brought by the attorney general to restrain defendant company from engaging in such practices, the court held that a court of equity could not declare invalid arrangements as to prices and terms of sale. A trading or manufacturing corporation has the sole discretionary power and authority to impose conditions, as it chooses, under which it will sell. *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971 (1897), aff'd in *Miller v. American Tobacco Co.*, 56 N. J. Eq. 847, 42 Atl. 1117 (E. & App., 1898) (per curiam). The appropriate procedure to challenge the exercise of the corporation franchise is by quo warranto. *Ibid.*

Four separate companies, owners of patent applications on brake linings, formed a new corporation and assigned the patent applica-

tions to such corporation. This corporation then granted license-royalty agreements to the four companies, authorizing them to manufacture and sell brake linings at certain fixed prices, using all the inventions and improvements contained in the several applications. An action was brought by a stockholder of the new corporation for an accounting of the royalties paid by the manufacturing companies. To the defense that the license agreements were part of a combination in restraint of trade, it was held that such a combination was valid. The agreements were based on the ownership of patent rights which give the owner the right to sell or license such rights at such prices and under such conditions as he may choose. *Massie v. Asbestos Brake Co.*, 95 N. J. Eq. 298, 123 Atl. 155 (1923).

Neither are such agreements in violation of the Sherman Antitrust Act. *Id.*

Patentee and the manufacturer of the patented article agreed that the executive board of the manufacturing company should have the power to fix the resale price of such articles. The agreement was valid as the patentee merely delegated to such board the power which he had to fix the price at which the patented article was to be sold. *American Mech. Imp. Co. v. Des Lauriers Aircraft Co.*, 94 N. J. Eq. 197, 119 Atl. 179 (1922).

Jurisdiction.

A corporation authorized by its charter to engage in the business of manufacturing and selling whiskey and spirits, either at wholesale or retail, sought to purchase securities of other corporations engaged in the same business. In a suit by a stockholder to restrain the corporation from purchasing such stock, the court held that if such purchase resulted in a monopoly, it arose from powers conferred on the corporation by the legislature when issuing the charter or certificate of incorporation. The legislature having issued such authority, and it not being in contravention of any constitutional provision, a court of equity is without jurisdiction to determine the question of monopoly. *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 54 Atl. 570 (1903).

Application of Statutes.

Sections 14:12-1 et seq. (L. 1896, c. 185, sec. 104), authorizing the consolidation of corporations, do not permit nor contemplate that a change of the object of incorporation is to be accomplished by means of the consolidation agreement. Such power of corporations to merge, as conferred by the act, applies only where they are organized to carry on a business of the same or similar nature. *Colgate v. U. S. Leather Co.*, 75 N. J. Eq. 229, 72 Atl. 126 (1909).

The power of corporations to consolidate and merge is not to be implied, and exists only by virtue of plain legislative enactment. *Colgate v. U. S. Leather Co.*, *supra*; *Wm. B. Riker & Sons Co. v. United Drug Co.*, 79 N. J. Eq. 580, 82 Atl. 930 (1912), *rev'g.*, *Id.*, 78 N. J. Eq. 319, 79 Atl. 1044 (1911); *Sons of Poland v. Association of the Sons of Poland*, 121 N. J. Eq. 102, 187 Atl. 356 (1936). Where some of the objects of one corporation, under its charter, are not similar in character to any of the objects of the company with which it is consolidating, such consolidation is prohibited under sections 14:12-1 et seq.; *Copeland et al. v. United Shoe Machinery Co.*, 84 N. J. Eq. 276, 94 Atl. 404 (1915), *aff'd.*, *Id.*, 85 N. J. Eq. 209, 95 Atl. 549 (E. & App., 1915). Where a foreign corporation merges with a domestic corporation such merger does not operate to dissolve the New Jersey Corporation. *Windhurst et al. v. Central Leather Co.*, 105 N. J. Eq. 621, 149 Atl. 36 (1930), *aff'd.*, *Id.*, 107 N. J. Eq. 528, 153 Atl. 402 (E. & App., 1931); *N. Y. Telephone Co. v. State Board of Taxes, etc.*, 10 N. J. M. 592, 159 Atl. 810 (1932).

Indictment.

An indictment alleged that members of a certain association conspired to monopolize the sale of kosher meats by controlling the retail price thereof. On motion to quash the indictment, it was held that at common law a conspiracy to create a monopoly was not criminal and not indictable. The indictment was quashed. *State of New Jersey v. Black et al.*, 5 N. J. Misc. 639, 138 Atl. 513 (1927).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Rev. Stat. 1937, as amended by Rev. Stat. (Supp., 1935)

Resale Price Maintenance

Sections 56: 4-3 to 56: 4-6 validate contracts fixing the resale price of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to consumers bears, a trademark, brand, or name. The statute is expressly inapplicable to contracts between producers, between wholesalers, or between retailers as to sale or resale price. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Rev. Stat. (1937)

Labor Unions

Section 34: 12-1 provides that any combination to persuade, advise, or encourage persons by peaceable means to leave or enter employment, is lawful.

Judicial Decisions

Labor.

Rights Concurrent With Union Membership.

A trade union entered into an agreement with plaintiff's employer which provided that no man could remain employed unless his union card or check was on deposit with the shop steward. In an action for damages brought by plaintiff, employee, against the union, the court held that the trade union was liable for interfering, without justification, with plaintiff's right to employment. Even though the union membership and agreement with employer may constitute an unlawful monopoly of labor in a particular trade, such right to employment exists, independent of the unlawful agreement. The fact that the employee is a member of the combination will not bar him. *Brennan v. United Hatters, Local 17*, 73 N. J. L. 729, 65 Atl. 165 (E. & App., 1906).

In suit brought by one union against another to restrain it from acting as the local representative of the general body, the court refused the injunction on the ground that it would aid in establishing a monopoly, controlling employment of all musicians. *O'Brien et al. v. Musical Mut. Protective & Benevolent Union*, 64 N. J. Eq. 525, 54 Atl. 150 (1903).

An electrical trade union entered into closed-shop contracts with all the master electricians in the city of Newark (N. J.) and its vicinity. An electrician, of 25 years experience, was denied membership in the union on the grounds that he failed to pass the union's technical examination. The electrician sued the union for damages because of his inability to obtain work and recovery was denied. *Reihing v. Local No. 52*, 94 N. J. L. 240, 109 Atl. 367 (1920).

Closed-shop agreements were not violative of the antitrust act (L. 1913, c. 13) (now repealed) as "labor" was not a "commodity" within the meaning of the act. *Ibid.*

Members of a local union brought suit to enforce rights arising under the constitution and bylaws of the union. The defense to the suit that the purpose of the union was to create a monopoly of the supply of labor in operating taxicabs and autobusses cannot be sustained as the members were seeking to enforce rights which were independent and collateral of such monopoly, if such did exist. *Harris et al. v. Geier*, 112 N. J. Eq. 99, 164 Atl. 50 (1932).

Labor Agreements

Section 34:12-1 makes it lawful for members of a trade union to combine together for the purpose of securing the control of the work

connected with their trade and to endeavor by peaceful means to effect such purpose. By this act the policy of the law with reference to such combinations was revolutionized, and what, before that time, would have been held an unlawful combination and conspiracy, became in this State a lawful association. *Mayer v. Journeymen Stone-Cutters Association*, 47 N. J. Eq. 519, 20 Atl. 492 (1890). Prior to the enactment of section 34:12-1, it was an indictable conspiracy for several employees to combine and notify the employer, that unless he discharges certain persons, they will in a body, quit his employment. *State v. Donaldson et al.*, 32 N. J. L. 151 (1867). See also *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881 (1894); *Cumberland Glass Mfg. Co. v. Glass Blowers Assn.*, 59 N. J. Eq. 49, 46 Atl. 208 (1899).

An employer engaged in the business of plating and polishing metals employed in its polishing department about 25 men, who were all members of a local union. The union called a strike to induce employer to accept a closed-shop contract. In an action by the employer to restrain the trade union from picketing, the evidence disclosed that the trade union did not have a monopoly of such labor and that there had been discrimination by the employer against union workers; injunctive relief was denied. *Four Plating Co. v. Mako*, 122 N. J. Eq. 298, 194 Atl. 53 (1937). See also, *N. J. Painting Co. v. Local No. 26, Brotherhood of Painters*, 96 N. J. Eq. 632, 126 Atl. 399, 47 L. R. A. 384 (E. & App., 1924) rev'g. 95 N. J. Eq. 108, 122 Atl. 622 (1924); *Barker Painting Co. v. Local 734, Brotherhood of Painters*, 12 F. (2d) 945 (1926); *Kinane v. Fay*, 111 N. J. L. 553, 168 Atl. 724 (1933); *Bayonne Textile Corp. v. American Federation of Silk Workers*, 116 N. J. Eq. 146, 172 Atl. 559 (E. & App., 1934), modifying 114 N. J. Eq. 307, 168 Atl. 799 (1934).

A trade union entered into a closed-shop contract with a bus company. Pursuant to such agreement, the union furnished drivers to the company. Several of these drivers joined another union. The first union declared such drivers had forfeited their membership and demanded that employer discharge them. This the employer did but later rehired them. In an action by union to enforce specific performance of the contract, injunctive relief was granted. *Hudson Bus Transportation Drivers' Association v. Hill Bus Co. et al.*, 121 N. J. Eq. 582, 191 Atl. 763 (1937; cf., *Canter Sample Furniture House v. Retail Furniture Employees Local No. 109 et al.*, 122 N. J. Eq. 575, 196 Atl. 210 (1937); *Mitnick v. Furniture Workers, Local 66, C. I. O.*, 124 N. J. Eq. 147, 200 Atl. 553 (1938).

A trade union membership contract classified union members as "juniors" and "seniors" and gave the latter prior rights to employ-

ment. "Juniors" were classified as "apprentices" without prescribing any test of capacity as condition to admission as senior members. "Junior" members were denied the right to participate in the formulation of the union's policies and management. The power to determine wage scales, working conditions, and apportionment of work was given to senior members exclusively. Junior members could not make agreements with employers as to work or salaries, and seniors could bar juniors from membership in the union proper. Such a contract was held invalid as an unreasonable restraint of junior members' constitutional right to liberty of contract (Const. U. S., Amend. V; Const. art. I, par. 1). The rights given senior members in the contract was an attempt to create a monopoly to the detriment of junior members, and therefore void. *Cameron v. International Alliance of Theatrical Stage Employees*, 118 N. J. Eq. 11, 176 Atl. 692 (E. & App., 1935), rev'g 114 N. J. Eq. 495, 169 Atl. 116 (1933), cert. den., 298 U. S. 659, 56 Sup. Ct. 681, 80 L. Ed. 1385 (1936). See also *Id.*, 119 N. J. Eq. 577, 183 Atl. 157 (1936); *Collins et al. v. International Alliance of Theatrical Stage Employees*, 119 N. J. Eq. 230, 182 Atl. 37 (1935); *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 Atl. 661 (1932); *Fleming v. Motion Picture Operators, Local 244*, 16 N. J. Misc. 502, 1 Atl. (2d) 850, aff'd 124 N. J. Eq. 269, 1 Atl. (2d) 386 (E. & App., 1938).

An agreement between an association representing the majority of building contractors in the Metropolitan area of New York City and Long Island with an association of labor unions in the same territory, providing for a "closed-shop" in such area, was held void as having for its object the monopolization of the labor market. An injunction restraining such union activity was granted. *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, 92 N. J. Eq. 131, 111 Atl. 376 (1920). See also *Baldwin Lumber Co. v. Local 560, Int'l Brotherhood of Teamsters, etc.*, 91 N. J. Eq. 240, 109 Atl. 147 (1920); *Blakely Laundry Co. v. Cleaners & Dyers Local No. 18*, 422, 11 N. J. Misc. 915, 169 Atl. 541 (1933); *Upholsterers, etc. Union, Local No. 76 et al. v. Essex Reed & Fibre Co., Inc.*, 12 N. J. Misc. 637, 174 Atl. 207; *Wasilewski v. Bakers Union*, 118 N. J. Eq. 349, 179 Atl. 284 (1935); *International Ticket Co. v. Wendrich*, 122 N. J. Eq. 222, 193 Atl. 808 (1937).

Complainant applied for membership in a union, after his employer made a closed-shop contract, and was rejected because the books of the union were closed to new membership. The union demanded that complainant be discharged. In an action brought by employer to restrain union from interfering with his employees, the court held that an agreement which creates a substantial monopoly

of labor is void and unenforceable. An injunction issued restraining the union from interfering with complainant's employment. *Wilson v. Newspaper & Mail Deliverers' Union of New York*, 123 N. J. Eq. 347, 197 Atl. 720 (1938).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Rev. Stat. (1937)

Railroads

Section 48: 12-126 provides that any railroad company may lease its road or any part thereof to any other company organized in New Jersey or any other State, and that any such railroad company may take a lease of the road or any part thereof of any other company organized in New Jersey or any other State. A railroad company may also unite or consolidate as well as merge its stock, property, franchise, and roads with those of any other company or companies, or may acquire by merger the stock, property, franchise, and roads of any other company or companies, or may do both.

After such lease, consolidation, or merger the acquiring company may operate and collect fares and freight as provided for companies organized under this law but not in excess of the charges on the line of any of the consolidated or merged companies, nor in excess of the rates limited by any special act incorporating such companies.

Such leasing, consolidation, or merger may be made where the roads of the companies involved connect, either directly or over the intervening lines of one or more other railroad companies.

Milk

App. A: 8-1 to App. A: 8-49 regulating the production, purchase, distribution, and sale of milk and cream provides (App. A: 8-34) that no milk dealers, processors, sub-dealers, or stores shall operate in any municipality under any secret or mutual agreement, arrangement, combination, contract, or common understanding whereby the price of fluid milk paid to the producers in this state is reduced, or the price to be paid to the consumers for such milk is decreased; any such arrangement is declared to be contrary to the public interest and in restraint of trade and commerce. The Milk Control Board, after a hearing, may decline to grant a license or may revoke a license already granted where the licensee has been a party to a combination to fix prices.

Stat. Ann. (1940)

Liquor

Section 33:1-43 provides that it shall be unlawful for any owner, part owner, stockholder, or officer or director of any corporation, or any other person whatsoever interested in any way whatsoever in any brewery, winery, distillery, or rectifying and blending plant or any wholesaler of alcoholic beverages, to conduct, own either in whole or in part, or be directly or indirectly interested in the retailing of any alcoholic beverages except as provided in this chapter. Any ownership, mortgage, or interest in such licensed premises, existing on December 6, 1933, shall not be deemed to be an interest in the retailing of alcoholic beverages up to December 6, 1940. Thereafter it shall continue not to be deemed a prohibited interest provided none of the products of the brewery, winery, distillery, rectifying, and blending plant, or wholesaler, are sold directly or indirectly at the licensed premises. Similar prohibitions are made against any interest in any of the above businesses when located outside of the state. The ownership, delivery, or loan of interior signs for advertising one's products shall not constitute an interest in the retailing of alcoholic beverages.

Section 33:1-43.1 provides that no owner, part owner, stockholder, officer, or director of any corporation, or any other person whatsoever interested in any way whatsoever in any brewery shall make any loan, directly or indirectly, to any retail licensee; but the foregoing shall not prohibit the extension, subject to rules and regulations, of reasonable credit in respect to ordinary current sales of brewery products; nor shall they furnish, repair, or replace fixtures in any such licensed retail business, except that the cleaning and repairing of pipes and similar matters may be permitted by rules and regulations.

Section 33:1-51 provides that any person who shall violate any of the other provisions of this chapter shall be guilty of a misdemeanor and punished by a fine not less than \$50 and not more than \$250, or by imprisonment for not less than ten days and not more than ninety days, or by both.

Section 33:1-52 provides that any person who shall knowingly aid or abet another in the violation of this chapter shall be guilty of a misdemeanor punishable in the same manner as the violation aided or abetted.

Section 33:1-53 provides that in case any person shall be convicted of a second or subsequent offense, he shall be punishable by a fine or imprisonment, the maximum and minimum of which shall be twice the limits otherwise imposed by this chapter, or by both

in the discretion of the court.. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Section 33:1-43 provides that it shall be unlawful for any owner, part owner, stockholder, or officer or director of any corporation, or any other person whatsoever interested in any way whatsoever in any brewery, winery, distillery, or rectifying and blending plant or any wholesaler of alcoholic beverages, to conduct, own either in whole or in part, or be directly or indirectly interested in the retailing of any alcoholic beverages except as provided in this chapter, and such interest shall include any payments or delivery of money or property by way of loan or otherwise accompanied by an agreement to sell the product of said brewery, winery, distillery, rectifying, and blending plant or wholesaler. See *Special Antitrust Laws: Liquor, supra*.

2. Public Contracts

No provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

It is within the power of the legislature to delegate to the public utility commission the power to approve the leases or articles of merger or consolidation of railroads. Section 48:12-126 is limited to this extent by the Public Utility Act, sections 48:2-1 et seq. (L. 1911, c. 195). *West Jersey & S. R. Co. v. Board of Public Utility Commisisoners*, 85 N. J. L. 468, 89 Atl. 1017 (1914), *affd*, 87 N. J. L. 170, 94 Atl. 57 (1915).

Resolution of board of alderman of a city which required that all printing for the board be done in printing shops who recognize trade unions and pay union wages to their employees was held to be void as it excluded all persons except those of a specified class. This tends toward monopoly. *Paterson Chronicle Co. v. City of Paterson*, 66 N. J. L. 129, 48 Atl. 589 (1901).

Commissioners of a city, attempting by resolution to grant an exclusive franchise for the collection and cremation of garbage for a period of 20 years, had no power, without legislative authority, to create such monopoly. *Conover et al. v. Long Branch Commission*, 65 N. J. L. 167, 47 Atl. 222 (1900). See also *Schwarz Bros. Co. v. Board of Health*, 84 N. J. L. 735, 87 Atl. 463 (1913).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

*Judicial Decisions***Restrictive Covenants Ancillary to the Sale of a Business.**

Vendor of private banking business agreed not to compete in same city for 10 years was held valid and enforceable. *Hoagland v. Segur*, 38 N. J. L. 230 (1876); in such an agreement it is competent for the parties to liquidate the damages to be recovered in case of breach. *Id.*

Vendor of stockyards business agreeing not to compete for 15 years in same city or within 200 miles thereof is not an unreasonable restraint and is valid. *Ellerman v. Chicago Junction Rys. & Union Stock-Yards Co.*, 49 N. J. Eq. 217, 23 Atl. 287 (1891).

A covenant by vendors of a sheet-iron business not to compete in city where business sold was located was held valid. *Carl v. Snyder et al.*, 26 Atl. 977 (1893).

Vendor of a factory engaged in business of manufacturing and selling sanitary pottery ware agreed not to compete for a period of 50 years "within any State of the United States of America, or within the District of Columbia, except in the State of Nevada and the territory of Arizona." Although sale of such products had never been carried on by the sellers in some of the territory described, the contract was divisible and could be enforced in such territory wherein the business had been carried on. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 (E. & App., 1899), mod'g *Trenton Potteries v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923 (1898).

Vendor, who was principal stockholder of a meat business agreed not to compete for 20 years "within 500 miles of Jersey City." This is interpreted as meaning two areas, Jersey City and the area within a radius of 500 miles from Jersey City. The covenant was held enforceable in the area where the business was carried on (Jersey City). *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 71 Atl. 265 (E. & App., 1908).

Vendor of business manufacturing white porcelain doorknobs agreed not to compete for a period of 5 years. The covenant was held valid. *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, 74 Atl. 681 (1909).

Vendor of shoe-repair business agreed not to compete in same city for 5 years; during such period vendee resold said business, and the

covenant was held reasonable and therefore enforceable by transferee of vendee. *Palumbo v. Piccioni*, 89 N. J. Eq. 40, 103 Atl. 815 (1918).

Manager for vendor of confectionery business together with vendor agreed not to compete in city and such covenant was to "remain in force after the above-mentioned store will be sold to other parties." The covenant was not an unreasonable restraint and is valid. *Scherman v. Stern*, 93 N. J. Eq. 626, 117 Atl. 631 (E. & App., 1922).

A covenant by the vendor of a wholesale cracker business not to compete for 10 years within a radius of 10 miles of territory covered by said business at time of sale, was held valid. *Nachamkis v. Goldsmith*, 101 N. J. L. 356, 128 Atl. 238 (1925).

Vendor of a partnership interest in a dry-goods store covenanted not to compete for 2 years within 2 miles of store wherein continuing partner conducted such business. The covenant was held valid. *Yanko v. Goldberg*, 98 N. J. Eq. 536, 131 Atl. 513 (1925); *Id.*, 101 N. J. Eq. 170, 137 Atl. 645 (E. & App., 1927).

A covenant by the vendor of a grocery business not to compete for a period of 5 years within a radius of 20 "square blocks" from said 607 Summit Avenue, Jersey City, is valid. *Katz v. Newman*, 97 N. J. Eq. 284, 127 Atl. 255 (E. & App., 1925). See also *Mazie et al. v. Wilson et al.*, 103 N. J. Eq. 569, 144 Atl. 13 (1928); *Stein v. Konmit*, 105 N. J. Eq., 90, 147 Atl. 111 (1929).

Vendor of a coal business agreed not to engage in the "buying, selling, or delivering of coal for consumption within the limits of the city of Jersey City and the territory adjacent thereto, which may be conveniently served by wagon deliveries from Jersey City (not including New York City) for a period of 20 years." The covenant is not unreasonable, and the restraint sufficiently necessary for the protection of the buyer's interests. *R. H. Perry & Co. v. Burns Bros.*, 101 N. J. Eq. 409, 139 Atl. 41 (1927) *aff'd.* 103 N. J. Eq. 366, 143 Atl. 918 (E. & App., 1928).

A covenant by a vendor of a bakery business not to compete "within a radius of 60 blocks, in any direction, it being the intention that this covenant shall be limited to a radius of 3 miles," is valid and enforceable. *Bloomfield Baking Co. v. Maluvius*, 112 N. J. Eq. 109, 163 Atl. 441 (1932). See also *Sandullo v. La Bruna*, 111 N. J. Eq. 4, 160 Atl. 834 (1933).

The owner of patents to certain sound-producing devices in an agreement ancillary to the sale of such patents, machinery, equipment, and goodwill agreed not to compete for 18 years within the United States. The covenants are valid and reasonably necessary

for the protection of the interests sold. *Voices, Inc., v. Metal Tone Manufacturing Co., Inc., et al.*, 119 N. J. Eq. 324, 182 Atl. 880 (1936) aff'd 120 N. J. Eq. 618, 187 Atl. 370 (E. & App., 1936) cert. den. 300 U. S. 656, 57 Sup. Ct. 433, 81 L. Ed. 866 (1936).

Vendor of baking business covenanted not to compete at any time within 1,000 miles of where business was located. The restraint is unlimited in time, and too broad in space. The restriction is unreasonable and therefore void. *Althen v. Vreeland*, 36 Atl. 479 (1897).

Covenantor was prohibited for 10 years by agreement from entering into the silk-finishing business or any similar business, or being connected with it in any manner or form, within the United States. The covenant was held invalid as an unreasonable restraint. *Wyder v. Milhomme*, 96 N. J. L. 500, 115 Atl. 380 (E. & App., 1921). See also *Stevens & Thompson Paper Co. v. Brady*, 106 N. J. Eq. 410, 151 Atl. 92 (1930).

A covenant, by the vendor of a restaurant, not to compete as principal, agent, or otherwise within a defined area and for a fixed period of time, is violated by working in a competing restaurant as waiter or cook. *Borgodos v. Chacalos et al.*, 109 N. J. Eq. 5, 156 Atl. 124 (1931).

A covenant by a vendor of a bus line, which operated between Williamstown, N. J., and Philadelphia, Pa., not to compete by operating any bus line between points in New Jersey and any other State is unenforceable as tending to create a monopoly. The restriction is unreasonable and unnecessary for the protection of the vendee's interests. *Schultz et al. v. Johnson*, 110 N. J. Eq. 566, 160 Atl. 379 (E. & App., 1932).

Restrictive Covenants Ancillary to Sale of a Professional Practice.

Partnership agreement entered into by physician and former assistant provided that in event that such partnership was terminated the latter agreed not to compete for 3 years in Atlantic City. The covenant was held to be reasonable. *Marvel v. Jonah*, 83 N. J. Eq. 295, 90 Atl. 1004 (E. & App., 1914). Note dissenting opinion; rev'g. 81 N. J. Eq. 369, 86 Atl. 968 (1913).

Restrictive Covenants Ancillary to Employment.

A covenant by an ice-wagon driver not to compete for 1 year after termination of employment in territory covered by route or within 5 squares therefrom was held valid. *American Ice Co. v. Lynch*, 74 N. J. Eq. 298, 70 Atl. 138 (1908). See also *Owl Laundry Co. v. Banks*, 83 N. J. Eq. 230, 89 Atl. 1055 (1914); *Same v. Delger et al.*, 89 Atl. 1056 (1914); *Pen Carbon Manifold Co. v. Tomney et al.*, 90 N. J. Eq.

233, 110 Atl. 445 (1919); *Sarco Co. v. Gulliver*, 3 N. J. Misc. 641, 129 Atl. 399 (1925) aff'd per curiam, 99 N. J. Eq. 432, 131 Atl. 923 (1926).

Real-estate salesman agreed not to compete for 1 years in city wherein employer did business. The agreement was held valid and enforceable. *J. I. Kislak, Inc., v. Muller*, 100 N. J. Eq. 110, 135 Atl. 673 (1926).

A covenant by an employee, working in capacity of assistant floor supervisor in laundry not to compete for 2 years in two counties wherein employer operated was upheld. *Ideal Laundry Co. v. Gugliemone*, 107 N. J. Eq. 108, 151 Atl. 617 (E. & App., 1930). See also *Grober v. Strick et al.*, 77 Fed. (2d) 762 (1935); *Davy Tree Expert Co. v. Ahlers*, 124 N. J. Eq. 175, 200 Atl. 1012 (1938).

Driver and solicitor for meat products business agreed not to compete for 1 year in seven counties in the State wherein employer operated. A third party, who had purchased employer's business subsequent to breach of covenant by employee, can enforce such covenant. It is no defense that the third party did not obtain a specific assignment of such covenant at the time of purchase. *A. Fink & Sons v. Goldberg*, 101 N. J. Eq. 644, 139 Atl. 408 (1927).

A striking employee, quitting employment without notice, was held to have violated his contract not to compete by appealing to customers of employer not to deal with such employer until strike was settled. *Perfect Laundry Co. v. Marsh*, 121 N. J. Eq. 588, 191 Atl. 774 (E. & App., 1937) rev'g 120 N. J. Eq. 508, 186 Atl. 470 (1936).

A covenant by a physician, employed as assistant to another physician, "not to engage in the practice of medicine or surgery in the city of Newark at any time hereafter" was held to be an unreasonable restraint and therefore invalid. *Mandeville v. Harmon*, 42 N. J. Eq. 185, 7 Atl. 37 (1886). For other employee's covenants not to compete see *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348 (1891); *Taylor Iron & Steel Co. v. Nichols et al.*, 73 N. J. Eq. 684, 69 Atl. 186 (E. & App., 1908) rev'g 70 N. J. Eq. 541, 65 Atl. 695 (1907); *Steinmeyer v. Phenix Cheese Co.*, 91 N. J. L. 351, 102 Atl. 150 (E. & App., 1917); *Gordon Supply Co. v. Galuska*, 113 N. J. Eq. 353, 166, Atl. 700 (1933); *Bond Electric Corp. v. Keller*, 113 N. J. Eq. 195, 166 Atl. 341 (1933).

Restrictive Covenants not Ancillary to Sale of a Business Interest.

A covenant made by vendor of real estate, that neither he nor his assignees will sell any marl from the premises adjoining the tract conveyed, being in general restraint of trade, was held void. *Brewer v. Marshall*, 19 N. J. Eq. 537 (1868).

Several inventors holding patents and improvements for electric car lighting devices sold such patents and improvements in considera-

tion of \$2,000,000 and agreed to assign to such purchaser any future patents secured on improvements made. The covenant was held to be reasonable and was enforced. *Consolidated Ry. E. L. & H. Co. v. United States Light & Heat Co.*, 77 N. J. Eq. 285, 78 Atl. 684 (1910); cf., *Albright v. Teas*, 37 N. J. Eq. 171 (1883).

A covenant by a party receiving stock of a corporation, under an exchange agreement, not to sell or transfer the stock without first offering it for sale to corporation's fiscal agent, was held to be a reasonable restraint on sale or transfer of personalty. *Cities Service Co. v. McFarland*, 10 N. J. Misc. 577, 159 Atl. 800 (1932).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (1940)

Cooperatives

Section 4: 13-27 provides that agricultural cooperatives may require members to buy or sell all or part of their specifically enumerated agricultural products or supplies exclusively through the association, but there shall be a reasonable period in each year within which members may give notice of withdrawal from these obligations. See *Cooperatives* in projected study.

Judicial Decisions

Tying Contracts.

A proprietor of a confectionery store purchased a refrigerator with a stipulation that he would use such refrigerator exclusively for the storage of the vendor's ice-cream products for the term of the conditional bill of sale. In an action on the notes under said bill of sale, the court held that the covenant was not an attempt to promote a monopoly, and was not an undue restraint of trade. *Clare v. Ice Cream Cabinet Co., Inc.*, 11 N. J. Misc. 386, 166 Atl. 722 (1933).

Exclusive Dealing Arrangements.

A railroad company contracted to give certain individuals the exclusive right of transporting locomotive engines and tenders over the right-of-way. Such a contract was held void as an attempt to create a monopoly. *The Union Locomotive & Express Co. v. Erie Ry. Co.*, 37 N. J. L. 23 (1874).

A contract that one person shall be employed as the sole agent of manufacturers to sell all of their output does not violate any principle of law, and is enforceable. *New York Trap Rock Co. v. Brown et al.*, 61 N. J. L. 536, 43 Atl. 100 (1898).

The owner of a patented observation wheel sold such article and agreed that for \$200 annually the purchaser would have the exclusive privilege of operating such article at a summer resort. Such a contract is valid because of the nature of a patent. *Sommers et al. v. Myers et al.*, 69 N. J. L. 24, 54 Atl. 812 (1903).

A manufacturing company of hair dye, made under a secret process, entered into a contract giving another the exclusive sales agency for such product. In return, the sales agency agreed to advertise and stimulate sales of the product. The contract was held to be valid, and not in restraint of trade. *Paragon Distributing Corp. v. Paragon Laboratories Inc., et al.*, 99 N. J. Eq. 224, 129 Atl. 404 (1925).

A dealer contracted with a brewery to purchase all the ale, beer, porter, etc., that he should sell in a certain township for a period of 10 years. The contract was held reasonable, and not in restraint of trade. *Peter Breidt City Brewing Co. v. Tomaine*, 40 N. J. L. 20 (1916).

A railroad company contracted with an express company, giving the latter exclusive right to use the station platform for its business. Such a contract does not create a monopoly and the express company is entitled to an injunction restraining others from soliciting business on the platform. *Thompson's Express & Storage Co. v. Whitmore et al.*, 88 N. J. Eq. 535, 102 Atl. 692 (1917).

NEW MEXICO

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. (1911) art. IV, sec. 38. The legislature shall enact laws to prevent trusts, monopolies, and combinations in restraint of trade.

Const. (1911) art. IV, sec. 26. The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities, or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege, or immunity shall be granted by the legislature or any municipality in this state.

STATUTORY PROVISIONS

Stat. Ann. (Courtright, 1929)

Sec. 117-114.—Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this state.¹

Sec. 35-2901. Restraints of trade.—Every contract or combination between individuals, associations, or corporations, having for its object or which shall operate to restrict trade or commerce or control the quantity, price, or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal.

Every person, whether as individual or agent or officer or stockholder of any corporation or association, who shall make any such contract or engage in any such combination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars nor less than one hundred dollars, and by imprisonment at hard labor not exceeding one year, or until such fine has been paid. (L. '91, ch. 10, sec. 1; C. L. '97, sec. 1292; Code '15, sec. 1685.)

¹This section is a part of the real estate law, secs. 117-101 to 117-404.

Sec. 35-2902. Monopolies.—Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this state, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. (L. '91, ch. 10, sec. 2; C. L. '97, sec. 1293; Code '15, sec. 1686.)

Sec. 35-2903. Monopolies—Restraint of trade—Liability—Contracts void.—All contracts and agreements in violation of the foregoing two sections shall be void, and the person or persons, corporation or corporations, association or associations who shall violate the provisions of either of said sections shall be civilly liable to the party injured for any and all damage occasioned by such violation, and any purchaser of any commodity from any individual, corporation, or association transacting business in violation of such sections shall not be liable for the payment for such commodity. (L. '07, ch. 18, sec. 1; Code '15, sec. 1687.)

Sec. 35-2904. Organizations exempted.—The labor of a human being is not a commodity or article of commerce. No law against monopolies or combinations in restraint of trade shall be held or construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for purposes of mutual help, and not having capital stock or conducted for profit to the organization, or to forbid or restrain individual members of such organizations from lawfully carrying out the objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under any law against monopolies or combinations in restraint of trade: *Provided, however,* That nothing herein contained shall be held or construed to justify any restraint of trade or restriction of competition except such as is incident to the protection and promotion of the interests of the members of such organizations, in view of their situation and circumstances; but such organizations and their objects, and the effectuation thereof, shall prima facie be presumed to be in reasonable restraint of trade or restriction of competition. (L. '23, ch. 37, sec. 1.)

Judicial Decisions

Application of Statutes.

Plaintiff in an arrangement to secure an exclusive agency for the sale of ground corn from the producing farmers of one county entered

into an agreement to sell the corn to the defendant for a stipulated price. Plaintiff and defendant also agreed to divide equally the difference between the moneys paid to the farmers and that received from the resale of such corn. The contract was held valid, and not in violation of sections 35-2901 and 35-2902 (Code of 1915, secs. 1685, 1686). "While such a price-fixing agreement is fraudulent, it does not restrain trade, and an indictment for violation of the antitrust law is demurrable. *State v. Gurley*, 25 N. M. 233, 180 Pac. 288 (1919).

Letters from a wholesaler to his retail customer, advising him of retail prices, territory, and the like, even though acquiesced in by the retailer, do not modify the original contract between the parties, which provides that the retailer may sell at any price he likes and anywhere he likes, nor are they repugnant to the State antitrust laws. *W. T. Rawleigh Co. v. Jones et al.*, 39 N. M. 381, 47 Pac. (2d) 906 (1935).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. Ann. (Courtright, Supp. 1938) Resale Price Maintenance

Sections 145-107 to 145-112 permit the fixing by contract of resale prices of branded commodities. Section 145-109 provides that this act shall not apply to contracts between producers, between wholesalers, or between retailers as to sale or resale prices. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 31-218 provides that cooperative marketing associations organized under sections 31-101 to 31-106 shall not be deemed monopolies, or in restraint of trade or attempts to fix prices or to create combinations or pools in violation of the laws of the state. Such associations may disseminate market information and advise members as to market conditions and selling prices. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Stat. Ann. (Courtright, 1929) Agricultural Marketing Associations

Section 32-601 provides that persons engaged in the production of agricultural products, may organize under sections 31-201 to 31-214 to act together in associations, corporate or otherwise, with or without capital stock. Such associations and contracts shall be presumed to be in reasonable restraint of trade. See *Cooperatives* in projected **MARKETING LAWS SURVEY** study.

Labor and Agricultural Organizations

Section 35-2904 provides that agricultural and horticultural organizations, labor organizations, instituted for mutual self help, not having capital stock, and not operated for profit, are exempt from the antitrust laws. See *General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS**I. Special Industry Antitrust Acts**

Stat. Ann. (Courtright, Supp. 1938)
Motion Pictures

Sections 35-2905 to 35-2927 provide that the intent of the act is to eliminate and prevent monopolies, restraint of trade, unfair combinations, favoritism, discrimination, overbuying, or preferences in the motion-picture industry; that any contract, combination, or monopoly which prevents any competitive exhibitor from acquiring his proportionate share of such products is illegal; that it shall be unlawful for any owner of any place where motion pictures are exhibited, where competition exists, to contract for, lease, license, rent, or buy more pictures than can or will be shown in the following 12 months, or for any motion picture to be bought or supplied for a theater in competition with others with the intent that the same will not be used; and that all motion pictures acquired for such a theater shall be used within six months after same are ready for showing; that any person selling, leasing, or supplying motion pictures to exhibitors competing with each other shall distribute them proportionately among such exhibitors, i. e., first-run pictures among those contracting for first-run pictures, second-run pictures among those contracting for them; etc.; that if two or more exhibitors desire to acquire their proportionate share of the product of any producer or distributor, the allotment shall be made by permitting each competitor to select pictures alternately from the distributor in proportion to the number of theaters owned by them; that the State Corporation Commission shall have the power to determine whether a theater is a first- or second-run theater; that whenever a group or series of pictures is announced by a distributor or producer, said announcement shall be filed with the Corporation Commission and announced simultaneously to all competitive exhibitors; after one exhibitor has purchased part of a group, the remainder cannot be sold to a competitor at a less price for a period of six months or be sold under a different playing arrangement; that

in any competitive situation any executory contract of sale, lease, or license of any product may be revoked by the exhibitor at any time prior to acceptance by the producer or distributor, or within twenty days from date of the contract and if not revoked by either party within said twenty days it becomes binding; also that it shall be unlawful for any producer to give, or for a competitive exhibitor to receive, any secret rebate, or reward for showing any picture; that it shall be unlawful in any town where competition exists for any person or corporation to contract for, license, buy, own, or control the exclusive right to the product of any producer or distributor for a period of more than one year; and that any competitive exhibitor having such a contract for more than one year at the time of the passage of the act shall not participate in the alternative selection of pictures until his competitors shall have acquired a number of pictures equal to that covered by his contract; producers and distributors operating theaters for the purpose of showing their own products cannot participate in such alternative selection until competition has been equalized in a like manner, nor may a producer or distributor refuse to sell his products to a competitive exhibitor in the manner provided by the act, nor may he refuse to allow competitive exhibitors to make selections as provided; that competitive contracts shall be filed with the Corporation Commission and that producers and distributors must appoint the Chairman of the Corporation Commission as their agent to accept service of process, which shall be a prerequisite to doing business in the state; that any person violating the act shall be subject to civil liability in both actual and punitive damages to the person or persons injured.

Stat. Ann. (Courtright, 1929)
Petroleum and Coal Oil

Sections 24-102 to 24-104, and 24-109 provide that companies engaged in the production or refining of petroleum or coal oil are subject to revocation of licenses for violation of the antitrust laws.

It is further provided that the license of any retailer of petroleum or coal oil may be revoked if such retailer has entered into any combination to purchase such commodities from any company or person not authorized to do business in the state, for the purpose of bringing such commodities into the state and disposing of them in violation of the antitrust laws; that such license may be revoked if the seller enters into any combination with the producer, refiner, or dealer from whom such commodity has been purchased, in violation of the state antitrust laws; that on request of the State Commerce

Commission, the Attorney General shall proceed against such retailer by injunction.²

L. 1939, c. 236

Liquor

Art. XIV, Sec. 1409 provides that it shall be a violation of this act for any wholesaler of alcoholic liquors, directly or indirectly, or through an affiliate, to own, either in whole or in part, any retail establishment or dispensary.

Art. XVII, Sec. 1707 (a) provides that the violation of any provision of this Act or of any valid rule or regulation promulgated under the provisions of this Act which is not herein declared to be a felony, shall be a misdemeanor, and upon conviction thereof any person shall be punished by a fine of not more than \$300 or by confinement in jail for not more than seven months or by both. If a corporation be convicted of such a violation it shall be punished by a fine of not more than \$1,000. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Stat. Ann. (Courtright, 1929)

Railroads

Sec. 116-704. Contracts against public policy.—All contracts between railroad companies, or between any parties whatever, restricting, or abridging, or purporting, or intending to restrict or abridge the right, privilege, franchise, or power of any railroad company or companies to build or operate its, or their, road or roads, or any part thereof within this state, or any part thereof, in any direction or directions, or to any part thereof within this state, or any part thereof, in any direction or directions, or to any extent whatever; or to make any railroad connections, or to cooperate with any corporation or person in any railroad or other business, or to promote the construction or operation of any railroad, or to establish any parallel or competing line or branch, or to establish or promote any competitive business, or to deal with any railroad corporation or other corporation, firm, or individual, or to waive any corporate duty, object, or franchise, being contrary to public policy, are hereby declared to be null, void, and inoperative in this state; and no suit, action, or proceeding in law or equity shall be brought or maintained in any court to enforce any such contract, or to recover damages for any breach or nonperformance thereof. (L. '82, ch. 59, sec. 1; C. L. '97, sec. 3910; Code '15, sec. 4735.)

² Sec. 24-102 was held invalid as a restriction on interstate commerce. *In re Wilson*, 10 N. M. 32, 60 Pac. 73 (1900). Sec. 24-109 amended the act to cure this defect.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

Stat. Ann. (Courtright, Supp. 1938)

Motor Vehicles

Sections 11-2101 to 11-2114 are identical in text with the Colorado statute. See Colo. Stat. Ann. (Michie, Supp. 1938), c. 16, secs. 407 to 419, set forth in full at pp. 72-76, *supra*.

Judicial Decisions

Exceptions to General Antitrust Laws

Cooperatives.

In an action by a cooperative society to enjoin a member from breaching an exclusive marketing agreement, the court held that while an exclusive marketing agreement between a cooperative association and its members may be contrary to the general antitrust law, it is expressly permitted by the Cooperative Marketing Act, section 35-2904. This act having been enacted subsequent to the antitrust law, must, to that extent, be held to modify the law. *Elephant Butte Alfalfa Ass'n. v. Ronault*, 33 N. M. 136, 262 Pac. 185 (1928).

Special Antitrust Laws

Petroleum and Coal Oil.

Section 24-102 has been held invalid in that the licensing provision thereof is an unlawful interference with interstate commerce as applied to sales of coal oil in the original package. *In re Wilson*, 10 N. M. 32, 60 Pac. 73 (1900).

II. CONTRACTS NOT TO COMPETE

Stat. Ann. (Courtright, 1929)

Railroads

See section 116-704, under *Special Antitrust Laws, supra.*

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A contract, ancillary to the sale of a business and its goodwill, not to compete with purchaser in the neighborhood for a period of 3 years, is not in restraint of trade. The agreement is limited in time and space and is no broader than necessary to protect the goodwill of the business. *Gonzales et al. v. Reynolds et al.*, 34 N. M. 35, 275 Pac. 922 (1929).

After liquidating his debts with other creditors at 35 cents on the dollar, defendant agreed to give plaintiff creditor promissory notes for the full amount of his indebtedness, providing plaintiff agreed not to engage in business in competition with defendant. In dismissing an action brought to recover the sums due on the notes, the court held the consideration illegal as a promise not to compete was in restraint of trade. *Gross, Kelley & Co. v. Bibo et al.*, 19 N. M. 495, 145 Pac. 480 (1914).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Laws 1939, c. 236

Liquor

Art. XIV, sec. 1405 provides that it shall be unlawful for any importer, distiller, brewer, rectifier, winer, nonresident licensee, or any kind or class of wholesale licensee, directly or indirectly, or through an affiliate (a) to require by agreement or otherwise that any wholesale, retail, dispensary, or club licensee engaged in the sale of any alcoholic liquor in this State, purchase any such products from such person to the exclusion in whole or in part of liquors sold or offered for sale by other persons; or (b) to induce such exclusive dealing through any of the following means: (1) By acquiring or holding any interest in any license with respect to the premises of

any such wholesale or retail liquor dealer, dispenser, or club; or (2) by acquiring any interest in any real or personal property owned or used by them in the conduct of their business, subject to such exemptions as the Chief of Division of Liquor Control shall prescribe; or (3) by furnishing, giving, renting, lending, or selling to any of the above licensees any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Chief of Division of Liquor Control shall by regulation prescribe; or (4) by paying or crediting them for any advertising, display or distribution services; or (5) by extending credit to them in any amount to aid or allow such person to commence business or to secure any part of a stock of merchandise with which to commence business in the first instance; or (6) by requiring any of them to take and dispose of a certain quota or combination of alcoholic liquor products; or (7) by commercial bribery, or by offering or giving any bonus, premium, or compensation to any officer, employee, agent, or representative of any such wholesale or retail liquor dealer, dispenser, or club; and (c) to sell, offer for sale, or contract to sell any retail liquor dealer, dispenser, or club any alcoholic liquors of any kind or class on consignment or under conditional sale or on any basis other than bona fide sale; provided, that this subsection shall not apply to transactions involving solely the bona fide return of merchandise for ordinary and usual commercial reasons arising after the merchandise has been sold. See *Special Antitrust Laws: Liquor, supra*.

Stat. Ann. (Courtright, Supp., 1938)
Cooperatives

Section 31-216 provides that members of cooperative marketing associations may be required by such association, as a condition of admission thereto, to execute contracts whereby the member agrees to sell all or part of his products to the association or buy all or part of his supplies from or through it. Section 31-218 provides that such agreements shall not be deemed to be in restraint of trade nor part of an illegal conspiracy or combination, nor contrary to any statute enacted against pooling or combinations. See *Cooperatives* in projected study.

Stat. Ann. (Courtright, 1929)

Section 32-1006, subsection 4, provides that cooperative marketing associations shall have the power to enter into contracts with their members for periods of not over 10 years requiring them to sell or market all or a special part of their products to or through the association. See *Cooperatives* in projected study.

NEW YORK

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

General Business Law (McKinney Supp. 1939)

Sec. 340. Contracts or agreements for monopoly or in restraint of trade illegal and void.—1. Every contract, agreement, arrangement, or combination whereby

A monopoly in the manufacture, production, transportation, marketing, or sale in this state of any article or product or service used in the conduct of trade, commerce, or manufacture, or of any article or commodity of common use is or may be created, established, or maintained, or whereby

Competition or the free exercise of any activity in this state in the manufacture, production, transportation, marketing, or sale in this state or in the supply or price of any such article, product, commodity, service, transportation, or trade practice is or may be restrained or prevented, or whereby

For the purpose of creating, establishing, maintaining a monopoly or unlawfully interfering with the free exercise of any activity within this state in the manufacture, production, transportation, marketing, or sale of any such article, product, commodity, or service, the free pursuit in this state of any lawful business, trade, or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

2. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen,

including live stock farmers and fruit growers, nor to contracts, agreements, or arrangements made by such associations, nor to bona fide labor unions.

3. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workmen to combine in unions, organizations, and associations, not organized for the purpose of profit.

Sec. 341. Penalty.—Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement, or combination, or who within this state shall do any act pursuant thereto, or in, toward, or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding twenty thousand dollars. An indictment based on a violation of any of the provisions of this section must be found within two years after its commission.

Sec. 342. Action to restrain and prevent.—The attorney general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act in, toward, or for the making or consummation of any contract, agreement, arrangement, or combination herein prohibited, wherever the same may have been made.

Sec. 343. Investigation by the attorney general.—Whenever it shall appear to the attorney general, either upon complaint or otherwise, that any person or persons, partnership, corporation, company, trust, or association shall have engaged in or engages in or is about to engage in any act or practice by this article prohibited or declared to be illegal, or that any person, persons, partnership, corporation, company, trust, or association, has assisted or participated in any plan, scheme, agreement, or combination of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such person, persons, partnership, corporation, company, trust, or association to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes is to be to the public interest to investigate. The attorney general may also require such other data and information

as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter. The attorney general, his deputy, assistant, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate, a court of record or a judge or justice thereof, and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and examination shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this article. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, document, or any other record, or from being examined or required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefor is made at the time testimony is about to be taken and as a condition precedent to offering such production or testimony and unless payment thereof be not thereupon made. The provisions for payment of witness fees and/or mileage do not apply to any officer, director, or person in the employ of any person, partnership, company, corporation, trust, or association whose conduct or practices are being investigated. If a person subpoenaed to attend such inquiry fails to obey the command of the subpoena without good cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to answer a question or to produce a book, paper, document, or other record when ordered to do so by the officer conducting such inquiry, or if a person, partnership, corporation, company, trust or association fails to perform any act hereunder required to be performed, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants, clerks, subordinates or employees, and all other persons to render and furnish to the attorney general, his deputy or other designated representative, when so requested, all information and assistance in their possession or within their power. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the attorney general the name of any witness examined or any other information obtained upon such inquiry, except as so directed by the attorney general shall be guilty of a misdemeanor. Such inquiry may upon written authorization of the attorney general be made public.

The misdemeanors provided in this section shall be punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both.

Sec. 344. (Repealed by 804, L. 1933.)

Sec. 345. No person excused from answering.—No person shall be excused from attending and testifying or from producing any books, papers, or other documents before the attorney general or his deputy or duly authorized representative, or any court, magistrate, justice or referee upon any inquiry, investigation, proceeding, or trial, pursuant to or for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which he may so testify, or produce evidence, documentary or otherwise. And no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial: *Provided, however,* No person so testifying or furnishing evidence shall be exempt from prosecution or punishment for any perjury committed by him in his testimony given as herein provided for, nor shall immunity apply to corporations or to the officers as such.

Sec. 346. (Repealed by 804, L. 1933.)

Sec. 347. Criminal prosecution.—The attorney general may prosecute every person charged with the commission of a criminal offense in violation of the laws of this state, applicable to or in respect of the practices or transactions referred to in this article. In all such proceedings, the attorney general may appear in person or by his deputy before any court of record or any grand jury and exercise all the powers and perform all the duties in respect of such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform; or the attorney general may in his discretion transmit evidence, proof, and information as to such offense to the district attorney of the county or counties in which the alleged violation has occurred, and every district attorney to whom such evidence, proof, and information is so transmitted shall forthwith proceed to prosecute any corporation, company, association, or officer, manager, or agent thereof, or any firm or person charged with such violation. In any such proceeding, wherein the attorney general has appeared either in person or by deputy, the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or the deputy attorney general so appearing.

Stock Corporation Law (McKinney)

Sec. 23. Combinations prohibited.—No domestic stock corporation and no foreign corporation doing business in this state shall

combine with any other corporation or person for the creation of a monopoly or for the unlawful restraint of trade or for the prevention of competition in any necessary of life.

Penal Law (McKinney)

Sections 580-583 provide (in part) that it is illegal for two or more persons to conspire to prevent another from exercising a lawful trade or calling by force, threats or intimidation or by interfering or threatening to interfere with property belonging to another, or to conspire to commit any act injurious to trade or commerce.

Judicial Decisions

Application of the Common Law.

In General.

The law of New York early limited arrangements between business persons which tended to control the flow of goods and services, and prices. *Stanton v. Allen*, 5 Denio 434 (1850). The policy was enforced both under the common law, and in applying early antitrust statutes. *Hooker & Woodward v. Vandewater*, 4 Denio 349 (1849); *Clancey v. The Onondaga Fine Salt Mfg. Co.*, 62 Barb. 359 (1862). Not all arrangements tending to prevent competition and regulate prices were considered unlawful. *People ex rel. Pinckney v. N. Y. Board of Fire Underwriters*, 54 How. Pr. 240 aff'd 7 Hun 248 (1876). The limits of permissible business combination, in varying factual situations, are illustrated in the above cases which have declared combinations and agreements to be unlawful.

A contract whereby a coal producer agrees to sell only to one coal dealer in a specified region, where the intent of the parties is to raise the price by suppressing the supply, is illegal as against public policy. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 (1877). An agreement among sheep brokers to form an association, pool profits, and deal exclusively with a similar association of butchers, the butchers agreeing to purchase exclusively from the dealers' association, was held invalid as against public policy. The arrangements are to be taken together, and are intended to control the market, fix prices, and destroy competition. *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790 (1893).

A corporation which acted as broker in arranging sale of milk by producers to milk dealers, and which corporation, under its by-laws, could fix the price for milk, was held an unlawful combination

where the corporation was organized and almost entirely owned by New York City milk dealers. Such a corporation is injurious to trade and commerce, and subject to an action for the revocation of its charter. *People v. Milk Exchange Ltd.*, 145 N. Y. 267, 39 N. E. 1062 (1895). An agreement whereby the producers of 90 percent of bluestone, in order to cut competition and control prices, set up a corporation as sole selling agent with power to fix prices and control production is void as against public policy, being in restraint of trade and for the purpose of creating a monopoly. *Cummings v. Union Bluestone Co.*, 164 N. Y. 401, 58 N. E. 525 (1900). Where a combination of envelope manufacturers that controlled 85 percent of the market set up a corporation to fix selling price and market their product, a contract with an outside manufacturer that the prices of the latter also be fixed by the corporation is invalid as in restraint of trade and tending toward monopoly. *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292, 59 N. E. 906 (1901). Cf. *Dolph v. Troy Laundry Machine Co.*, 28 F. 553 (C. C. N. D. N. Y., 1886), rev'd on other grounds, 138 U. S. 617, 11, Sup. Ct. 412, 34 L. Ed. 1083 (1891).

An agreement between a railroad and an association of grain elevators, whereby the railroad transports grain for members of the association at a rate one-half cent per bushel less than for nonmembers, is unlawful as applied to a competing nonmember elevator. *Kellogg v. Lehigh Val. R. Co.*, 61 App. Div. 35, 70 N. Y. S. 237 (1901). A combination by competing watch manufacturers to create a monopoly and drive plaintiff out of business by refusing to sell to any dealer who purchased from plaintiff violates the common law and a section enacted prior but similar to Penal Law section 580. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 3 Misc. 582, 24 N. Y. S. 647 (1893). Where the sole manufacturer of quilting machines in the county sold his entire stock to plaintiff and promised not to manufacture such machines for 99 years, no unlawful monopoly was created as others can engage in such manufacture. *Excelsior Quilting Co. v. Creter*, 36 Misc. 698, 74 N. Y. S. 361 (1902).

A corporation which books theatrical shows for a number of theaters may hire only those which agree not to play for competitors. Such an arrangement is valid both at common law and under Penal Code, section 580. *People v. Klaw*, 55 Misc. 72, 106 N. Y. S. 341 (1907); *Roseneau v. Empire Circuit Co.*, 131 App. Div. 429, 115 N. Y. S. 511 (1909), motion den. mem. op. 117 N. Y. S. 1146 (1909).

The entire set-up of the major league baseball teams, in relation to their players and each other, has been declared an unlawful monopoly, holding the players in a species of quasi peonage. *American League Baseball Club v. Chase*, 149 N. Y. S. 6 (1914).

A combination of wholesale druggists who agreed with the makers of patent medicines that the latter should not sell to any druggist who sold below a fixed resale price was held valid where all dealers could purchase on equal terms. Public policy commends the conduct of business in such a way as to serve all consumers alike. *Park & Sons Co. v. National Wholesale Druggists' Assn.*, 175 N. Y. 1, 67 N. E. 136 (1903). The fact that a firm controls 90 percent of the tobacco trade and has a sole selling agent in the State who refuses to sell goods to a particular dealer does not per se establish an illegal combination. It is the right of any person to refuse to deal with another. *Locker v. American Tobacco Co.*, 121 App. Div. 443, 106 N. Y. S. 115 (1907), aff'd. mem. op. 195 N. Y. 565, 88 N. E. 289 (1909). A bylaw of the Associated Press whereby its service was denied any member that patronized a rival news service is reasonable and valid. *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981 (1893). To the same effect see *Marsich v. Eastman Kodak Co.*, 269 N. Y. 621, 200 N. E. 27 (1936). The collective refusal by the publishers of several newspapers to sell to a particular dealer is not unlawful. *Collins v. American News Co.*, 34 Misc. 260, 69 N. Y. S. 638 (1901).

Combinations to Fix Prices.

An association of manufacturers of wire cloth, each member agreeing not to sell below the price fixed by the association, is invalid. *DeWitt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.*, 16 Daly 529, 14 N. Y. S. 277 (1891); where all the manufacturers of harrows transferred all of their assets to one corporation, each taking back the exclusive right to sell the type of harrow previously dealt in, at prices fixed by the corporation, an unlawful combination exists. *Strait v. National Harrow Co.*, 18 N. Y. S. 224 (1891); *National Harrow Co. v. E. Bement & Sons*, 21 App. Div. 290, 47 N. Y. S. 462 (1897). See also *People v. Duke*, 19 Misc. 292, 44 N. Y. S. 336 (1897).

A group of insurance companies may form an exchange and refuse to deal with any insurance broker that disobeys their rules, including the fixing of rates. *Tanenbaum v. New York Fire Ins. Exch.*, 33 Misc. 134, 68 N. Y. S. 342 (1900). See also *People ex rel. Pickney v. N. Y. Board of Fire Underwriters*, 54 How. Pr. 240, aff'd 7 Hun 248 (1875).

A group of middlemen, who were customers of the plaintiff manufacturer, may combine to force the grant of a higher margin of profit. *Shinola Co. v. The House of Krieg*, 75 Misc. 220, 133 N. Y. S. 1015 (1912), affd. per. cur. 145 N. Y. S. 1145 (1914).

In *Dolph v. Troy Laundry Mach. Co.*, 28 F. 553 (C. C. N. D. N. Y.) (1886), an agreement between competitors in the manufacture and sale of washing machines setting a scale of prices and providing for division of profits was declared a valid restraint of trade, since washing machines are not articles of necessity. Case reversed on other grounds, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083 (1891). (This is an obsolete view. *Ed.*)

Resale Price Maintenance.

A resale price agreement made by the owner of a book copyright and the publisher was held valid at common law. *Murphy v. Christian Press Ass'n Pub. Co.*, 38 App. Div. 426, 56 N. Y. S. 597 (1899). See *Park and Sons v. National Wholesale Druggists' Ass'n*, 54 App. Div. 223, 66 N. Y. S. 615 (1900). The practice of a manufacturer of a branded soda giving rebates to customers that agreed not to sell his brand, nor that of any competitor, below a specified price, was held valid. *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. S. 91 (1899).

These cases have been superseded by the New York Fair Trade Act. See *Exceptions to the General Antitrust Laws*, *infra*. See also vol., *State Price Control Legislation*.

Types of Combination.

(1) *Trust arrangement*.—A combination by means of a trust, whereby the control of a constituent corporation is surrendered by its stockholders and officers and vested in trustees, and which tends to prevent competition and control prices and output, is against public policy. Corporation participating in such an arrangement will be dissolved. *People v. North River Sugar Refining Co.*, 54 Hun 354, 7 N. Y. S. 406 (1889), *aff'd* 121 N. Y. 582, 24 N. E. 834 (1890). For effects of this case see, *Cameron v. Havemeyer*, *infra*; *Havemeyer v. Brooklyn Sugar Refining Co.*, *infra*; *Gray v. Oxnard Bros. Co.*, *infra*.

(2) *Pool*.—Several firms in the lumber business pooled their export trade, did business through one central yard and divided profits. Such arrangement was not an unlawful monopoly, since it did not appear that the parties controlled the supply of lumber so that the price would be enhanced. *Export Lumber Co., Ltd., v. South Brooklyn Sawmill Co.*, 54 App. Div. 518, 67 N. Y. S. 626 (1900).

(3) *Transfer of stock*.—The purchase of the stock of another corporation to prevent competition is not in itself an unlawful restraint of trade. *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. 618, 56 N. Y. S. 288 (1899). The absorption of one company by another does not create a monopoly, since others may engage in the same business. *Francis v. Taylor*, 31 Misc. 187, 65 N. Y. S. 28 (1900), *aff'd mem. op.* 52 App. Div. 631, 65 N. Y. S. 1133 (1900).

An agreement among stockholders not to transfer or vote their stock without the consent of all, made to prevent sale of the company's franchise by the board of directors, is in restraint of trade as tending to form a monopoly. *Fisher v. Bush*, 35 Hun 641 (1885).

Constitutionality of Statutes.

General Business Law, sections 340 to 347 is constitutional; it is substantially a codification of the common law. *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

Subdivision 2 of section 340 of General Business Law, exempting from its application a "closed shop" contract by a bona fide labor union, is constitutional, *Williams v. Quill*, 277 N. Y. 1, 12 N. E. (2d) 547 (1938). See *Exceptions to the General Antitrust Laws, infra*.

Application of Statutes.

Interpretation.

Penal Law, section 580 was not impliedly repealed by sections 340 to 347 of the General Business Law. *People v. Dwyer*, 215 N. Y. 46, 109 N. E. 103 (1915). L. 1918, c. 490, which amended General Business Law, section 340, did not annul the previous provisions of section 340. *Standard Engraving Co. v. Volz*, 200 App. Div. 758, 193 N. Y. S. 831 (1922).

Scope.

L. 1899, c. 690, General Business Law, sections 340-346, was held to apply only to commodities in common use, and not to the service of transmitting a telegram, which is not such a commodity. *In re Jackson*, 57 Misc. 1, 107 N. Y. S. 799 (1918). Nor did it apply to advertising matrixes, *Finnegan v. Butler*, 112 Misc. 280, 182 N. Y. S. 671 (1920); nor to photoengravings, *People v. Epstein*, 102 Misc. 476, 170 N. Y. S. 68 (1918).

However, an agreement between stonemasons designed to restrain competition and fix prices in supplying building foundations is within the act, even though the building of foundations entails work and labor as well as the use of materials. *People v. Amanna*, 203 App. Div. 548, 196 N. Y. S. 606 (1922).

In 1921, the Donnelly Act was amended by L. 1921, c. 712, which added the words "any article or product used in the conduct of trade, commerce, or manufacture." Thereafter, photoengravings were held to be within the act, and a union of photoengravers organized to establish minimum prices was held unlawful. *Standard Engraving Co. v. Volz*, 200 App. Div. 758, 193 N. Y. S. 831 (1922). See also *Photo-Engravers' Board of Trade v. Addison*, 145 Misc. 479, 260 N. Y. S. 332 (1932), *aff'd mem. op.* 239 App. Div. 827, 264 N. Y. S. 939 (1933).

An agreement between persons engaged in shrinking and preparing woolen goods for manufacturers was held not to be within section 340 of the General Business Law, since it deals with services, not products or commodities. *New York Clothing Mfg. Exch. v. Textile Finishers' Assn.*, 238 App. Div. 444, 265 N. Y. S. 105 (1933).

An agreement by a railroad to deal only with the members of a grain elevator association of which plaintiff was not a member is not a conspiracy within Penal Code, section 580, where it was executed under the assumption that plaintiff would come into the elevator association and participate equally with the members. *Kellogg v. Sowerby*, 190 N. Y. 370, 83 N. E. 47 (1907).

Where all coal dealers in a town combined to fix prices and prevent competition, there was an indictable conspiracy under sections 580 and 583 of the Penal Law, even though the combination was to prevent the previous ruinous competition which caused the participants to operate their businesses at a loss. The fact that only reasonable prices were charged is no defense; the combination is unlawful, and it is not dependent upon proof that the public was injured. The overt act required by Penal Law, section 583, was supplied by the raising of the price of coal. *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785 (1893).

Where several sugar companies entered an agreement whereby each was to transfer control to a board of trustees, and the trustees were to direct all constituents, there was an unlawful conspiracy within subsection 6 of section 580 of the Penal Law. *People v. North River Sugar Refining Co.*, 54 Hun 354, 7 N. Y. S. 406 (1889), *affd.* 121 N. Y. 582, 24 N. E. 834 (1890).

A pooling agreement and price-fixing arrangement between a poultry receivers' association and a jobbers' association, which controlled nearly all of the poultry shipped to New York City, is unlawful within section 580 of the Penal Law. *People v. Dwyer*, 160 App. Div. 542, 145 N. Y. S. 748 (1914), *affd.* 215 N. Y. 46, 109 N. E. 103 (1915). A conspiracy on the part of municipal officials and others to fraudulently award sewer contracts is indictable under Penal Law, section 580. *People v. Connolly*, 253 N. Y. 330, 171 N. E. 393 (1930).

A combination to destroy plaintiff's business by threats and intimidation is a violation of a section enacted prior but similar to General Business Law, section 340. Acts valid when done singly may be unlawful when done in combination. *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. S. 373 (1902).

Where one ice company purchased the business and good will of over one hundred competing ice dealers, the latter agreeing not to engage in the business for a specified time in specified territory, such contracts, though not in themselves illegal, are in violation of Gen-

eral Business Law, sections 340 to 346, if made for the purpose of creating a monopoly or controlling prices. *People v. American Ice Co.*, 120 N. Y. S. 443 (1909) affd. mem. op. 125 N. Y. S. 1136 (1910). A conspiracy by a motion-picture theater corporation and its officers to ruin a competitor's business by inducing film producers to boycott the competitor and breach their contracts to furnish it films is prohibited by section 340 of the General Business Law. *Peekskill Theatre v. Advance Theatrical Co. of N. Y.*, 206 App. Div. 138, 200 N. Y. S. 726 (1923).

A regulation of the New York Stock Exchange limiting the sale of securities by members to persons who resold "packages" or units of securities to the public was held a violation of General Business Law, section 340 and Penal Law, section 580, its purpose being to restrain competition. *Pirnie Simons & Co. v. Whitney*, 144 Misc. 812, 259 N. Y. S. 193 (1932).

A contract between two corporations which dominated the automatic sorting and tabulating machine industry, which provided for settlement of patent disputes, cross-licensing, fixed prices for leasing machines, and stipulated that neither would solicit the other's customers, is a violation of General Business Law, section 340 and invalid. *Remington Rand, Inc., v. International Business Mach. Co.*, 167 Misc. 108, 3 N. Y. S. (2d) 515 (1937).

An association of merchant-middlemen in the smoked-fish industry who attempted to persuade retail stores to deal with them exclusively by threatening to picket and boycott is an unlawful combination within purview of General Business Law, section 340. The exemption of labor unions from that section applies only to bona fide employee organizations. *People v. Distributor's Division, S. F. W. U.*, 169 Misc. 255, 7 N. Y. S. (2d) 185 (1938).

A contract made by a producer who controlled the photographic market with a group of dealers whereby a price scale for its products was established and the dealers were prohibited from selling to anyone who violates the price scale is not a violation of General Business Law, section 340. *Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. S. 140 (1935), affd. per cur. 269 N. Y. 621, 200 N. E. 27 (1936).

An agreement by the owners of several theaters throughout the country to book only attractions that would play for them exclusively is not a criminal conspiracy within purview of Penal Code, section 580. *People v. Klaw*, 55 Misc. 72, 106 N. Y. S. 341 (1907).

A resolution of the New York Stock Exchange prohibiting members from transacting business with any member of a competing exchange is not a violation of General Business Law, section 340.

Heim v. New York Stock Exchange, 64 Misc. 529, 118 N. Y. S. 591 (1909), affd. 138 App. Div. 96, 122 N. Y. S. 872 (1910).

In an indictment for violation of General Business Law, sections 340 to 346, alleging that the accused controlled 75 percent of the poultry business in New York City, the prosecution must prove control of the market, since such a combination is not criminal unless the parties have sufficient power to control or dominate the particular business. *People v. Baff*, 99 Misc. 684, 166 N. Y. S. 136 (1917).

The American Society of Composers, Authors, and Publishers, which protects copyrights of composers and others by suing for unauthorized use is not a combination in restraint of trade. *174th St. & St. Nicholas Ave. Amusement Co. v. Maxwell*, 169 N. Y. S. 895 (1918).

Where plaintiff purchased knapsacks of defendant, who agreed not to sell them to any of plaintiff's competitors for 6 months, the contract was held reasonable and not in violation of General Business Law, section 340. *Levine Distributing Co. v. Rubinstein*, 159 Misc. 28, 285 N. Y. S. 1020 (1935).

Plaintiff, who was excluded from a dress retailers' organization affiliated with a manufacturers' organization for violation of a rule cannot enjoin expulsion; no boycott exists in violation of section 340 of the General Business Law, since the organization did not attempt to fix prices or control production. *Wolfenstein v. Fashion Originator's Guild*, 244 App. Div. 656, 280 N. Y. S. 361 (1935).

A corporation owning a bungalow colony which refuses to allow tradesmen other than those licensed by it to deal therein, except under onerous conditions, is not violating section 340 of the General Business Law or section 861 of the Penal Code, since the restraint is a reasonable one. *Dougherty v. Rockaway Operating Co.*, 163 Misc. 806, 298 N. Y. S. 242 (1937).

Refusal to Deal.

Where a publishers' association which controlled virtually all the morning newspapers in New York City refused to supply a news dealer with any papers, unless he agreed to deal with one of the papers of the association which he did not want, a conspiracy existed in violation of General Business Law section 340, Stock Corporation Law section 23, and Penal Law section 580. *Sultan v. Star Co.*, 106 Misc. 43, 174 N. Y. S. 52 (1919). See also *Finnegan v. Butler*, 112 Misc. 280, 182 N. Y. S. 671 (1920).

Where defendant, the distributor for several newspapers, refused to sell any papers to plaintiff news dealer, stating that he was too close to X, another dealer, and would jeopardize X's business, a prima facie case of conspiracy between defendant and X exists

within the terms of General Business Law, section 340. *Langley v. Furman*, 132 Misc. 726, 230 N. Y. S. 538 (1928).

The refusal by several publishers of newspapers to sell to plaintiff is not in itself unlawful. Anyone may refuse to deal with another; it is conspiracy in conjunction with others to prevent exercise of lawful business practices that is forbidden by Penal Law, section 580, and General Business Law, section 340. *Lucomsky v. Palmer*, 141 Misc. 278, 252 N. Y. S. 529 (1931). Cf. *Brown v. Metropolitan News Co.*, 149 Misc. 536, 267 N. Y. S. 623 (1933). See also *Lepler v. Palmer*, 150 Misc. 546, 270 N. Y. S. 440 (1934).

Resale Price Maintenance and Price Fixing.

An agreement by publishers controlling 90 percent of the book trade not to sell books to book sellers who did not maintain a fixed retail price was held invalid as applied to uncopyrighted books, being in restraint of trade and tending toward monopoly within the meaning of General Business Law, section 340, although such agreement was held valid as applied to copyrighted books. *Straus v. American Publishers' Ass'n*, 177 N. Y. 473, 69 N. E. 1107 (1904), 193 N. Y. 496, 86 N. E. 525 (1908), 199 N. Y. 548, 93 N. E. 1133 (1910). This was reversed on appeal, and the agreement held invalid under the Sherman Act as to both uncopyrighted and copyrighted books *Straus v. American Publishers' Ass'n*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192 (1913).

The licensor of a patented article cannot fix the resale price of such article; such an arrangement violates General Business Law, section 340. *Straight Side Basket Corp. v. Webster Basket Co.*, 4 F. Supp. 644 (1933).

A member of an association of retail petroleum dealers may not enjoin sale of products for less than posted prices, since such an arrangement violates section 340 of the General Business Law. *Cline v. Consumers' Co-op. Gas & Oil Co.*, 152 Misc. 653, 274 N. Y. S. 362 (1934). See also *Drake v. Siebold*, 81 Hun 178, 30 N. Y. S. 697 (1894).

These cases have been largely superseded by the New York Fair Trade Act. See *Exceptions to the General Antitrust Laws*, *infra*, Vol. *State Price Control Legislation*.

Building Trades.

An agreement by a stone masons' union to work only for members of a stone mason contractors' association, and not to work for any contractor owing money to any member of the association, in return for which the association granted the union a closed shop, was held an illegal monopoly and conspiracy to prevent another from exercising his lawful trade or calling within Penal Code, section 580, where the

union refused to work for a member of the association, who was expelled for nonpayment of dues. *Brescia Construction Co. v. Stone Masons' Contractors' Assn.*, 195 App. Div. 647, 187 N. Y. S. 77 (1921). This case was decided prior to L. 1933 Ex. Sess., c. 804, sec. 1, which amended General Business Law, section 340, subsection 2 by exempting bona fide labor unions from the Donnelly Antitrust Act.

An agreement between stone mason contractors to restrain competition and fix prices in supplying foundations for buildings is an unlawful combination within General Business Law, section 340. *People v. Amanna*, 203 App. Div. 548, 196 N. Y. S. 606 (1922).

Where an arrangement between a contractors' association and a plasterers' union in substance bound the union to supply labor only to those contractors approved by a joint committee, an unlawful monopoly and boycott existed, within the terms of section, 340 of the General Business Law. The exemption of labor unions from that statute extends only to bona fide labor activities. *Falciglia v. Gallagher*, 164 Misc. 838, 299 N. Y. S. 890 (1937).

A contract by a builders' association giving preference on certain work to a bricklayers' union and regulating the type of work, was held not to violate Penal Law, section 580. *National Fireproofing Co. v. Mason Builders Assn.*, 169 F. 259 (1909).

As to Municipal Licensing.

Plaintiff milk dealer had his license revoked by the New York City Board of Health because he had delivered milk free and made cash payments to dealers to procure their business, which the board claimed tended to precipitate trade wars, from which the sale of adulterated milk generally followed. Plaintiff's action for an order of mandamus, alleging that the license was revoked arbitrarily for the purpose of driving him out of business, was granted. "If the possibility of adulteration, as a result of free competition, brings about a departmental policy which practically eliminates competition, then the effect is to deprive the public of benefits which it has heretofore derived from the enforcement of section 340 of the General Business Law." *In re Morris*, 128 Misc. 280, 219 N. Y. S. 143 (1926).

A statute whereby plumbers are regulated and licensed does not create an unlawful monopoly and is constitutional, although applicable only to master plumbers, and two of the five members of the examining board are master plumbers. *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686 (1895).

As to Public Service Corporations.

The rule that public service corporations, particularly railroads, are not subject to the Antitrust Acts (enacted prior but similar to

Stock Corporation Law, sec. 23 and General Business Law, sec. 340) because corporations form a separate class specially regulated by legislation was established in New York by a series of cases: *Attorney General v. Consolidated Gas Co.*, 124 App. Div. 401, 108 N. Y. S. 823 (1908); *In re Attorney General*, 125 App. Div. 804, 110 N. Y. S. 186 (1908). See also *People v. Willcox*, 207 N. Y. 86, 100 N. E. 705 (1912), to the effect that public service companies are a distinct class. Accord: *Continental Securities Co. v. Interborough Rapid Transit Co.*, 203 F. 521 (1913), overruling 156 F. 389 (1907); *Id.*, 207 F. 467 (1913) to the effect that since the creation of the public service commission, a monopoly regulated by law and subject to visitation is preferred for public utilities in New York to unrestricted competition.

Earlier New York cases, although not applying the rule, have held combinations of utilities to be valid. Thus exclusive allocation of tributary territory by parallel railroads was permitted in *Ives v. Smith*, 3 N. Y. S. 645 (1888), *affd. per cur.* 55 Hun 606, 8 N. Y. S. 46 (1889); an interchange of traffic between two street railways in *Brooklyn El. R. Co. v. Brooklyn, B. & W. E. R. Co.*, 23 App. Div. 29, 48 N. Y. S. 665 (1897), *affd. mem. op.* 48 N. Y. S. 1101 (1897); *cf. Alexandria Bay Steamboat Co. v. New York Cent. & H. R. R. Co.*, 18 App. Div. 527, 45 N. Y. S. 1091 (1897); purchase of the stock of one gas company by another, *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. 618, 56 N. Y. S. 288 (1899); grant of territory and facilities exclusively by one telephone company to another, *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. S. 511 (1907), *affd. per cur.* 106 N. Y. S. 1149, 108 N. Y. S. 1150 (1908); joint arrangement by non-competing telephone companies, including an agreement not to compete, *Wayne-Monroe Tel. Co. v. Ontario Tel. Co.*, 60 Misc. 435, 112 N. Y. S. 424 (1908); and permitting a joint purchasing agency to be set up by the members of the New York Central group to purchase railroad equipment, *Venner v. New York Central & H. R. R. Co.*, 160 App. Div. 127, 145 N. Y. S. 725 (1914), *affd.* 217 N. Y. 615, 617, 111 N. E. 487 (1916); consolidation of the New York Central System, *Venner v. New York Central & H. R. R. Co.*, 177 App. Div. 296, 164 N. Y. S. 626 (1917), *affd. per cur.* 226 N. Y. 583, 123 N. E. 893 (1919), *pet. for cert. den.* 294 U. S. 617, 39 Sup. Ct. 391, 63 L. Ed. 803 (1919). *Cf. Delavan v. New York, N. H. & H. R. Co.*, 154 App. Div. 8, 139 N. Y. S. 17 (1912), *affd. mem. op.* 157 App. Div. 916, 142 N. Y. S. 1115 (1913), case dismissed as moot 216 N. Y. 359, 110 N. E. 763 (1915). See also *Benedict v. Western U. Tel. Co.*, 9 Abbott's New Cases 214 (1878), permitting a pooling arrangement between competing telegraph companies. *Cameron v. New York & M. V. Water Co.*,

62 Hun. 269, 16 N. Y. S. 757 (1891), aff'd. 133 N. Y. 336, 31 N. E. 104 (1892), permitting the consolidation of two water companies to supply a municipality.

As to Patented Articles.

The owner of a patent may grant the exclusive right to its use to an association of manufacturers. Such contract is not illegal as in restraint of trade since the owner of a patent may grant or withhold it as he sees fit. *Good v. Tucker & Carter Cordage Co.*, 121 N. Y. 1, 24 N. E. 15 (1890). See *Tying contracts and Exclusive Dealing Arrangements, infra*. But the grant of a patent as part of an unlawful combination is invalid. *Strait v. National Harrow Co.*, 18 N. Y. S. 224 (1891).

The fact that patents are involved does not remove an agreement from the scope of the antitrust laws. The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. *Remington Rand, Inc., v. International Business Mach. Co.*, 167 Misc. 108, 3 N. Y. S. (2d) 515 (1937). See also *Landauer v. Bard-Parker Co.*, 125 Misc. 461, 210 N. Y. S. 635 (1935); *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12 (1889); *Diamond Expansion Bolt Co.*, 177 App. Div. 554, 164 N. Y. S. 433 (1917).

Actions on Illegal Contracts.

Contracts illegal under the antitrust laws will not be enforced, and money owed under the terms of such a contract cannot be recovered. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 (1876); *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790 (1893); *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292, 59 N. E. 906 (1901); *Cummings v. Union Bluestone Co.*, 164 N. Y. 401, 58 N. E. 525 (1900); *U. S. Electric Mfg. Corp. v. Bright Star Battery Co.*, 6 N. Y. S. (2d) 690 (1938). An agent who participated in an unlawful conspiracy along with his principal may not be compelled to account for money unlawfully withheld from his principal. *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707 (1889). A purchaser of trust certificates issued by an illegal trust cannot procure an accounting and distribution of the profits by the trustees. *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59 (1895).

As an aftermath of *People v. North River Sugar Refining Co.*, 54 Hun 354, 7 N. Y. S. 406 (1889), aff'd. 121 N. Y. 582, 24 N. E. 834 (1890), some of the trust certificate holders brought action for an accounting against the trustees of the trust which had been declared unlawful. Relief was granted on the basis that since the trust agreement was void, the trustees held the property under an implied trust for the certificate holders. *Cameron v. Havemeyer*, 12 N. Y. S. 126 (1890). See also *Havemeyer v. Brooklyn Sugar Refining Co.*, 13 N. Y. S. 873 (1890).

However, the receiver of one of the constituent corporations was not permitted to recover from the trust his corporation's share of the profits, since recovery would entail enforcing of an unlawful contract. *Gray v. Oxnard Bros. Co.*, 59 Hun 387, 13 N. Y. S. 86 (1891).

Actions Collateral to Illegal Contracts.

As between the receiver of an illegal trust, and a constituent corporation, the former is entitled to money due to the latter under a contract with the latter by a third person, which contract had been assigned to the trust. *Pittsburg Carbon Co. v. McMillan*, 119 N. Y. 46, 23 N. E. 530 (1890).

Where the president of one corporation who was also an officer of a second corporation arranged a lease of property by the former to the latter, it is no defense to an action for rent to allege that the lease was part of a scheme to create a monopoly, where there is no proof of knowledge of such scheme on the part of the lessor corporation other than the knowledge of its president, since the knowledge of its agent will not be imputed to the lessor corporation. *Brooklyn Distilling Co. v. Standard Distilling Co.*, 120 App. Div. 237, 105 N. Y. S. 264 (1907), *affd.* 193 N. Y. 551, 86 N. E. 564 (1908).

Where defendant subscribes to the stock of a corporation organized for a lawful purpose, the fact that such corporation thereafter engages in an unlawful monopoly in restraint of trade is no defense in an action by the corporation to recover the unpaid subscription. *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729 (1894); *Id. v. Spamer*, 143 N. Y. 676, 38 N. E. 731 (1894); *Id. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403 (1895).

Where plaintiff furnished materials for defendant's building pursuant to a contract awarded as part of a conspiracy unlawful under section 340 of the General Business Law, plaintiff can recover on the common count for value of the goods, even though he cannot recover on the contract. *Milton Schnaier Contracting Corp. v. International Tailoring Co.*, 205 App. Div. 527, 199 N. Y. S. 502 (1923).

Retroactivity.

The remedy provided by sections 340 to 342 of the General Business Law is applicable to combinations entered into before its enactment. *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

Enjoining Prosecution of Indictment.

Plaintiffs had been indicted for violation of General Business Law, sections 340 to 341. Thereafter they brought an action in equity to enjoin the district attorney from prosecuting them, alleging that the statute was unconstitutional, and that they had no adequate remedy at law. A demurrer was sustained *per curiam* on the ground that

on the facts stated in the complaint equity would not enjoin the prosecution; the constitutional questions were not considered. *Buffalo Gravel Corp. v. Moore*, 234 N. Y. 542, 138 N. E. 439 (1922).

Measure of Damages—Persons Liable.

An ice corporation entered into an illegal contract whereby it sold all of its production to a second corporation under terms restraining competition and creating a monopoly as prohibited by General Business Law, section 340. A stockholder of the first corporation may recover for damages sustained from its directors where they knowingly violated their duty by so contracting, even though no recovery could be had on the contract itself. Damages recoverable are the loss of profit to the corporation (per share of stock owned) during the period of the illegal contract, and a factor to be considered in determining the loss is the effect of a price war prior to the contract, which might have continued but for the contract. *Di Tomasso v. Loverro*, 250 App. Div. 206, 293 N. Y. S. 912 (1937), *aff'd*, 276 N. Y. 551, 12 N. E. (2d) 570 (1938), *rearg.* and motion denied, 276 N. Y. 610, 12 N. E. (2d) 601 (1938), motion denied, 276 N. Y. 681, 13 N. E. (2d) 59 (1938).

As to Federal Statutes.

The Federal statutes forbidding unlawful combinations in restraint of trade apply only to interstate or foreign commerce and their violation can only be adjudicated in the Federal courts, which alone have jurisdiction. The common law and State statutes determine the illegality of such combinations when attacked in the State courts. *Locker v. American Tobacco Co.*, 121 App. Div. 443, 106 N. Y. S. 115 (1907), *aff'd* 195 N. Y. 565, 88 N. E. 289 (1909).

Pleading.

In an action on a contract valid on its face, the defense that it is in reality part of an illegal conspiracy must be specifically pleaded, and cannot first be raised by an amendment at the trial, since that would set up a new defense. *Drake v. Siebold*, 81 Hun 178, 30 N. Y. S. 697 (1894).

Examination of Witnesses and Evidence.

As to the right of the attorney general to examine witnesses prior to bringing an action under sections 340 to 346 of the General Business Law see *In re Attorney General*, 21 Misc. 101, 47 N. Y. S. 20 (1897), 22 App. Div. 285, 47 N. Y. S. 883 (1897), *mem. op.* 49 N. Y. S. 1132 (1898), *aff'd*, 155 N. Y. 441, 50 N. E. 57 (1898), *app. dismissed mem. op.* 50 N. E. 1115 (1898). See also *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

In an action under General Business Law, sections 340 to 346, the prosecution may examine only those books and records of the accused

corporation which might tend to show a monopolistic purpose or intent. *People v. American Ice Co.*, 120 App. Div. 234, 104 N. Y. S. 858 (1907). Cf. *In re Ottinger*, 216 App. Div. 271, 214 N. Y. S. 613 (1926).

In a prosecution for violation of sections 340 and 341 of the General Business Law, alleging a contract or combination to restrict trade or competition in the supply or price of a commodity, the evidence must prove that the parties have sufficient power to control or dominate the particular business. *People v. Baff*, 99 Misc. 684, 166 N. Y. S. 136 (1917).

Necessary Allegations.

In a prosecution of an unlawful contract violating a section enacted prior but similar to Penal Code, section 580, it is sufficient to allege the parts of the contract which are illegal. It is not essential to set forth all of the provisions of such contract. *People v. American Ice Co.*, 135 App. Div. 180, 120 N. Y. S. 41 (1909).

An indictment for violation of General Business Law, section 340, alleging that defendants and 41 other persons controlled 75 percent of the poultry business in New York, and that defendants formed a corporation for the purpose of fixing the price of all poultry bought by themselves and the 41 others, is insufficient in absence of allegations that defendants could influence the others to accept or that the combination was in fact carried out. It is necessary to allege that the defendants entered into a contract by which a monopoly was created, or competition restrained, or that they entered into a contract whereby those results might be attained. *People v. Baff*, 98 Misc. 547, 164 N. Y. S. 709 (1917).

As to motions to make more definite and certain, or to strike part of pleadings as irrelevant and redundant, in a private action under sections 340 to 346 of the General Business Law see *Gerseta Corp. v. Silk Assn. of America*, 220 App. Div. 302, 222 N. Y. S. 7 (1927).

Scope of Injunction.

In a prosecution for violation of a section enacted prior to but similar to Penal Law section 580, the court held that it is the duty of the trial court to decide whether the injunction should be confined to further violations of the statute and executory contracts or whether the accused corporation's charter should be revoked. *People v. American Ice Co.*, 135 App. Div. 180, 120 N. Y. S. 41 (1909).

Who May Sue.

The minority stockholders of a railroad corporation cannot in their individual capacity restrain the transfer of its stock by the railroad holding the majority control to a competing railroad, since they

suffer no direct injury. *Delavan v. New York, N. H. & H. R. Co.*, 154 App. Div. 8, 139 N. Y. S. 17 (1912), *affd. mem. op.* 157 App. Div. 916, 142 N. Y. S. 1115 (1913), case dismissed as moot 216 N. Y. 359, 110 N. E. 763 (1915).

A private individual cannot sue to restrain the enforcement of an agreement which violates Penal Law, section 580 and General Business Law, section 340, in absence of proof that it was aimed at or affected him injuriously, as distinguished from the general public; such suit can only be maintained at the instance of the state. *Paine Lumber Co. v. Neal*, 212 F. 259 (1913), *affd.* 214 F. 82 (1914), 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256 (1916). See also *Gill Engraving Co. v. Doerr*, 214 F. 111 (1914); *Irving v. Neal*, 209 F. 471 (1913).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Unconsolidated Laws (McKinney)

Resale Price Maintenance

Sections 2201 as amended (Supp. 1939) and sections 2202 to 2205 validate contracts fixing the resale price of branded commodities. The statutes are expressly inapplicable to contracts between producers, between wholesalers, or between retailers as to sale or resale prices. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperative Corporations Law (McKinney Supp. 1939)

Cooperatives

Section 128 provides that no agricultural cooperative marketing association organized under sections 105 to 130 shall be deemed a conspiracy or combination in restraint of trade, illegal monopoly, or attempt to lessen competition or fix prices. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Penal Law (McKinney)

Section 582, a part of the act defining and punishing conspiracies, sections 580 to 584, provides that associations of farmers, gardeners, or dairymen, including livestock farmers and fruit growers, engaged in collective marketing for their members of agricultural or dairy products produced by them, are not conspiracies, nor are such marketing contracts or agreements to be deemed injurious to trade or commerce. See vol. *Cooperatives* in projected study.

General Business Law (McKinney Supp. 1939)

Section 340 provides that the provisions of the general antitrust act shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including livestock, farmers, and fruit growers. See *General Antitrust Laws, supra*.

**Agriculture and Markets Law (McKinney)
Milk Producers' and Distributors' Bargaining Agencies**

Sections 258k to 258n, as amended Supp. 1939, authorize and provide for the organization of milk producers' bargaining agencies and milk distributors' bargaining agencies, and the making of marketing agreements concerning the amount of milk which may be handled and the prices to be paid by the distributors to the producers. Section 258l expressly provides that the activities of such agencies, and the agreements or arrangements made thereby, shall not be deemed conspiracies, combinations, contracts, or agreements in restraint of trade. However, this section also provides that the Commissioner of Agriculture may issue a cease-and-desist order after proper notice and hearing, if he finds that such marketing agreements result in a monopoly or restraint of trade to such an extent that the price of milk is unduly enhanced thereby. See *Special Antitrust Laws: Special Industry Antitrust Acts, infra*. See also Vol. *State Price Control Legislation: Administrative Price Control*.

Milk Control

Sections 252 to 258j, as amended Supp. 1939, concerned with the licensing and regulation of milk dealers, expressly provide that a cooperative association of dairymen organized under the cooperative association law and engaged in making collective sales for its members, shall not be deemed a conspiracy or combination in restraint of trade or an illegal monopoly. However, section 258c provides that the Commissioner of Agriculture shall have the power to revoke or suspend, or to refuse to grant or renew, the license of any milk dealer who has been a party to a combination to fix prices contrary to law. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also Vol. *Cooperatives* in projected study.

**General Business Law (McKinney Supp. 1939)
Labor Unions**

Section 340 provides that the provisions of the general antitrust act shall not apply to bona fide labor unions; that the labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and that nothing contained

in that Act shall be deemed to prohibit or restrict the right of workmen to combine in unions, organizations, and associations, not organized for the purposes of profit. See *General Antitrust Laws, supra*.

Penal Code (McKinney)

Section 582 provides that cooperation of persons to obtain an increase in wages or to maintain wages is not a conspiracy.

Judicial Decisions

Cooperatives.

The exemption of cooperatives from the application of the State antitrust laws, under section 340 of the General Business Law, Penal Code, section 582, and Agriculture and Markets Law, section 258c (f), is constitutional. The exemption is based upon a reasonable classification and does not violate the fourteenth amendment of the Federal Constitution. *Barns v. Dairymen's League, Co-op. Assn.*, 220 App. Div. 624, 222 N. Y. S. 294 (1927); *Dairymen's League Co-op. Assn. v. Weckerle*, 160 Misc. 866, 291 N. Y. S. 704 (1936). See also *Royce v. Rosasco*, 159 Misc. 236, 287 N. Y. S. 692 (1936), upholding the price-fixing features of the Milk Control Act (Agriculture and Markets Law, c. 12, 1934) without discussing alleged violation of the antitrust laws.

Fair Trade.

"The Fair Trade Act (Unconsol. (McKinney) secs. 2201 to 2205) entitles a retailer to seek redress under a vertical price-fixing arrangement, and is not in conflict with the provisions of the Donnelly Act (General Business Law, secs. 340 to 346), which bans horizontal price fixing. The legislature has seen fit by the later enactment to declare vertical price arrangements of a specified character to be valid, therefore, such arrangements must be construed to be without the language of the earlier Donnelly Act." *Port Chester Wine & Liquor Shop v. Miller Bros.*, 253 App. Div. 188, 1 N. Y. S. (2d) 802, 808 (1938), *affd.* 281 N. Y. 101, 22 N. E. (2d) 253 (1939).

Organized Labor.

A "closed shop" contract by a bona fide labor union is exempt from the application of section 340 of the General Business Law. *Williams v. Quill*, 277 N. Y. 1, 12 N. E. (2d) 547 (1938).

This exemption applies only to bona fide labor activities, not to those intended to advance monopolistic aims of employer groups.

Falciglia v. Gallagher, 164 Misc. 838, 299 N. Y. S. 890 (1937). It applies only to bona fide employee groups, not to employer groups masquerading as employees. *People v. Distributor's Division, S. F. W. U.*, 169 Misc. 255, 7 N. Y. S. (2d) 185 (1938).

It has been stated that a strike for purposes other than to maintain or better wages is not within the exemption of Penal Code, section 582. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. S. 279 (1916). However, an agreement between a union of jobbers and the manufacturers of ladies coats, limiting amount of work in outside shops and fixing wages and working conditions does not violate General Business Law, section 340, nor Penal Law, sections 580 and 582, from which labor unions are specifically exempted. *Maisel v. Sigman*, 123 Misc. 714, 205 N. Y. S. 807 (1924). See also *American Cloak & Suit Mfrs'. Assn. v. Brooklyn Ladies' Garment Mfrs'. Assn.*, 143 Misc. 319, 255 N. Y. S. 614 (1931); *Farulla v. Ralph A. Freundlich, Inc.*, 152 Misc. 761, 274 N. Y. S. 70 (1934).

An agreement by a union controlling 98 percent of the fur workers in New York City to furnish labor only to members of a manufacturers' trade association is exempt from General Business Law, section 340. *American Fur Mfrs'. Assn. v. Associated Fur C. & T. Mfrs.*, 161 Misc. 246, 291 N. Y. S. 610 (1936), aff'd mem. op. 251 App. Div. 708, 296 N. Y. S. 1,000 (1937). See also *People v. Herson*, 255 App. Div. 645, 8 N. Y. S. (2d) 887 (1939).

The burden of proving that portions of a collective bargaining agreement were not a bona fide labor contract but a subterfuge to evade the provisions of General Business Law, section 340, is upon the plaintiff. *Sainer v. Affiliated Dress Manufacturers*, 168 Misc. 319, 5 N. Y. S. (2d) 855 (1938).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

General Business Law (McKinney) Transportation

Sections 350 and 351 provide that any foreign corporation or any partnership, association, or person whatsoever, engaged in the transportation business in this state shall be guilty of a misdemeanor if it creates, enters into or becomes a member of, or a party to any pool, trust, agreement, combination, or understanding with any other corporation, partnership, or person, to control the volume of transportation between this country and Europe, or to control, limit, regu-

late, or fix the rates thereof, or who shall refuse to sell to any person, on demand transportation between the United States and Europe, either eastbound or westbound. Any contract in violation hereof shall be void. Any foreign corporation violating any of these provisions shall forfeit its right to do business in the state.

Agriculture and Markets Law (McKinney): Milk

Sections 252 to 258j, as amended Supp. 1939, providing for the licensing of milk dealers, give the Commissioner of Agriculture the power to refuse to grant or renew, or revoke or suspend, the license of any milk dealer who has been a party to a combination to fix prices.

Sections 258k to 258n, as amended Supp. 1939, authorize the organization of milk producers' bargaining agencies and milk distributors' bargaining agencies, and the making of marketing agreements concerning the amount of milk which may be handled and the prices to be paid by the distributors to the producers. Section 258m expressly provides that if the Commissioner of Agriculture has reason to believe that any such marketing agreement results in a monopoly or restraint of trade to such an extent that the price of milk is unduly enhanced thereby, he shall serve a complaint upon the parties to such an agreement, grant a hearing, and if he finds that the agreement has such results, shall issue a cease-and-desist order. If such order is not obeyed, the commissioner shall file the order and proceedings with the attorney general who may apply to the supreme court for action. However, the law also provides that the activities of such agencies, and the agreements and arrangements made by them as authorized hereby, shall not be deemed conspiracies, combinations, contracts, or agreements in restraint of trade or commerce or an illegal monopoly. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *State Price Control Legislation: Administrative Price Control*.

Alcoholic Beverages Control Law (McKinney Supp. 1939)

Section 101 provides that it shall be unlawful for a manufacturer or wholesaler (a) to be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to such sale at retail by stock ownership, interlocking directors, mortgage or lien on any personal or real property, or by any other means; or (b) to make, or cause to be made any loan to any person engaged in the manufacture or sale of any alcoholic beverage at wholesale or retail. Any lien, mortgage, or other interest or estate, now held by a manufacturer or wholesaler on the real property of any licensee, acquired on or before December 31, 1932, shall not be included within the provisions of this section.

Section 105 (16) provides that no retail licensee for off-premises consumption shall be interested, directly or indirectly, in any premises, other than those for which he is licensed, where liquors, wines, or beer are manufactured or sold at wholesale or retail, or in any business devoted wholly or partially to the sale of such beverages at wholesale or retail, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. Any lien, mortgage, or other interest or estate now held by such retailer on or in the personal or real property of such premises, acquired on or before December 31, 1932, shall not be included within the provisions of this subdivision. Section 106 (13) makes similar provisions concerning retail licensees for on-premises consumption.

Section 105 (17) provides that no retail licensee for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines, or beer at wholesale or retail. Section 106 (14) makes similar provisions concerning retail licensees for on-premises consumption.

Section 118, as amended by L. 1938, c. 329, provides that any license or permit issued pursuant to this chapter may be revoked, cancelled, or suspended for cause, and must be revoked if, within a period of 2 years, there shall have been two convictions for any violation of this chapter by a licensee or permittee or any of their clerks, agents, employees, or servants on such licensed premises. Violation of the provisions of section 101 of this chapter shall cause a forfeiture of the license or permit of all parties participating or concerned in the violation. Section 130 (3) provides that any violation by any person of any provision of this chapter for which no punishment or penalty is otherwise provided shall be a misdemeanor. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

2. Public Contract Provisions

Highway Law (McKinney)

Section 39 provides that no patented article or material or any other material or article shall be specified, contracted for, or purchased in the construction of state highways, except under circumstances that there can be fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the superintendent of public works. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Public Contract Provisions.

An arrangement whereby one bidder on a public contract pays another a consideration in exchange for the latter withdrawing or altering his bid is illegal. The State may recover the damages sustained thereby, and no recovery will be permitted between the parties to such an unlawful contract. *Sharp v. Wright & McDonald*, 35 Barb. 236 (1862); *People v. Lord & Leahey*, 6 Hun. 390 (1876), affd. 71 N. Y. 527 (1878); *Baird v. Sheehan*, 38 App. Div. 7, 56 N. Y. S. 228 (1899), affd. per cur. 166 N. Y. 631, 60 N. E. 1107 (1901); *Woodworth v. Bennett*, 43 N. Y. 273 (1870); *People v. Connolly*, 253 N. Y. 330, 171 N. E. 393 (1930).

Agreements between two or more bidders to share profits or work is illegal, if made for the purpose of preventing competition and affecting the price by removing bidders. *Atcheson v. Mallon*, 43 N. Y. 147 (1870); *Kelly v. Devlin*, 58 How. Pr. 487 (1879), aff'd. 15 Jones & S. 555 (1881).

However, agreements to share work, profits, or losses are valid where they do not unreasonably infringe the competition for the award involved. *Briggs v. Tillotson*, 8 Johns 304 (1811); *Dutch v. Harrison*, 5 Jones & S. 306 (1874) (where one bidder subcontracted before entering bid); *Kohart v. Skou*, 163 App. Div. 899, 147 N. Y. S. 509 (1914). In *Marsh v. Russell*, 66 N. Y. 288 (1876) an agreement by four persons to share the profits and losses of contracts with municipalities to furnish recruits for the civil war, each agreeing to make no contract for less than \$500 per man, was held valid and enforceable. A lawful business can be carried on by a firm as well as by individuals, and members of a firm can regulate the price at which they will deal. The real question is whether such agreement is made for the purpose of preventing fair competition and affecting the price by removing bidders.

A contract by an asphalt company to sell exclusively to one person in New York City for the purpose of paving streets is valid in the absence of a combination to stifle bids. *Stemmerman v. Kelly*, 150 App. Div. 753, 135 N. Y. S. 827 (1912).

Where the specifications for asphalt for a public highway contract are so framed that only one company can qualify therefor, the manufacturer of asphalt of equal quality may enjoin the letting of the contract on the ground that it cannot be let under competition as required by Laws 1913, chapter 80, sections 14 and 25. *Warner-Quinlan Asphalt Co. v. Carlisle*, 158 App. Div. 638, 144 N. Y. S. 70 (1913).

The choice of a patented street pavement was not unlawful when authorized by the city charter, where patentees offered to sell at a stipulated price to the successful bidder, although patentees were unsuccessful in bidding on the same contract. *Adams v. Van Zandt*, 199 N. Y. S. 225 (1923).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

Contracts not to compete ancillary to the transfer of an interest in a business are valid when reasonable in reference to the interest protected. The reasonableness of the time and space limits of such contracts vary with the circumstances. The test has been said to be whether the restraint is such only as to afford a fair protection to the interests of the party in favor of which it is given, and not so large as to interfere with the interests of the public.

Covenants held to be valid and enforceable: *Nobles v. Bates*, 7 Cowan 307 (1827) (partner selling his interest in harness business agreed not to compete within 20 miles); *Chappel v. Brockway*, 21 Wend. 157 (1839) (covenant not to engage in packet business at any time thereafter between Rochester and Buffalo); *Noah v. Webb*, 1 Edw. Ch. 604 (1833) (not to engage in the newspaper business for 8 years in certain cities); *Jarvis & Lobdell v. Peck*, 1 Huff. Ch. 479 (1840), aff'd 10 Paige 118 (1843) (in dissolution of partnership, agreement by one partner not to disclose trade secrets); *Dunlop v. Gregory*, 10 N. Y. 241 (1851) (covenant not to run a steamboat above a point on the Hudson); *Alcock v. Giberton & Binsse*, 12 N. Y. Sup. Ct. (5 Duer) 76 (1855) (not to use secret mode of conducting business, nor to teach secret process to others, nor to manufacture certain porcelain teeth); *Shearman v. Hart*, 14 Abb. Pr. 358 (1862) (partners agreed that in the event of dissolution neither should continue lithographic business in the building used by firm, or at any place within one block, for 6 months, without the consent of the other); *Muller v. Vettel*, 25 How. Pr. 350 (1862) (oral agreement not to engage in butcher business for 10 years within six blocks of business sold); *Ewing v. Johnson*, 34 How. Pr. 202 (1864) (not to "interfere, hinder, or obstruct" tobacco business and trade routes in two cities and several villages wherein business sold was carried on); *Hard v. Seeley*, 47 Barb. 428 (1865) (not to engage in vending or manufac-

ture of a certain medicine, nor to impart the art of making such medicine to others); *Dethlefs v. Tamsen*, 7 Daly 354 (1878) (partnership articles provided that on retirement from store business retiring partner would not engage in competitive business); *Sander v. Hoffman*, 64 N. Y. 248 (1876) (not to engage in grocery business within a portion of New York City for 5 years); *MacKinnon Pen Co. v. Fountain Ink Co.*, 16 Jones & S. 442, appeal dismissed 93 N. Y. 658 (1882) (not to engage in pen manufacturing business as long as certain articles of trust were fulfilled by vendee); *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887) (not to engage in match business in the United States, except Nevada and Montana, for 99 years); *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469 (1891) (not to engage in cheese business in competition with vendee); *Watertown Thermometer Co. v. Pool*, 51 Hun 157, 4 N. Y. S. 861 (1889) (not to manufacture thermometers or storm glasses in the United States for 10 years); *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. S. 339 (1897) (not to engage in provision business within 450 miles of New York County for 10 years); *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. S. 573 (1898) (not to solicit freighting business east of the Mississippi); *Ru Ton v. Everitt*, 35 App. Div. 412, 54 N. Y. S. 896 (1898) (not to enter produce commission business for 10 years); see also *A. Booth & Co. v. Seibold*, 37 Misc. 101, 74 N. Y. S. 776 (1902); *American Ice Co. v. Mechel*, 109 App. Div. 93, 95 N. Y. S. 1060 (1905) (copartners covenant not to engage in ice business in city for 10 years); *Salaman v. Siegelman*, 102 App. Div. 406, 92 N. Y. S. 844 (1905) (covenant of partner not to engage in similar business in State); *Sanford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. S. 270 (1906) (covenant not to compete on dissolution of partnership held so indefinite as to be enforceable only in part); *Standard Slide Corporation v. Appel et al.*, 190 App. Div. 799, 180 N. Y. S. 431 (1920) (partner not to engage in mica slide manufacturing business for 5 years in the United States (except New Mexico), enforceable whether partner engaged in business as principal or employee); *Broadbrooks v. Tolles*, 114 App. Div. 646, 99 N. Y. S. 996 (1906) (not to engage in lumber, cement, sewer pipe, and wall plaster business within 25 miles of a city for 25 years); *Metropolitan Opera Co. v. Hammerstein*, 221 N. Y. 507, 116 N. E. 1061 (1917) (not to engage in opera in New York, Chicago, Boston, and Philadelphia for 10 years); *Comerma Co. v. Comerma*, 182 App. Div. 576, 169 N. Y. S. 884 (1918), affd. mem. op., Id. 225 N. Y. 676, 122 N. E. 878 (1919) (covenant not to bid in on tile structures for

30 years in the United States, except six Western States, Canada, and Mexico); *Hackenheimer v. Kurtzmann*, 235 N. Y. 57, 138 N. E. 735 (1923) (not to compete in piano business for 10 years); *Lappono v. Marmone*, 204 App. Div. 496, 198 N. Y. S. 433 (1923); *Jochum Bros. v. Ridgewood Pie Baking Co.*, 210 App. Div. 428, 206 N. Y. S. 252 (1924); *Bernfeld v. Freedenberg*, 125 Misc. 645, 211 N. Y. S. 692 (1925); *McCarty v. Constable*, 221 App. Div. 307, 223 N. Y. S. 484 (1927) (covenant "not to engage in the electrical business in the village of Sidney" construed as preventing engaging in such business in the village at any time thereafter, but vendor was not restrained from selling to the residents of Sidney at his new store in another village, who came there unsolicited); *Gru Corporation v. Right-in-Garage, Inc.*, 137 Misc. 139, 244 N. Y. S. 484 (1930) (not to reopen garage within 10 blocks for 5 years); *Shangold v. Berson*, 125 Misc. 646, 211 N. Y. S. 695 (1925) (covenant by partner not to compete in shoe business not violated by partner opening store outside of area restricted and using mailing list of customers of old firm).

Covenants held to be invalid and unenforceable: *Ross v. Sadgbeer*, 21 Wend. 166 (1839) (not to engage in the occupation or business of manufacturing that required the consumption of ashes, for 10 years, within 40 miles of a certain village); *Lawrence et al. v. Kidder et al.*, 10 Barb. 641 (1851) (not to engage in manufacture of palm leaf beds for 5 years in the State of New York west of Albany and in Columbus, Ohio); *Stephens v. Aulis*, 3 Thomp. & Co. 781 (1874) (oral covenant not to engage in business of making iron castings at a certain village or within 10 miles); *U. S. Cordage Co. v. William Walls' Son's Rope Co.*, 90 Hun 429, 35 N. Y. S. 978 (1895) (nominal partners are not bound by covenant of general partner not to compete in firm's cordage business); *People v. American Ice Co.*, 120 N. Y. S. 443 (1909) aff'd mem. op. 125 N. Y. S. 1136 (1910) (contract whereby vendor agreed not to compete in ice business in a definite area for a fixed term was found to be part of a scheme on the part of the purchaser to create a monopoly and control prices); *Mahler v. Mahler*, 160 App. Div. 548, 145 N. Y. S. 764 (1914) (vendor of candy importing business agreed not to compete in such business, no time or space limitation).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

Covenants ancillary to the sale of a professional practice are valid and enforceable if reasonably restrictive as to time and place. *J. W. Smith v. A. Smith*, 4 Wend. 468 (1830) (not to compete in medical

practice within 6 miles of a certain town); *Mott v. Mott*, 11 Barb. 127 (1851) (not to engage in medical practice in a certain town and village for 5 years); *Holbrook v. Waters*, 9 How. Pr. 335 (1854) (not to engage in practice of medicine in certain county after a given date); *Greenfield v. Gilman*, 140 N. Y. 168, 35 N. E. 435 (1893) (not to engage in practice of medicine for 5 years in two towns); *Niles v. Fenn*, 12 Misc. 470, 33 N. Y. S. 857 (1895) (not to engage for 4 years in dental practice within a portion of a city); *Amedon v. Gannon*, 6 Hun 384 (1876) (a covenant not to "locate to practice" within same town for 10 years, was not violated by covenantor where he practiced in restricted area but did not "locate" there).

Restrictive Covenants Ancillary to Employment.

Contracts not to compete with an employer after termination of a contract of employment are valid if reasonable. *Schwarz v. Regensburg & Sons*, 223 N. Y. 521, 119 N. E. (2d) 51 (1936). A contract not to compete during a term of employment is likewise valid. *McCall Co. v. Wright*, 198 N. Y. 143, 91 N. E. 516 (1910). See also *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461 (1894).

The reasonableness of the restriction is determined by considering all the circumstances, including the nature of the information gained through employment, the character of the business, its technique, and the type of services rendered by the employee. The restrictions were held reasonable in the following cases: *Daly v. Smith* (6 Jones & S.) 158 (1875) (not to render professional services as an actress to any other theater in New York during period of contract); *Davies v. Racer*, 72 Hun 43, 25 N. Y. S. 293 (1893) (not to engage in custom house broker's business for 1 year within 50 miles of New York City); *National Wall Paper Co. v. Hobbs*, 90 Hun 288, 35 N. Y. S. 932, (1895) (not to engage in wallpaper business in any State or Territory of the United States except State of Washington); *A. L. & J. J. Reynolds Co. v. Dreyer*, 12 Misc. 368, 33 N. Y. S. 649 (1895) (not to compete as wholesale groceries route salesman for 6 months within radius of 10 miles of New York City; see also *Hackett v. A. L. & J. J. Reynolds Co.*, 30 Misc. 733, 62 N. Y. S. 1076 (1900); *Magnolia Metal Co. v. Price*, 65 App. Div. 276, 72 N. Y. S. 792 (1901) (not to compete in antifriction metal business for 5 years); *Mutual Milk & Cream Co. v. Prigge*, 112 App. Div. 652, 98 N. Y. S. 458 (1906) (an employee, a minor, covenanted not to compete as milk driver or salesman for 3 years); *Mutual Milk Co. v. Heldt*, 120 App. Div. 795, 105 N. Y. S. 661 (1907) (not to engage in employment as milk driver or salesman for 36 months); *Tolman v. Mulcahy*,

119 App. Div. 42, 103 N. Y. S. 936 (1907) (not to reveal trade secrets); see also *Kaunagraph Co. v. Stampagraph Co.*, 197 App. Div. 66, 188 N. Y. S. 678 (1921) aff'd. 235 N. Y. 1, 138 N. E. 485 (1923) (enjoining employee from disclosing trade secrets); *Witkop & Holmes Co. v. Boyce*, 61 Misc. 126, 112 N. Y. S. 874 (1908) (salesman and deliveryman for grocer enjoined from engaging in employ of competitor where customer list was transferred); *Stover v. Gamewell Fire Alarm Telegraph Co.*, 164 App. Div. 155, 149 N. Y. S. 650 (1914) (not to engage in competing telegraph signal manufacturing business for 10 years); cf., *Sutherland v. Connecticut Mutual Life Ins. Co.*, 87 Misc. 383, 149 N. Y. S. 1008 (1914) (forfeit of prospective fees, if life insurance agent ever engages in business for another); *New York Wet Wash Laundry Co. v. Unger*, 170, App. Div. 761, 156 N. Y. S. 598 (1915) (not to engage in laundry business in Manhattan for 1 year); *Eastern New York Wet Wash Laundry Co. v. Abrahams*, 173 App. Div. 788, 160 N. Y. S. 69 (1916) (not to engage in laundry business for 18 months); *Clark Paper & Mfg. Co. v. Stenacker*, 100 Misc. 173, 165 N. Y. S. 367 (1917); *Amalgamated Industrial Corp. v. Teichholtz*, 177 App. Div. 456, 164 N. Y. S. 289 (1917) (not to engage in window cleaning and house renovating business within 30 miles of Times Square for 10 years); *Wilkinson Bros. & Co. v. Ebbets*, 103 Misc. 324, 170 N. Y. S. 1041 (1918), motion den. mem. op. 170 N. Y. S. 1118 (1918) (not to engage in paper stock business for 3 years); *Eastman Kodak Co. v. Powers Film Products*, 189 App. Div. 556, 179 N. Y. S. 325 (1919), motion den. mem. op. 179 N. Y. S. 919 (1920) (not to engage in photographic supply business anywhere in United States for 2 years); *J. & J. G. Wallach Laundry System, Inc. v. Fortcher*, 116 Misc. 712, 191 N. Y. S. 409 (1921) (laundry company's driver enjoined from soliciting former customers for 2 years); *A. Finkenberg's Sons v. Adest*, 203 App. Div. 631, 197 N. Y. S. 246 (1922) (retail furniture salesman enjoined from soliciting former customers for 90 days); *Altschul-Batterson Co. v. Markowitz*, 213 App. Div. 769, 210 N. Y. S. 506 (1925) (not to solicit customers of insurance brokerage firm for 1 year); *Ward Baking Co. v. Tolley*, 222 App. Div. 653, 225 N. Y. S. 75 (1927) aff'd. mem. op. 248 N. Y. 603, 162 N. E. 542 (1928) (not to engage in manufacturing or selling cake for 10 years within 100 miles of any city in which employer was engaged in cake business); *Wallace v. Kranz*, 226 App. Div. 125, 234 N. Y. S. 439 (1929) (not to engage in business of security trader for 3 months in a county); *Eagle Pencil Co. v. Jannsen*, 135 Misc. 534, 238 N. Y. S. 49 (1929) (not to engage in competing pencil manufacturing business for 5 years in the United States); *Elbe File & Binder Co. v. Fine*, 137 Misc. 255, 242 N. Y. S. 632 (1930) (not to

engage in competing binder business for 5 years); *Davey Tree Expert Co. v. Back*, 137 Misc. 702, 244 N. Y. S. 239 (1930) (not to compete in tree surgery for 1 year within 100 miles of plaintiff's office); *Foster v. White*, 248 App. Div. 451, 290 N. Y. S. 394 (1936) (physician agreed not to practice his profession in a county except while employed by a medical group); *Markowitz v. Tabakin*, 250 App. Div. 768, 293 N. Y. S. 768 (1937) (employee of towel service company agreed not to engage in same business for 5 years, competitor who had knowledge of the contract was also restrained from employing covenantor); *Interstate Tea Co. v. Alt*, 271 N. Y. 76, 2 N. E. (2d) 51 (1936) (employee agreed not to interfere with trade connections of employer anywhere or at any time, injunction granted restraining employee from establishing trade relationships with customers served by employer or whose names were learned by employee during employment); *Briggs v. Glover*, 167 Misc. 306, 3, N. Y. S. (2d) 979 (1939) (employee engaged as hostess in business of advertising local merchants and contacting new residents agreed not to engage in same business for 5 years at any place where employer operated).

In the following cases, the restrictions ancillary to contracts of employment were declared to be unreasonable: *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312, 140 N. E. 708 (1923) (a contract by an ordinary paper salesman not to enter like employment for 8 years after termination of employment was held void as in restraint of personal liberty); *Stull v. Westfall*, 25 Hun. 1 (1881) (covenant of employee of dairy business not to solicit customers of employer nor do anything to divert employer's dairy business); *Bingham et al. v. Maigne*, 20 Jones & S. 90 (1885) (covenant by employee of vendor of business manufacturing printers' rollers not to compete as long as vendees or successors remained in possession of business purchased); *Oppenheimer v. Hirsch*, 5 App. Div. 232, 38 N. Y. S. 311 (1896) (covenant by a salesman of a butcher supply company, employed in Philadelphia only, not to engage in similar business in 16 States for 8 years); *Tolman v. Mulcahy*, 119 App. Div. 42, 103 N. Y. S. 936 (1907) (not to reveal trade secrets of money-lending business); *Fries v. Parr*, 139 N. Y. S. 220 (1912); *Magid v. Tannenbaum*, 164 App. Div. 142, 149 N. Y. S. 445 (1914) (covenant by salesman of a tailor, not to engage in same business for 1 year); *Kaumagraph Co. v. Stampagraph Co.*, 197 App. Div. 66, 188 N. Y. S. 678 (1921), *aff'd.* 235 N. Y. 1, 138 N. E. 485 (1923) (covenant by employee not to engage at any time in same or similar business of employer which involved use of secret processes, anywhere in the United States); *New York Linen Supply & Laundry Co. v. Schachter*, 212 N. Y. S. 72 (1925) (not to engage in employment as a laundry driver for a

period of 5 years); *Eldridge v. Milo*, 129 Misc. 666, 222 N. Y. S. 420 (1927); *Corpin v. Wheatley*, 227 App. Div. 612, 237 N. Y. S. 205 (1929) (beauty parlor employee covenanted not to work in same business for 1 year); *Unity Coat & Apron Co. v. Battist*, 148 Misc. 411, 264 N. Y. S. 801 (1933) (trailer for laundry company not to engage in laundry business in parts of New York City for 5 years); *Lantieri Beauty Salon v. Yale*, 169 Misc. 547, 7 N. Y. S. (2d) 984 (1938) (manicurist not to work in a beauty shop within 20 blocks for 2 years). *Schmidt v. Central Laundry & Supply Co.*, 13 N. Y. S. (2d) 817 (1939) (laundry company employee not to engage in similar business in same county for 10 years).

In *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. S. 37 (1911), a paper pattern company hired a competitor's manager and started a campaign to secure such competitor's customers. In the absence of a clear showing that manager was using information as to customers confidentially acquired, while in such competitor's employ, injunctive relief will not be granted to restrain manager and present employer from engaging in fair competition.

In absence of an express contract, a salesman who learned the names and addresses of his employer's customers and their habits will not be enjoined from using his knowledge for his own benefit by soliciting them after his employment has terminated. *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. S. 910 (1912) aff'd. per cur., 210 N. Y. 529, 103 N. E. 1121 (1913); see also *Mahler v. Mahler*, 160 App. Div. 548, 145 N. Y. S. 764 (1914); *Oxyphathor Co. v. DeCordero*, 164 App. Div. 962, 149 N. Y. S. 513 (1914) (injunctive relief granted restraining former employees from using confidential information or trade secrets acquired during employment) *Cornibert v. Cohn*, 169 Misc. 285, 7 N. Y. S. (2d) 351 (1938); *Goldschmidt v. Sachs*, 162 N. Y. S. 323 (1916) (complaint alleging former employee of public accountant was using confidential customer lists of former employer, held to set forth good cause of action); *People's Coat, Apron & Towel Supply Co. v. Light*, 171 App. Div. 671, 157 N. Y. S. 15 (1916) aff'd. 224 N. Y. 727, 121 N. E. 886 (1918) (employee entering service of competitor restrained from using customer lists of former employer where customers could not be reached by ordinary advertising); *New York Towel Supply Co., Inc. v. Lally*, 162 N. Y. S. 247 (1916) (two former employees of linen supply company could not be restrained from personally soliciting former employer's customers in the absence of contract not to compete, there being no secret process involved); *S. W. Scott & Co. v. Scott*, 186 App. Div. 518, 174 N. Y. S. 583 (1919) (in ordinary contract of employment there is no implied

covenant that employee, after termination, may not solicit former employer's customers in behalf of a business established by said employee) *New Warsaw Bakery Co. v. Uciniski*, 6 N. Y. S. (2d) 862 (1938); *Sachters Ice Cream Co. v. Sunshine Ice Cream Co.*, 116 Misc. 428, 190 N. Y. S. 391 (1921) (an ice-cream salesman being an ordinary employee in an ordinary business could not be restrained from soliciting former employer's customers); see also *Goldberg v. Goldberg*, 205 App. Div. 435, 200 N. Y. S. 3 (1923) (laundry driver); *Shevers Ice Cream Co., Inc., v. Polar Products Co.*, 194 N. Y. S. 44 (1921) (an employee, planning on competing with employer in ice-cream business made a list of employer's customers, was enjoined from using such lists in competitive business subsequently established by the employee); see also *Kremer v. Kremer*, 221 App. Div. 747, 225 N. Y. S. 260 (1927).

Restrictive Covenants Ancillary to the Lease of Property.

Lessor covenanted that lessee was to have the exclusive right to sell dry goods in the block. Thereafter, lessor rented another store in the block to another party and granted it permission to sell women's clothing. In a suit for injunction by lessee, demurrer was overruled. *Staff v. Bemis Realty Co.*, 111 Misc. 635, 183 N. Y. S. 886 (1920).

A covenant by a lessor of a department of dressmaker's business not to engage in a similar business to compete with lessee during term of the lease was held invalid and unenforceable. *Merl, Inc. v. Richfield-Jenks, Inc., et al.*, 125 Misc. 318, 209 N. Y. S. 530 (1925).

A covenant in a lease of upper floors of a building for a furniture department not to permit ground floor to be used for sale of furnishings was violated where restricted space was used for sale of lamps. *Ludwig Baumann & Co. v. Manwit Corp.*, 213 Misc. 300, 207 N. Y. S. 437 (1925).

Lessor covenanted with lessee not to lease part of building to any other store selling cigars, stationery, sporting goods, newspapers, ice cream, and soda. Subsequently another tenant was permitted to sell some of the restricted commodities. Injunctive relief was granted to lessee against the lessor and other tenant. *Graff v. Bernawitt Corp. et al.*, 142 Misc. 866, 255 N. Y. S. 56 (1931), aff'd 234 App. Div. 868, 253 N. Y. S. 1086 (1931).

Restrictive Covenants Ancillary to Conveyance of Realty.

A deed conveying a small parcel of land contained a covenant that such property was not to be used in the coal and ice business. The grantee subsequently conveyed such parcel to defendant and the deed of conveyance was silent as to the restriction on use. Where the de-

fendant had both actual and constructive notice, the covenant being reasonably restrictive, was held valid. *Rubel Bros. v. Dumont Coal & Ice Co.*, 110 Misc. 32, 180 N. Y. S. 662 (1920).

Protection of Goodwill in Absence of Contract—Implied Covenants.

Where defendant sold all interest in a grocery business, including goodwill, to plaintiff, but did not contract not to compete, defendant was free to carry on a similar business in the locality, but he was under the obligation not to solicit his former customers, although he could sell to such customers without solicitation. *Von Bremen v. MacMonnies*, 200 N. Y. 41, 93 N. E. 186 (1910). Injunction issued restraining vendor of lunch wagon manufacturing business from soliciting customers of business sold. *P. J. Tierney Sons, Inc. v. Tierney Bros.*, 130 Misc. 428, 224 N. Y. S. 144 (1927).

Assignability.

Where plaintiff sold land to X, X covenanting not to sell sand from such land in competition with plaintiff, the covenant was held enforceable against X's grantee with notice. *Hodge v. Sloan*, 107 N. Y. 214, 17 N. E. 335 (1887).

An employee of a laundry agreed not to work for a competing company in the same territory for eighteen months after the termination of employment. The restriction was held not enforceable by the purchaser of the business and assignee of the contract. A bilateral contract for personal services cannot be assigned by either party. *Avenue Z Wet Wash Laundry Co. v. Yarmush*, 129 App. Div. 427, 221 N. Y. S. 506 (1927); *Jochum Bros. v. Ridgewood Pie Baking Co.*, 210 App. Div. 428, 206 N. Y. S. 252 (1924) (partners selling pie business covenanted not to compete with vendee in greater New York and New Jersey for 10 years. Covenant was held to be enforceable against covenantors by subsequent purchaser from original vendee of business sold, where evidence showed that the intent of the contract was that such covenant was to run with the business). See also *Amercian Ice Co. v. Mechel*, 109 App. Div. 93, 95 N. Y. S. 1060 (1905); *Sanford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. S. 270 (1906).

Liquidated Damages.

Contracts not to compete containing provisions for liquidated damages in case of breach are valid, nor do such provisions bar equitable relief. *Nobles v. Bates*, 7 Cowan 307 (1825) (provision that vendor would forfeit final installment of purchase price for a breach); *J. W. Smith v. A. Smith*, 4 Wend. 468 (1830) (bond of \$500 forfeited

for breach); *Chappel v. Brockway*, 21 Wend. 157 (1839) (sum of \$25,000 provided for in bond could be recovered); *A. L. & J. J. Reynolds Co. v. Dreyer*, 12 Misc. 368, 33 N. Y. S. 649 (1895) (clause for liquidated damages no bar to injunctive relief); *Zimmermann v. Gerzog*, 13 App. Div. 210, 43 N. Y. S. 339 (1897) (presence of clause for liquidated damages does not make an action for money damages the exclusive remedy available, equity will enjoin a breach); see also *Foster v. White*, 248 App. Div. 451, 290 N. Y. S. 394 (1936).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Alcoholic Beverages Control Law (McKinney, Supp. 1939)

Liquor

Section 101 provides that it shall be unlawful for a manufacturer or wholesaler to make any gift or lend services of any kind whatsoever, directly or indirectly, to any licensee which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler; or to enter into any contract with any retail licensee whereby the latter agrees to confine his sales to alcoholic beverages manufactured or sold by one or more such manufacturers or wholesalers. Any such contracts shall be void and subject the licenses of all parties concerned to revocation. See *Special Antitrust Laws: Liquor, infra*.

Penal Law (McKinney)

Sec. 861. Agreements or contracts for privileges to deal with occupants of tenements, apartment houses, or bungalow colonies.—1. A contract, agreement, or arrangement entered into or executed by and between the owner or prospective owner of an apartment house, tenement, or what is commonly known as a bungalow colony connected with common or joint means of ingress and egress, whether such apartment house, tenement, or bungalow colony is in existence or in process of construction or to be constructed in the future, or any person in possession or claiming possession of such apartment house, tenement, or bungalow colony, or any part thereof, including the common or joint means of ingress or egress, or any of the agents, employees, or servants of such an owner or possessors thereof and a dealer in or seller of fuel, ice, or food, or his agents, employees, or representatives for the purpose of giving to such

dealer or seller the privilege of selling or delivering fuel, ice, or food, to the persons occupying or to occupy such apartment house, tenement, or bungalow colony, or any part thereof, is against public policy and void.

2. Any person who shall, directly or indirectly, either as the owner or prospective owner of such apartment house, tenement, or bungalow colony, or any part thereof, including the common or joint means of ingress or egress, or as an agent, employee, or servant of such an owner, or any person in possession or claiming possession of such apartment house, tenement, or bungalow colony, or any part thereof, including the common or joint means of ingress or egress, accept any money, property, or thing of value for permitting or giving to any person, or his agents, employees, or representatives, the privilege of selling or delivering fuel, ice, or food, to the persons occupying or to occupy such apartment house, tenement, or bungalow colony, or any part thereof, and any person who shall, directly or indirectly, either as a seller of, or dealer in, fuel, ice, or food, as an agent, employee, or representative of such seller or dealer, pay or give any money, property, or thing of value, for such privilege shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten nor more than one hundred dollars, or by imprisonment for not less than thirty days nor more than one year, or by both such fine and imprisonment in the discretion of the court. If a corporation is convicted of a violation of this section, it shall be punished by a fine of not less than fifty nor more than one thousand dollars.

3. A person occupying an apartment house, tenement, or bungalow colony, or any part thereof, to whom fuel, ice, or food, shall be sold or delivered by a seller or dealer who has paid or given any money, property, or thing of value for the privilege of selling or delivering fuel, ice, or food, to the persons occupying or to occupy such apartment house, tenement, or bungalow colony, or any part thereof, may recover of such seller or dealer for his benefit a penalty, in the sum of two hundred and fifty dollars, in a civil action brought in a court of competent jurisdiction.

Sec. 444. Contracts for the use of the streets for hack stands.—The owner, lessee, or other occupant of any real property, or any other person, copartnership, or corporation, who shall make or enter into any agreement, contract, or arrangement whatsoever whereby the right is attempted to be granted or is granted to any person, copartnership, association, or corporation to use any portion of any public highway, street, avenue, boulevard, park, or other public property owned by the state of New York or any municipality therein for the purpose of permitting any vehicle to stand while awaiting pas-

sengers for hire or as a private hack stand, and any owner, lessee, or other person, copartnership, or corporation who shall make or enter into any contract or arrangement for the payment of or receives thereby any sum of money, percentage, or profits or other thing of value under any such contract, agreement, consent, or arrangement for such use of such public property as such private hack stand, shall be guilty of a misdemeanor.

Cooperative Corporations Law (McKinney, Supp. 1939)

Cooperatives

Sections 37 and 95 provide that the bylaws of a cooperative stock or nonstock agricultural, dairy, or horticultural corporation may require the members to sell all or any part of their specifically enumerated agricultural, dairy, and horticultural products, exclusively through such corporations; but in such case, shall specify a reasonable period, in each year, during which any member, by giving notice to the corporation, may withdraw and be released from this obligation. See vol. *Cooperatives* in projected study.

Cooperative Corporations Law (McKinney)

Section 119 provides that an agricultural cooperative marketing association may enter into marketing contracts with its members requiring them to sell, for any period of time, not in excess of five years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities created thereby. Section 128 provides that such contracts shall not be considered illegal as such, or in unlawful restraint of trade, or as a part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

General Business Law (McKinney Supp. 1939)

Section 340 provides that sections 340 to 347, the general antitrust act, shall not apply to the marketing contracts of cooperative associations of farmers, gardeners, or dairymen, including livestock farmers and fruit growers. See *General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Penal Law (McKinney)

Section 582, a part of the law defining and punishing criminal conspiracy, sections 580 to 584, expressly provides that the contracts and agreements of associations of farmers, gardeners, or dairymen, including livestock farmers and fruit growers, engaged in making col-

lective sales or marketing for its members, are not conspiracies and they shall not be construed to be injurious to trade or commerce. See *Exceptions to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected study.

Agriculture and Markets Law (McKinney)

Section 258c (f), as amended Supp. 1939 (a part of the act providing for the licensing of milk dealers and regulation of the milk industry, sections 252 to 258j) provides that the marketing contracts of a cooperative association of dairymen, organized under the Cooperative Corporations Law, shall not be deemed to be conspiracies or to be injurious to public welfare, trade, or commerce, if otherwise authorized by such law. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

In General.

Agreements to sell to one person exclusively if reasonable and not part of a general scheme to restrain trade are valid. The following exclusive selling arrangements have been upheld by the courts: *Van Marter v. Babcock*, 23 Barb. 633 (1857) (a contract to sell exclusively all peppermint oil produced for 2 years); *Livestock Association of New York v. Levy*, 22 Jones & S. 32 (1886) (an arrangement between two corporations dealing in livestock to deal exclusively with each other for 3 years); *Barber Asphalt Paving Co. v. Brand*, 55 Hun 606, 7 N. Y. S. 744 (1889) (a contract to sell asphalt exclusively to certain persons in various cities was held not prima facie void as in restraint of trade); *New York Bank-Note Co. v. Hamilton Bank-Note Engraving & Printing Co.*, 83 Hun. 593, 31 N. Y. S. 1060 (1895), affd. 28 App. Div. 411, 50 N. Y. S. 1093 (1898) (an agreement by a manufacturer not to sell presses designed for certain types of printing to others); *Blauner v. Williams Co.*, 36 Misc. 173, 73 N. Y. S. 165 (1901) (a contract to sell packets of a particular design and pattern to one person only); *Levine Distributing Co., Inc. v. Rubenstein*, 159 Misc. 28, 285 N. Y. S. 1020 (1935) (an agreement by the seller of 30,000 knapsacks not to sell to competitors of the buyer for 6 months is valid at common law and does not violate section 340, General Business Law); *Bullinger v. Interboro Brewing Co.*, 194 App. Div. 205, 185 N. Y. S. 481 (1920) (an agreement to purchase exclusively from a particular brewery).

See also *Standard Fashion Co. v. Seigal-Cooper Co.*, 157 N. Y. 60, 51 N. E. 408 (1898); *Butterick Pub. Co. v. Frederick Loeser & Co.*, 232 N. Y. 86, 133 N. E. 361 (1921), which involved contracts by department stores to sell only the patterns of a particular manufacturer.

However, an agreement by a coal dealer to sell exclusively to another dealer in a certain area for the purpose of enabling that dealer to have a monopoly was held void. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 (1876).

An agreement designating one corporation as the exclusive sales agent in a state for a company which controls 90 percent of the tobacco trade authorizing such agent to market its products in such way and to whom it pleases is valid and not an illegal combination in restraint of trade, in absence of evidence of any attempt to regulate competition or production. *Locker v. American Tobacco Co.*, 121 App. Div. 443, 106 N. Y. 115 (1907), *affd mem. op.* 195 N. Y. 565, 88 N. E. 289 (1909); *Koopman v. Lachman*, 203 App. Div. 354, 196 N. Y. S. 595 (1922); *Reliance Grant Elevator Equipment Corp. v. Reliance B. B. D. H. Co.*, 205 App. Div. 320, 199 N. Y. S. 476 (1923).

Contracts granting exclusive sales agencies within defined territories have been upheld in the following cases: *Wachtel v. A. R. Mosler Co.*, 195 App. Div. 240, 186 N. Y. S. 449 (1921), *affd mem. op.* 233 N. Y. 588, 135 N. E. 929 (1922) (exclusive territory for sale of automobile parts); *Anheuser-Busch Ice & Cold Storage Co. v. Reynolds*, 221 App. Div. 174, 222 N. Y. S. 650 (1927) (exclusive territory for sale of beer); *Kessler v. A. W. Haile Motor Co.*, 127 Misc. 413, 217 N. Y. S. 182 (1926) (exclusive territory for sale of automobiles).

As Applicable to Services.

A physician may agree to send all of his prescription business to the purchaser of his drug store. *Ward v. Hogan*, 11 Abb. N. C. 478, 11 Daly 227 (1882). A provision by the Associated Press requiring its members to deal with it exclusively, refusing to deal with members who patronize competitors was enforced. *Matthews v. Associated Press*, 136 N. Y. 333, 662, 32 N. E. 981 (1893). A news service corporation cannot restrain a competing news service from enforcing a like rule. *Dunlaps' Cable News Co. v. Stone*, 15 N. Y. S. 2 (1891). A contract to buy all the insurance on certain premises from one broker for 5 years was upheld. *I. Tannebaum Son & Co. v. Rothenberg & Co.*, 201 App. Div. 272, 194 N. Y. S. 315 (1922), *affd per cur.* 236 N. Y. 520, 142 N. E. 267 (1923).

As Applicable to Leases.

A lease for the use of patented machinery, exclusively, for a period of years is a valid arrangement. *Good v. Tucker & Carter Cordage*

Co., 121 N. Y. 1, 24 N. E. 15 (1890). Similarly, a contract to lease a motion-picture film, exclusively, to a certain theater in a city for a specified period is valid. *Brooklyn Majestic Theater Co. v. Vitagraph Co.*, 233 N. Y. 682, 135 N. E. 969 (1922). The lease of the exclusive right to operate a game in an amusement park is valid, and the lessee may enjoin operation of other such games leased with knowledge of the contract. *Gonzales v. Reichenthaler*, 233 N. Y. 607, 135 N. E. 938 (1922).

As Applicable to Public Service Companies.

A railroad may grant to a hackman the exclusive privilege to solicit business at its depot. *Brown v. New York Cent. & H. R. R. Co.*, 75 Hun 355, 27 N. Y. S. 69 (1894). See also *Borland v. Curto*, 121 Misc. 336, 201 N. Y. S. 236 (1923); *New York Cent. & H. R. R. Co. v. Ryan*, 71 Misc. 241, 129 N. Y. S. 55 (1911).

Where a steamship line reduced its freight rates to all customers agreeing to deal with it exclusively, it was held that there was no obligation to give such reduced rates to those refusing to enter into such agreements. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292 (1894). Cf. *Central New York Tel. & Tel. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206 (1910) (a hotel granting a telephone company its business exclusively was held to be an illegal restraint). See also *Greely Square Hotel Co. v. Arrow Bros. Interstate Co.*, 134 Misc. 95, 234 N. Y. S. 87 (1929); cf. *City of New York v. Yellow Taxi Corp.*, 157 Misc. 723, 284 N. Y. S. 544 (1935).

As Applicable to Exclusive Privileges to Deal with Occupants of Tenements, Apartment Houses, or Bungalow Colonies.

A summer residential association which leased homes to its members could not, by a retroactive bylaw, grant the exclusive privilege of dealing in groceries within its ground to the exclusion of outside grocers then dealing with the lessees; the imposition of such a restriction after the leases had been made is unreasonable. *Thousand Island Park Association v. Tucker*, 173 N. Y. 203, 65 N. E. 975 (1902).

A contract whereby the defendant sold the exclusive privilege of selling ice in a proposed apartment house was held not to be in violation of section 861, subsection 2 of the Penal Law, as the defendant was not an "owner of an apartment house" within meaning of the statute, since no apartment house had been erected. *People v. Grundstein*, 230 App. Div. 499, 245 N. Y. S. 523 (1930). Penal Law, section 861, subsection 2, was held to apply in a similar case where the apartment was actually under construction. *Arbuzese v. Norge Realty Corp.*, 151 Misc. 463, 271 N. Y. S. 889 (1934). Cf. *Sardone v. Joseph Diamond Holding Co.*, 244 App. Div. 300, 279 N. Y. S.

659 (1935); motion to dismiss granted per cur. 268 N. Y. 631, 198 N. E. 528 (1935). Section 861 of the Penal Law was held not to apply in a suit by a bungalow colony tenant and a merchant to enjoin the operator of such colony from preventing the merchant from bringing in supplies, thus forcing him to deal with stores within the colony. *Dougherty v. Rockaway Operating Co.*, 163 Misc. 806, 298 N. Y. S. 242 (1937).

As Applicable to Cooperatives.

Exclusive cooperative marketing contracts have been upheld in suits by cooperative associations against their members. *Bullville Milk Producers Ass'n Inc. v. Armstrong*, 108 Misc. 582, 178 N. Y. S. 612 (1919) aff'd, 190 App. Div. 952, 180 N. Y. S. 932 (1920); *Castorland Milk & Cheese Co. v. Shantz*, 179 N. Y. S. 131 (1919); *Dairy-men's League Co-op. Ass'n v. Holmes*, 207 App. Div. 429, 202 N. Y. S. 663 (1924), aff'd 239 N. Y. 503, 147 N. E. 171 (1924); *Frame v. Trenton Milk & Cream Co., Inc.*, 125 Misc. 86, 210 N. Y. S. 591 (1925); *Parker v. Dairymen's League Co-op. Ass'n Inc.*, 222 App. Div. 341, 226 N. Y. S. 226 (1927); *Rhodes v. Little Falls Dairy Co., Inc.*, 230 App. Div. 571, 245 N. Y. S. 432 (1930), aff'd, 256 N. Y. 599, 177 N. E. 140 (1931).

As Applicable to Grants by Municipalities.

An ordinance prohibiting the collection of garbage by unlicensed persons, and providing that licenses are to be granted only to those persons having contracts with the city, was held valid as coming within the city charter and the general police power, although it resulted in an exclusive privilege in one person. *City of Rochester v. Gutherlett*, 73 Misc. 607, 133 N. Y. S. 541 (1911), aff'd, 151 App. Div. 900, 135 N. Y. S. 1104 (1912), aff'd 211 N. Y. 309, 105 N. E. 548 (1914). A city can impose exclusive control over the removal of garbage even to the extent of preventing a restaurateur from fulfilling a contract with a third person. *Eddy v. City of Buffalo*, 193 App. Div. 246, 184 N. Y. S. 51 (1920).

Measure of Damages.

The proper measure of damages for failure to deliver a quantity of tires in violation of a contract granting exclusive sales rights of such tires is the difference between the contract price and the price at an established market elsewhere plus transportation, and not the difference between the contract price and the covenantee's selling price. *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510 (1920).

Equitable Remedies.

The purchaser of a specially made printing press under an agreement by the seller not to sell any other such presses may enjoin the

use of a press so purchased with knowledge of such agreement. *New York Bank-Note Co. v. Hamilton Bank-Note Engraving & Printing Co.*, *supra*. See also *Gonzales v. Reichenthaler*, *supra*.

Equity will grant specific performance of a contract by a magazine to advertise a patented device to the exclusion of other similar devices, as damages would be difficult to determine and each publication would constitute a separate breach. *Goddard v. American Queen*, 44 App. Div. 454, 61 N. Y. S. 133 (1899).

Where the defendant is financially irresponsible and damages would not be recoverable, injunctive relief to insure performance of a contract to buy beer exclusively will be granted. *Pabst Brewing Co. v. Sloane*, 155 App. Div. 580, 140 N. Y. S. 858 (1913).

A contract vesting the title to all the musical compositions of a composer in a publisher exclusively for 5 years which bound the latter to publish only one-half of the compositions submitted at any time during the 5 years, was held to be so inequitable that equity would grant neither injunctive nor mandatory relief but leave the publisher to his remedy at law. *M. Witmark & Sons v. Peters*, 164 App. Div. 366, 149 N. Y. S. 643 (1914).

When a contract granted exclusive foreign rights to motion pictures, equity will not issue a temporary injunction to restrain a violation during the time that the parties were disputing the price, as to do so would result in irreparable injury to the producer without substantial benefit to the plaintiff. *Export & Import Film Co. v. B. P. Schulberg Productions*, 125 Misc. 756, 211 N. Y. S. 838 (1925), *aff'd mem. op.* 218 App. Div. 823, 218 N. Y. S. 740 (1926).

NORTH CAROLINA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. I. Sec. 7. Exclusive emoluments.—No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

Const. art. I. Sec. 31. Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed.

STATUTORY PROVISIONS

Code Ann. (Michie, 1939)

Sec. 2559. Combinations in restraint of trade illegal.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars. (1913, c. 41, sec. 1.)

Sec. 2560. Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of the preceding section of this chapter. (1913, c. 41, sec. 2.)

Sec. 2561. Burden of proof as to reasonableness on defendant.—All contracts, combinations in the form of trust, and conspira-

cies in restraint of trade or commerce prohibited in the two preceding sections of this chapter are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of the preceding sections of this chapter that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce. (c. 41, sec. 3.)

Sec. 2562. Contracts to be in writing.—No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the state of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the state of North Carolina, or at any point in the state of North Carolina, which contract is now illegal or which contract is made illegal by any other section of this chapter. (1913, c. 41, sec. 4.)

NOTE.—For further treatment of sec. 2562, see *Contracts Not to Compete, infra*.

Sec. 2563. Particular acts defined.—In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, expressly or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

1. To agree or conspire with any other person, firm, corporation, or association to put down or keep down the price of any article produced in this state by the labor of others, which article the person, firm, corporation or association intends, plans, or desires to buy.

2. To make a sale of any goods, wares, merchandise, articles, or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in goods, wares, merchandise, articles, or things of value of a competitor or rival in the business of the person, firm, corporation, or association making such sales.

3. To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.

4. Who directly or indirectly buys or sells within the state, through himself or itself, or through any agent of any kind or as agent or principal, or together with or through any allied, subsidiary, or dependent person, firm, corporation, or association, any article or thing of value which is sold or bought in the state to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low, or by raising the price of any article or thing of value bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured.

5. Who deals in any thing of value within the state of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation, or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

6. Who is engaged in buying or selling any thing of value in North Carolina, to make or have any agreement or understanding, express or implied, with any other person, firm, corporation, or association, not to buy or sell such things of value within certain territorial limits within the state, with intention of preventing competition in selling or to fix the price or prevent competition in buying of such things of value within these limits: *Provided*, Nothing herein shall be construed to prevent an agent from representing more than one principal. But nothing in this proviso shall be construed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or lowering prices: *Provided, further*, That nothing herein shall be construed to prevent a person, firm, or corporation from selling his or its business and goodwill to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: *Provided*, Such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter. (1913, c. 41, sec. 5.)

Sec. 2564. Violation a misdemeanor; punishment.—Any corporation, either as agent or principal, violating any of the provisions

For further treatment of sec. 2563, subsecs. (2) and (6), see *Tying Contracts and Exclusive Dealing Arrangements and Contracts Not to Compete, infra*. For further treatment of sec. 2563, subsecs. (3), (4), and (5), see vol. *State Price Control Legislation: Antidiscrimination Legislation*.

of the preceding section shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 41, sec. 5.)

Sec. 2565. Persons encouraging violation guilty.—Any person, being either within or without the state, who encourages or willfully allows or permits any agent or associates in business in this state to violate any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in the preceding section. (1913, c. 41, sec. 6.)

Sec. 2566. Continuous violations separate offenses.—Where the things prohibited in this chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense. (1913, c. 41, sec. 7.)

Sec. 2567. Duty of attorney general to investigate.—The attorney general of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in this state, which are or may be embraced within the meaning of the statutes of this state defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations in North Carolina doing business in violation of law; and all other corporations of every character engaged in this state in the business of transporting property or passengers, or transmitting messages and all other public-service corporations of any kind or nature whatever which are doing business in the state for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the North Carolina corporation commission is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers, and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, sec. 8.)

Sec. 2568. Power to compel examination.—In performing the duty required in the preceding section, the attorney general shall have power, at any and all times, to require the officers, agents, or employees of any such corporation and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit them-

selves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; and the attorney general is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any judge of the supreme or superior court, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, sec. 9.)

Sec. 2569. Person examined exempt from prosecution.—No person examined, as provided in the preceding section, shall be subject to indictment, prosecution, punishment, or penalty by reason or on account of anything disclosed by him upon such examination, and full immunity from prosecution and punishment by reason or account of anything so disclosed is hereby extended to all persons so examined. (1913, c. 41, sec. 9.)

Sec. 2570. Refusal to furnish information; false swearing.—Any corporation unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: *Provided*, That if any corporation shall in writing notify the attorney general that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to the judge of the supreme or superior court, who shall fix an appropriate time and place for such examination or inspection, and such corporation shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provision of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury. (1913, c. 41, sec. 10.)

Sec. 2571. Criminal prosecution; solicitors to assist; expenses.—The attorney general in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of

the solicitors in the state, who shall, upon being required to do so by the attorney general, send bills of indictment and assist him in the performance of the duties of his office: *Provided*, That the state shall pay the actual and necessary expenses of the solicitor incurred while performing such duties and not over one hundred dollars as an extra fee when the expense account is approved by the attorney general and governor and duly audited, and the amount of the fee is fixed by them.

The necessary expenses incident to carrying out the provisions of this chapter shall, when approved by the governor and audited, be paid out of any money in the state treasury not otherwise appropriated. (1913, c. 41, sec. 13.)

Sec. 2572. Remedy by civil action.—If it shall become necessary to do so, the attorney general may prosecute civil actions in the name of the state on relation of the attorney general to obtain a mandatory order to carry out the provisions of this chapter, and the venue shall be in any county as selected by the attorney general. (c. 41, sec. 11.)

Sec. 2573. In what name civil action prosecuted.—It shall be the duty of the attorney general, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the state, or any officer or department thereof, as provided by law, or in the name of the state on relation of the attorney general, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, sec. 12.)

Sec. 2574. Civil action by person injured; treble damages.—If the business of any person, firm, or corporation shall be broken up, destroyed, or injured by reason of any act or thing done by any other person, firm, or corporation in violation of the provisions of this chapter, such person, firm, or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, sec. 14.)

Judicial Decisions

Application of Common Law.

An agreement between milk dealers handling about 60 percent of the milk in a particular city to raise the price of milk and the subsequent raising of the price have been *held* to constitute conspiracy at

common law, milk being one of the necessities of life. *State v. Craft*, 168 N. C. 208, 83 S. E. 772 (1914).

Since the gist of the offense of common-law conspiracy to raise prices is the unlawful agreement and combination, and not the raising of the price in and of itself, it has been held that it is sufficient to prove the conspiracy and the raising of the price, and that it is no defense that such price was not raised to the level set out in the agreement, or that one other than one of the conspirators sold at as high a price, or that the price might be reasonable. *Ibid.*

Constitutionality of Statutes.

Section 2563, subsection (3) has been held constitutional and not uncertain, vague, or indefinite. *State v. Atlantic Ice & Coal Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

Application of Statutes.

There is a dictum to the effect that an offense, indictable at common law as conspiracy to break up the business of another by resorting to systematic falsehood and misrepresentation, was not changed by the antitrust law, Laws 1913, c. 41. *State v. Dalton*, 168 N. C. 204, 83 S. E. 693 (1914). The present antitrust law, Code Ann. (Michie, 1935), sections 2559-2574, is substantially similar to that of 1913.

It has been held that the monopoly statute applies as much to railroads as to individuals and other corporations. *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E., 240 (1937).

In an action for damages by a contract truck carrier engaged in intrastate transportation of gasoline and kerosene against certain railroads, a complaint alleging that the railroads had unlawfully conspired to injure such truck carrier in violation of the antitrust statute, by reducing rates for transportation of such oils intending later to restore them and by charging lower rates to certain points in the state where there was competition than to other points without sufficient reason, with intent to injure contract truck carriers, was held to state a cause of action for damages under the antitrust act. *Ibid.* See also *Pater-son v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364 (1938).

Wilfulness is an essential ingredient of the offense of violating section 2563 subsection (3). *State v. Atlantic Ice and Coal Co.*, 210 N. C. 742, 188 S. E. 412 (1936). Wilfulness has been defined as the wrongful doing of an act without justification. *Ibid.* See also *Rice v. Asheville Ice Co.*, 204 N. C. 768, 169 S. E. 707 (1933).

Application of Statute to Sales Below Cost.

Predatory sales below cost have been held to be within the scope of section 2563, subsection (3). *State v. Atlantic Ice and Coal Co.*, *supra*. In a prosecution against a foreign corporation operating the

largest coal business in town, for violating section 2563, subsection (3), by wilfully undertaking to destroy or injure the business of competitors with the intention of fixing the price of coal thereafter, evidence that defendant lowered its prices in the city so that it was selling for less than cost, and that the other 25 coal dealers in town could not afford to sell at such a price was held sufficient to take the case to the jury. *Ibid.*

Eleven fish dealers, the only fish dealers except two small ones in a certain city, formed a corporation; each sold his respective business to such corporation, and each covenanted in the bill of sale not to enter into the same business within 100 miles thereof for 10 years, each dealer acquiring an interest in the corporation in return. The court held that such covenant was not illegal either under the antitrust law, L. 1913, c. 41, section 5 (Code Ann. (Michie, 1935), section 2563 (6)), or the common law, but was valid as a reasonable restraint of trade in that it was entered into pursuant to the sale of a business and its good will. A dissenting opinion, however, contended that there was no analogy between this contract and an ordinary sale of goodwill with covenant not to compete. This covenant, stated the dissent, was part of a "combine" or trust to destroy competition. *Morehead City Sea Food Co. v. Way*, 169 N. C. 679, 86 S. E. 603 (1915). See *Contracts Not to Compete, infra*.

Damages.

It has been held that acts which violate the antitrust act give the injured party a cause of action for damages, since the act itself expressly provides in section 2574 for a right of action for injury to a business. *Bennett v. Southern Ry. Co., supra*. The fact that such acts are made criminal offenses by the act does not mean that they can be inquired into only by the attorney general. *Ibid.*

Mere violation of the monopoly statute without proof of damages resulting therefrom will not warrant recovery in an action for violation of the statute. Under section 2574 the burden is put on the party claiming violation to show that his business was destroyed or injured as a proximate result of the violation. *Lewis v. Archbell*, 199 N. C. 205, 154 S. E. 11 (1930). See also *Smith v. Morganton Ice Co.*, 159 N. C. 151, 74 S. E. 961 (1912).

Power to Enjoin.

It has been held that equity will not enjoin the violation of section 2563 at the instance of an alleged injured party, since section 2564 makes violation of the former section a crime, and equity does not have jurisdiction to enjoin the commission of a crime. *Carolina Motor Service, Inc. v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 185 S. E. 479 (1936).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code Ann. (Michie, 1939)

Resale Price Maintenance

Sections 5126 (k) to 5126 (r) permit the fixing of resale prices for branded articles, but specifically provide that this act shall not apply to contracts or agreements between producers or distributors, between wholesalers, or between retailers as to sale or resale prices. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Code Ann. (Michie, 1939)

Cooperatives

Section 5259 (m) provides that no agricultural cooperative organized under sections 5259 (a) to 5259 (ee) shall be deemed a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Judicial Decisions**Cooperative Associations.**

A cooperative association composed of tobacco growers of North Carolina, South Carolina, and Virginia, organized under the Cooperative Marketing Act, has been held not to be a monopoly, but to be created for the protection of the tobacco growers against oppression by the tobacco buyers and for the orderly and systematic marketing of their products. The act by its provisions insures that an association organized thereunder will not be used for private gain and can operate only for the protection of the producer-members. *Tobacco Growers Coop. Assn. v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923).

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts**

Code Ann. (Michie, 1939)

Transportation Companies

Section 3460 prohibits and makes void any (1) merger, lease, or acquisition of any interest in, (2) contract, agreement, or understanding calculated to or which may lessen competition by any competing railroads or other transportation company. Independently owned and operated railroads of not more than 100 miles in length are exempted from this provision.

Section 3461 prohibits any railroad or other transportation company from (1) acquiring, holding, or guaranteeing the bonds or stock of, or leasing, purchasing, consolidating, or merging with any parallel or competing road or company, or (2) selling any of its stocks or bonds to any holding or voting company whereby such consolidation or merger might be effected. Any such purchase, contract, merger, or sale is void. Independently owned and operated railroads not exceeding 100 miles in length are exempted from this provision.

Tobacco Boards of Trade

Section 4930 (f) specifically provides that nothing in this section, which authorizes the organization of tobacco boards of trade in North Carolina towns and cities by tobacco warehousemen and purchasers of leaf tobacco at auction, shall authorize the organization of any association for the purpose of controlling prices or the making of rules and regulations in restraint of trade.

Commercial Fertilizers

Section 4688 charges the Commissioner of Agriculture with supervision of the trade in commercial fertilizers and with reporting to solicitors and the General Assembly information as to the existence or formation of trusts or combinations dealing in fertilizers or fertilizing materials which are or may be offered for sale, whereby the interest of the farmers may be injuriously affected, such information to be published in the Bulletin of the Department of Agriculture.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Application of Common Law.

An agreement between bidders for a government contract not to bid against each other, so as to enable one to get the contract at a higher rate and divide the profits between them has been held illegal. *S. Francis King v. S. E. Winants*, 71 N. C. 469 (1874).

An agreement between the highest bidder at a sale of public lands and the next highest bidder, whereby the latter gave the former his note for \$100, in consideration that the former would not comply with his bid, thereby permitting the latter to obtain the lands at a lower bid, has been held illegal. *Blythe v. Lovingood*, 24 N. C. 20 (1841).

II. CONTRACTS NOT TO COMPETE

Code Ann. (Michie, 1939)

Section 2562 provides that no contract limiting the right of any person to do business anywhere in the state shall be enforceable unless in writing. It further provides that this shall not be construed as legalizing such contracts which are now illegal or are made illegal by the provisions of the general antitrust law. See *General Antitrust Laws, supra*.

Section 2563, subsection (6), prohibits any agreement not to buy or sell within certain territorial limits, with the intention of preventing competition in selling or to fix prices or to prevent competition in buying within these limits. It further provides, however, that this does not prevent two or more principals from using a common agent for authorized purpose, but not to suppress competition or lower prices, nor does it prevent a firm from selling out with agreement not to enter into competition in a limited territory, provided such agreement does not violate the common law against trusts or the provisions of this act. See *General Antitrust Laws, supra*.

Judicial Decisions

Restrictive Covenants Ancillary to Sale of a Business or Professional Practice.

In general it has been held at common law that a contract entered into upon the sale of a business and its goodwill, that the vendor will not compete with the vendee in the same kind of business which is the subject matter of the sale, will be sustained as a reasonable restraint of trade. *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212 (1896); *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813 (1896); *King v. Fountain*, 126 N. C. 196, 35 S. E. 427 (1900); *Hauser v. Harding*, 126 N. C. 586, 35 S. E. 586 (1900); *Wooten v. Harris*, 153 N. C. 43, 68 S. E. 898 (1910); *Anders v. Gardner*, 151 N. C. 604, 66 S. E. 665 (1910); *Morehead City Sea Food Co. v. Way*, 169 N. C. 679, 86 S. E. 603 (1915); *Bradshaw v. Milliken*, 173 N. C. 432, 92 S. E. 161 (1917).

One of the most frequent tests applied by the courts in the past in determining whether a contract not to compete is enforceable is the reasonableness of its territorial limitation. Originally, a territorial limitation was held to be reasonable if its boundaries were sufficiently limited and certain. Applying such a test a contract by the owner of a newspaper, entered into upon its sale, that he would not edit, print, or conduct a newspaper anywhere in the State, was

held reasonable, *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 812 (1896), as was an agreement made upon the sale of a livery business not to engage in the same business in the same town, *King v. Fountain, supra*. A contract not to engage in the practice of medicine within a certain city and the territory surrounding, made upon sale of the practice, was held reasonable and valid as to the territory within the city limits but uncertain as to the territory surrounding the city, so that it was enforceable only so far as the former was concerned. *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586 (1900). The same rule was followed in *Shute v. Heath*, 131 N. C. 281, 42 S. E. 704 (1902), and *Teague v. Schaub*, 133 N. C. 458, 45 S. E. 762 (1903). The other most frequent test applied was the reasonableness of the time limitation. In applying such a test the courts have held that a limitation which is to endure for the life of the promisor is reasonable. *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813 (1896), *Hauser v. Harding, supra*. Where no time limit is stated in the contract; the courts have construed it as enduring for the lives of the promisor. *Ibid*. The terms of these tests have gradually been abandoned by the courts, however, until the test which is now applied is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given and is not so large as to interfere with the interests of the public. *Morehead City Sea Food Co. v. Way, supra*.

The same rule is applied in cases which arise under the antitrust statute, since section 2563, subsection (6) expressly exempts such contracts when made in connection with the sale of a business and its goodwill. *Hill v. Davenport*, 195 N. C. 271, 141 S. E. 752 (1928).

Restrictive Covenants Ancillary to Employment.

The courts have held valid a covenant by an employee, entered into upon accepting employment, that upon termination of such employment he would not accept employment from or become affiliated with any business of a like nature, *Moskin Bros. v. Swartzberg*, 199 N. C. 539, 155 S. E. 154 (1930), and a covenant by an employee that he would not solicit or accept business from his employer's clients for a period of 3 years after termination of his employment. *Scott v. Gillis*, 197 N. C. 223, 148 S. E. 315 (1929).

Restrictive Covenants not Ancillary to the Sale of a Business.

A contract between two brothers who together ginned 80 percent of the cotton ginned in a certain city, whereby one sold a cotton gin to the other and agreed not to gin cotton or buy or sell cottonseed on one side of a certain creek, in consideration of the other agreeing not to gin on the other side, has been held to violate the Antitrust

Act, L. 1913, c. 41, sec. 5f (Code Ann. (Michie 1935, sec. 2563, subsec. (6))), in that it did not provide for the sale of the goodwill of the gin plant but was merely a division of territory for the purpose of eliminating competition. *Shute v. Shute*, 176 N. C. 462, 97 S. E. 392 (1918).

A contract whereby one party agreed not to sell flour in a certain territory, in consideration of a promise by the other party not to sell meats and lard in the same territory, has been held an illegal restraint of trade in that it amounted to an agreement to suppress and destroy competition in trade in the necessaries of life. *Culp v. Love*, 127 N. C. 457, 37 S. E. 476 (1900).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Michie, 1939)

Section 2563, subsection (2), provides that it shall be unlawful for any person, firm, or corporation to make a sale of any merchandise or things of value whatsoever, in the State, upon the condition that the purchaser shall not deal in the goods of a competitor of the seller. See *General Antitrust Laws, supra*.

Section 2563, subsection (6), prohibits any agreement not to buy or sell within certain territorial limits, with the intention of preventing competition in selling or to fix the price or to prevent competition in buying within these limits. It further provides, however, that this does not prevent two or more principals from using a common agent for authorized purposes, but not to suppress competition or lower prices, nor does it prevent a firm from selling out with agreement not to enter into competition in a limited territory, provided such agreement does not violate the common law against trusts or the provisions of this act. See *General Antitrust Laws, supra*.

Cooperatives

Section 5259 (y) provides that an agricultural marketing cooperative may enter into marketing contracts with its members, requiring them to sell, for any period of time not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association. Section 5259 (m) provides that such marketing contracts shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected **MARKETING LAWS SURVEY** study.

Judicial Decisions

Exclusive Dealing Arrangements.

Under section 2563 subsection (2), a contract by a railroad to buy all of its cross ties from one vendor, the vendor agreeing to sell only to that railroad, does not violate the statute unless it is proved that the sale was "upon condition" that the purchaser was not to buy from a competitor, this being a question for the jury. *Lewis v. Archbell*, 199 N. C. 205, 154 S. E. 11 (1930).

Section 2563 subsection (6) by its terms makes the invalidity of the agreement depend upon the intent of the parties and not upon the effect of the agreements. *Mar-Hof Co. v. Rosenbacher*, 176 N. C. 330, 97 S. E. 169 (1918); *Florsheim Shoe Co. v. Leader Dept. Store, Inc.*, 212 N. C. 75, 193 S. E. 9 (1937). Subjected to such a test, to be determined by the character of the transaction and the purpose of the parties, a contract whereby a manufacturer agrees that a certain retailer shall have the exclusive sale of an article of his manufacture for a period of 2 years has been held not to violate an earlier Antitrust Act, Laws 1913, c. 41 (Code Ann. (Michie 1935) section 2563, subsection (6)) where it was shown that the manufacturer was desirous only of introducing his article in a new market and the retailer, depending on his exclusive agency, had spent large sums in advertising the product. *Mar-Hof Co., Inc. v. Rosenbacher, supra*. Again, since no intent to stifle competition appeared, it has been held that a contract making a department store exclusive agent for the sale of a certain manufacturer's shoes, is not governed by section 2563, subsection (6). *Florsheim Shoe Co. v. Leader Dept. Store, Inc., supra*.

A contract which violates section 2563, subsection (2) will support an action for damages by one whose business is injured thereby. *Lewis v. Frye et al.*, 207 N. C. 852, 175 S. E. 717 (1934).

A contract of sale of merchandise for resale by the buyer, which provides that the buyer will not sell or permit the sale on his premises of any other similar merchandise, has been held to violate the Antitrust Law, Public Laws 1911, c. 167, section 1, subsection (a), Code Ann. (Michie 1935) section 2563, subsection (2), and to be unenforceable in any action by the vendor for the price of the goods sold. *Standard Fashion Co. v. Grant*, 165 N. C. 453, 81 S. E. 606, dismissed 239 U. S. 654, 60 L. Ed. 487, 36 Sup. Ct. 164 (1915). The court expressly stated that the issue of recovery on a quantum valebant for the value of the goods was not raised and therefore the question was not answered. *Ibid*.

Application of Cooperative Marketing Statutes.

Marketing contracts between a tobacco growers cooperative association and its members, requiring the latter to sell all their tobacco to the association for a limited period of time, have been held not to be in restraint of trade where there is no real allegation and proof that the object of such contracts was to procure a price for such products beyond their real value. Where there is no such allegation and proof, the legality of such contracts will be presumed. *Tobacco Growers Coop. Assn. v. Jones*, 185 N. C. 265, 117 S. E. 174 (1923).

NORTH DAKOTA



I. TRUSTS, COMBINATIONS AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. sec. 146. Any combination between individuals, corporations, associations or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this state, whenever the owner or owners thereof violate this article shall be deemed annulled and become void.

STATUTORY PROVISIONS

Comp. Laws Ann. (1913)

Sec. 9950. Pools and trusts—Penalty.—Any corporation organized under the laws of this state or any other state or country for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of, or a party to any pool, trust, agreement, contract, combination, confederation or individual, to regulate or fix the price of any article of merchandise, commodity or property, or to fix or limit the amount or quantity of any article, property, merchandise or commodity to be manufactured, mined, produced, exchanged or sold in this state, shall be guilty of misdemeanor. (1907, ch. 259, sec. 1; R. C. 1905, sec. 9225; 1890, ch. 174, sec. 1; R. C. 1895, sec. 7481.)

Sec. 9951. Defining pools and trusts.—A pool or a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or two or more of them for either, any or all of the following purposes:

1. To create or carry out restrictions in trade.

2. To limit or reduce the production, or increase or reduce the price of property, merchandise or commodities.

3. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any property, article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this state; or to establish any pretended agency whereby the sale of any such property, article or commodity shall be covered up or made to appear to be for the original vendor, for a like purpose or purposes.

4. To make or enter into or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any property, commodity or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card price list, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any property, article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any article or commodity, that its price might in any manner be affected. (1907, ch. 259, sec. 2; R. C. 1905, sec. 9229.)

Sec. 9952. Punishment of corporations.—Every corporation, whether organized under the laws of this state or any other state or country, doing business in this state, and every person, partnership, or association of individuals so doing business, violating any of the provisions of this chapter, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars. (1907, ch. 259, sec. 3; R. C. 1905, sec. 9226; 1890, ch. 173, sec. 3; R. C. 1895, sec. 7482.)

Sec. 9953. Punishment of corporate officers.—Every person who as president, manager, director, stockholder, receiver, or agent or other employee of any corporation, on behalf of such corporation mentioned in the last section, or as a member of any partnership or association of individuals, violates any of the provisions of this chapter, upon conviction, shall be fined not to exceed two thousand dollars, or imprisoned in the county jail not to exceed one year, and, in the discretion of the court, a sentence of both fine and imprisonment may be imposed. (1907, ch. 259, sec. 4; R. C. 1905, sec. 9227; 1890, ch. 174, sec. 3; R. C. 1895, sec. 7483.)

Sec. 9954. Foreign or domestic corporations violating, prohibited from doing business in the state.—Every domestic or foreign corporation authorized to do business in this state, which shall have been found guilty in any court of competent jurisdiction of violating any of the provisions of this chapter, is hereby denied the right of and prohibited from doing business in this state, and the charter, articles of incorporation or authority granted, authorizing such corporation to do business in this state, shall cease and become void, and it shall become the duty of the secretary of state, upon the filing in his office of a certified copy of such judgment, to immediately cancel the authorization or charter of such corporation and give such corporation written notice of such cancellation. (1907, ch. 259, sec. 5; R. C. 1905, sec. 9232.)

Sec. 9955. What necessary in information.—In any information or indictment for any offense named in this chapter it is sufficient to state the purposes of the trust or combination and that the accused is a member of, acted with or in pursuance to it, without giving its name or description, or how or where it was created. (1907, ch. 259, sec. 6; R. C. 1905, sec. 9235.)

Sec. 9956. What necessary to prove in prosecution.—In prosecutions under this chapter it shall be sufficient to prove that a trust or combination exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it or proving or producing any articles of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all, and proof that any person has been acting as agent of any defendant in transacting the business of such defendant in this state, or, while agent of such defendant and in the name, behalf or interest of such defendant, violated any of the provisions of this chapter, shall constitute prima facie proof that the same was the act of such defendant. (1907, ch. 259, sec. 7; R. C. 1905, sec. 9236.)

Sec. 9957. Contracts in violation void.—Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable either in law or in equity. (1907, ch. 259, sec. 8; R. C. 1905, sec. 9237.)

Sec. 9958. Purchaser not liable.—No purchaser of any property, article, or other commodity from any individual, company, association of individuals, or corporation transacting business contrary to any provision of the preceding sections of this chapter, shall be liable for the price or payment of such property, article, or commodity, and may plead this chapter as a defense in any suit for such price or payment. (1907, ch. 259, sec. 9; R. C. 1905, sec. 9239.)

Sec. 9959. Taking testimony.—Whenever any proceeding shall have been commenced in any court of competent jurisdiction in this state by the attorney general against any corporation or corporations, individual or individuals, or association of individuals, copartnership or joint stock company or other association, under any of the provisions of this chapter, and the attorney general desires to take the testimony of any officer, director, agent, or employe of any such corporation, individual, copartnership, joint stock company, or association proceeded against, or any member or employe thereof in any court in which said action may be pending, or before any person duly authorized by any court to take testimony in any such action and such individual or individuals whose testimony is desired are without the jurisdiction of the court of this state or reside without the state of North Dakota, or cannot be found within this state, then in such case, the attorney general may file in the court in which said action is pending, in term time or in vacation, or with any judge thereof or with any person duly authorized to take the testimony in such action, an application in writing, stating therein the name or names of the persons or individuals whose testimony he desires to take, and the time when and place where he desires the said person to appear and testify, and thereupon the court in which said action is pending, or a judge thereof, or the person before whom testimony is being taken, shall immediately issue a notice in writing, directed to the attorney or attorneys of record, if any, in said cause appearing for any such defendant or defendants or to any defendant, agent, officer, or employe of any such defendant or defendants who are parties to said action, notifying said defendant, attorney or attorneys of record for such defendant or other officer, agent, or employe of any such party defendant that the testimony of the person or persons named in the application of the attorney general is desired and requiring such persons named to appear at the time and place therein stated then and there to testify in said action, and requiring said defendant, attorney or attorneys of record for any such defendant or such officer, agent, or employe of any such defendant to whom said notice is delivered, or upon whom the same is served, to have said officer, agent, employe, or representative of such defendant or defendants named in such notice whose evidence it is desired to take, at the place named in said notice and at the time therein fixed, then and there to testify; provided, however, that such notice shall always allow the persons required to testify such reasonable time for travel to the designated point where such testimony is required to be given as will, in the judgment of the court, be sufficient to permit the person cited to appear, to be present at the time and place designated in such notice; provided, also, that such time shall in no case be less than ten days

from the service of said notice. Such notice may be served by any person authorized by law to serve a subpoena. (1907, ch. 259, sec. 10.)

Sec. 9960. Failing to testify.—Whenever any defendant, attorney or attorneys of record, or any agent, officer, or employe of any such party defendant shall have been notified as provided in the preceding section to require any officer, agent, director, or other employe to attend before any court or other person authorized to take the testimony as therein provided, shall fail to appear and testify or fail to produce such books, papers or documents as he or they shall have been ordered to produce by the court or the person authorized to take said evidence, then it shall be the duty of the court before whom said action is pending, upon motion of the attorney general, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by any such party defendant whose officer, agent, director or employe has neglected or failed to attend or testify or to produce any such book, papers, or documents as he or they shall have been ordered to produce in said action by the court or the person authorized to take such testimony, and said court upon motion of the attorney general, shall render judgment by default against any such defendant. In case any officer, agent, employe, director, or other representative of any such defendant as hereinbefore mentioned, who shall reside in or be found within this state, shall be subpoenaed to appear and testify in any suit or proceeding brought under the provisions of this chapter, or to produce such papers, books and documents as shall have been ordered produced by the court, or other person authorized to take such testimony, then the answer, motion, demurrer or other pleading then or thereafter filed by any such defendant shall, on motion of the attorney general, be stricken out and judgment in said cause rendered as on default. (1907, ch. 259, sec. 11.)

Sec. 9961. Injunction.—The court in which any action or suit is brought under the provisions of this chapter shall, upon the relation of the attorney general, made either at the time of the beginning of said suit or at any time thereafter during its pendency, issue an injunction enjoining any defendant, agents or other employes of any such defendant from selling or assigning or in any other manner disposing of or secreting any of the property or assets of such defendant then situated in this state during the pendency of such suit and enjoining the removal of any such assets or other property from the jurisdiction of this state or the courts thereof; provided, however, that such injunction shall, on motion of any such defendant, be dissolved, upon the filing of a bond in an amount to be approved by the court, conditioned that the defendant shall pay any judgment, fine, and costs finally entered against the defendant in the action or proceeding in which such bond is filed. (1907, ch. 259, sec. 12.)

Comp. Laws Ann. (Supp., 1925)
Discriminations

Sections 3043 to 3047 provide that price discrimination in purchasing from and selling to different localities with the intent to create a monopoly or destroy the business of a competitor or dealer by anyone engaged in the production, manufacture, or distribution of milk, cream, butterfat, grain, or any commodity in general use is prohibited and punishable by a fine and forfeiture of the corporate charter, or revocation of permit or license, as the case may be. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Sections 3048 to 3055 provide that price discrimination in selling to different localities for the purpose of destroying the business of a competitor by anyone engaged in the production, manufacture, or distribution of any commodity in general use is prohibited and punishable by fine or imprisonment in county jail not to exceed one year or both; and by forfeiture of charter rights. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Comp. Laws (1913)
Conspiracy Statute

Sec. 9441 provides (in part) that it is illegal for two or more persons to conspire to prevent another from exercising a lawful trade or calling by force, threats or intimidation, or by interfering or threatening to interfere with the property of another, or to conspire to commit any act injurious to trade or commerce.

Judicial Decisions

Quo warranto is of common law origin, and the attorney general may bring such proceedings to forfeit the charter of a corporation illegally combined to fix prices, whether or not criminal proceedings have been instituted. Legislative sanctions unless clearly intended to supersede the common law remedy are presumptively cumulative. The fact that in the reenactment of the Pool and Trust Act in 1907 (L. 1907, c. 259) a former provision for quo warranto proceedings (Rev. Codes, 1905, sec. 9232) was omitted and that the revision in 1913 (Comp. Laws Ann. 1913, sec. 9954) provided that every corporation "who shall be found guilty" of violating the Antitrust Act shall be denied corporate existence was not intended to make the criminal remedy exclusive. *State v. Gamble-Robinson Fruit Co.*, 44 N. D. 376, 176 N. W. 103 (1919).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**L. 1937, c. 126****Resale Price Maintenance**

Sections 1 to 6 provide that contracts fixing the resale price of branded commodities in open competition with commodities of the same general class produced by others are valid. The act is expressly inapplicable to agreements between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Resale Price Maintenance*.

Comp. Laws Ann. (Supp., 1925)**Cooperatives**

Section 4609b26 provides that no cooperative marketing association organized under sections 4609b1 to 4609b30 shall be deemed to be a combination in restraint of trade, an illegal monopoly, or an attempt to fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS**I. Special Industry Antitrust Acts****CONSTITUTIONAL PROVISIONS****Railroads**

Const. section 141 provides that no railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line. Any attempt to evade the provisions of this section by any railroad corporation, by lease or otherwise, shall work a forfeiture of its charter.

STATUTORY PROVISIONS**Comp. Laws Ann. (1913)****Common Carriers**

Section 4620 provides that no railroad shall consolidate with, lease, purchase, or in any way own or control a parallel or competing line; a railroad may consolidate to form one continuous line.

Section 4718 provides that combinations, contracts, or agreements, express or implied, by any railroad or common carrier to prevent by change in time schedules, carriage in different cars, or by other means or devices the carriage of freight from being continuous, are unlawful.

Section 4721 provides that it shall be unlawful for any railroads, railroad corporations, or common carriers subject to the provisions of article 21, sections 4708 to 4783, to enter into any contracts, agreements,

or combinations for the pooling of freight of different or competing railroads, railroad corporations, or common carriers; or divide between them the aggregate or net proceeds of the earnings of such companies; each day of its continuance shall be deemed a separate offense. Violation of the law shall be deemed a misdemeanor, and an offender shall be subject to a fine of from \$500 to \$5,000 for each offense.

L. 1937, c. 259

Liquor

Section 4 provides that no person shall hold a wholesale and a retail license at the same time.

Section 14 provides that any person violating any of the provisions of this act shall, upon conviction, as a first offense, be fined not more than \$500, or be imprisoned in the county jail for not more than ninety days or both. Any subsequent offense shall be punished by a fine of not more than \$1,000, or by imprisonment in the county jail for not more than six months, or by both. The license of a person so convicted shall be revoked thereupon.

L. 1935, c. 97

Beer

Section 7 provides that no brewer, domestic or foreign, operating within or without the State, shall be licensed to operate or conduct, directly or indirectly, either in the name of the brewery or as a subsidiary or through any other of its officers, agents, or employees, a branch or distributing office, as a wholesale dealer in this State; nor shall any brewery operating within or without the State be licensed to engage in the retail sale of beer within the State.

Section 17 provides that any person violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100 or more than \$1,000 or imprisonment in the county jail for a period of not more than six months, or both. For a second offense, the same penalty shall be assessed and in addition thereto the license of the offender shall be revoked.

2. Public Contract Provisions

Comp. Laws Ann. (1913)

Patented Articles

Section 1836 provides that public institutions shall not request bids for any article of a specified brand or name or the products of any manufacturer or any patented apparatus or appliance when such requirement will prevent proper competition unless bids on similar articles are also permitted. See *Governmental Purchasing*.

L. 1929, c. 195

Section 9 provides that the Board of Administration, City Council, City Commission, Board of Education, etc., shall not, in specifying material to be used, ask for bids for any article of a specified or copyrighted brand or name or the product of any one manufacturer, or any patented article, when such requirement will prevent proper competition, unless bids are also asked on other similar articles of equal value. See projected Vol. *Governmental Purchasing*.

L. 1931, c. 205

Section 6 provides that the Board of State Capitol Commissioners shall not request bids for any article of a specified or copyrighted brand or name, or the product of any one manufacturer, or any patented article when that prevents proper competition, unless bids are also asked on other similar articles of equal value. See projected Vol. *Governmental Purchasing*.

Comp. Laws Ann. (Supp., 1925)
Textbooks

Section 1399a1 provides that before textbooks may be offered for sale to the state schools, the companies so offering must agree not to enter into any understanding, agreements, or combinations to control prices or restrict competition in the sale of textbooks. See projected Vol. *Government Purchasing*. **MARKETING LAWS SURVEY series.**

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

Comp. Laws Ann. (1913)

Sec. 5928. In restraint of business void.—Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than as provided by the next two sections, is to that extent void. (R. C. 1905, sec. 5372; Civ. C. 1877, sec. 959; R. C. 1899, sec. 3926.)

Sec. 5929. Goodwill excepted.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein. (R. C. 1905, sec. 5373; Civ. C. 1877, sec. 960; R. C. 1899, sec. 3927.)

Sec. 5930. Partners excepted.—Partners may upon or in anticipation of a dissolution of the partnership agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof. (R. C. 1905, sec. 5374; Civ. C. 1877, sec. 961; R. C. 1899, sec. 3928.)

Judicial Decisions

Restrictive Covenants Ancillary to Sale of a Business.

An agreement to discontinue and refrain from reestablishing a newspaper for 5 years, ancillary to the sale of a newspaper, is valid within the exception of section 5929, as such agreement evidenced the sale of the goodwill of that business. *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713 (1901). Rehearing denied, January 17, 1902.

An agreement not to enter the second-hand clothing, jewelry, and pawn business within a certain city for 5 years ancillary to the sale of an interest in such business is within the exception in section 5930 (Rev. Codes 1905, sec. 5374). *Siegel v. Marcus*, 18 N. D. 214, 119 N. W. 358 (1909). Working as an agent of a competitor is a violation of the agreement prohibiting the vendor from competing either directly in his own name or indirectly as agent of another. *Ibid.*

Defendants, owners of the majority of stock in a city bank, sold all of their interest, and covenanted that they would not engage in the "banking, real-estate, farm-loan, or insurance business within the city or territory where the bank draws business." Upon a finding of facts that the defendant had opened a banking business in an adjoining county and occasionally sold land in that county, the court, in a suit to restrain defendant from selling land within certain territory, dismissed the action for want of equity. *Strobeck v. McWilliams et al.*, 42 N. D. 30, 171 N. W. 865 (1919).

The defendant subleased a store building and fixtures to the plaintiff, who also purchased the stock therein, stipulating that the vendor might repurchase the stock at the end of 2 years. The plaintiff subsequently purchased the building and fixtures and in consideration thereof, defendant orally agreed not to compete with plaintiff. In an action to enforce the oral agreement, the court denied an injunction, holding that the right of the defendant to repurchase the stock of the grocery store did not constitute an interest in the good will of the business within section 5929 and that the contract not to compete, not being ancillary to the sale of the good will of a business, was directly in his own name or indirectly as agent of another. *Ibid.*

A contract whereby the vice president of a company sold his stock in a hardware, furniture, and undertaking business and agreed not to engage in such businesses as owner, manager, or servant in the same city or within a radius of 15 miles for 10 years was held valid as a contract involving the sale of goodwill together with a business within meaning of section 5929. *Bessel v. Bethke*, 56 N. D. 1, 215 N. W. 868 (1927).

Restrictive Covenants Ancillary to Employment.

A contract of employment whereby the plaintiff agreed not to engage in the practice of dentistry in the same city with the defendant during the employment or for 2 years thereafter, is void under section 5928 and does not fall within the exceptions provided for in sections 5929 or 5930. *Olson v. Swendiman*, 62 N. D. 649, 244 N. W. 870 (1932).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Comp. Laws Ann. (Supp. 1925) Cooperatives

Section 4609b17 provides that a cooperative marketing association and its members may execute marketing contracts requiring the members to sell all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities created by the association, for any period of time not over five years. Marketing contracts between the association and its members shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

OHIO



I. TRUSTS, COMBINATIONS AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Code Ann. (Throckmorton, 1936)

Sec. 6390. Definition of terms.—The word “person” or “persons” as used in this chapter includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, or a foreign country. (93 v. 146, sec. 12.)

Sec. 639L. Definition of trusts.—A trust is a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce.
2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity.
3. To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity.
4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state.
5. To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article,

commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy, and void. (93 v. 143, sec. 1.)

Sec. 6392. Owning trust certificate or entering into a combination prohibited.—It shall not be lawful for a person, partnership, association, or corporation, or an agent thereof, to issue or own trust certificates, or for a person, partnership, association, or corporation, or an agent, officer, or employee thereof, or a director or stockholder of a corporation, to enter into a combination, contract, or agreement with any person or persons, corporation or corporations, or a stockholder or director thereof, the purpose and effect of which is to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of a trustee or trustees with the intent to limit or fix the price or lessen the production and sale of an article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of such article. (93 v. 145, sec. 10.)

Sec. 6393. Illegal contract.—A contract or agreement in violation of any provision of this chapter is void and not enforceable either in law or equity. (93 v. 145, sec. 8.)

Sec. 6394. Foreign corporations must comply with antitrust acts; revocation of certificate.—A foreign corporation or foreign association exercising any of the powers, franchises, or functions of a corporation in this state, violating any provision of this chapter shall not have the right of, and shall be prohibited from, doing any business in this state. The attorney general shall enforce this provision by proceedings in quo warranto in the supreme court, or the court of appeals of the county in which the defendant resides or does business, or by injunction or otherwise. The secretary of state shall revoke the certificate of such corporation or association theretofore authorized by him to do business in this state. (103 v. 424; 101 v. 274; 93 v. 144, sec. 3.)

Sec. 6395. Violation; penalty.—A person, firm, partnership, corporation, or association violating any provision of this chapter shall forfeit and pay to the state, for the use of the general revenue fund thereof, the sum of fifty dollars for each day that such violation is committed or continued after due notice given by the attorney general

or a prosecuting attorney. Such sum may be recovered in the name of the state in any county where the offense is committed or where any of the offenders reside; and the attorney general, or the prosecuting attorney of any county upon the order of the attorney general, shall prosecute for the recovery thereof. When such action is prosecuted by the attorney general he may begin the same in the court of common pleas of Franklin county or of any county in which the defendant resides or does business. (101 v. 275; 93 v. 145, sec. 7.)

Sec. 6396. Criminal penalty; penalty when violation relates to bread, meat, vegetables, etc.—A violation of any or all of the provisions of this chapter is a conspiracy against trade, and a person engaged in such conspiracy or taking part therein, or aiding or advising in its commission, or, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carrying out any of the stipulations, purposes, prices or rates, or furnishing any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violating a provision of this chapter, shall be fined not less than fifty dollars nor more than five thousand dollars or imprisoned not less than six months nor more than one year, or both. Provided, however, that when the violation of the provisions of this chapter consists of a combination to control the price or supply, or to prevent competition in the sale of bread, butter, eggs, flour, meat, vegetables or any one of said articles, the person or persons thus engaged shall upon conviction thereof be fined in any sum not less than five hundred dollars and be imprisoned in the penitentiary not less than one nor more than five years. Each day's violation of any of the provisions of this chapter shall constitute a separate offense. (103 v. 254; 93 v. 144, secs. 4, 10.)

Sec. 6397. Liability for damages.—In addition to the civil and criminal penalties provided in this chapter, the person injured in his business or property by another person, or by a corporation, association, or partnership, by reason of anything forbidden or declared to be unlawful in this chapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant or his agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and recover twofold the damages sustained by him and his costs of suit. When it appears to the court, before which a proceeding under this chapter is pending, that the ends of justice require other parties to be brought before such court, the court may cause them to be made parties defendant and summoned whether they reside in the county where such action is pending, or not. (93 v. 146, sec. 11.)

Sec. 6398. What indictment shall contain.—In an indictment for an offense provided for in this chapter, it is sufficient to state the pur-

pose or effects of the trust or combination, and that the accused is a member thereof, or acted with or in pursuance of it or aided or assisted in carrying out its purposes, without giving its name or description, or how, when, and where it was created. (93 v. 144, sec. 5.)

Sec. 6399. Evidence.—In prosecutions under this chapter, it shall be sufficient to prove that a trust or combination as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing an article of agreement, or a written instrument on which it may have been based; or that it was evidenced by a written instrument. The character of the trust or combination alleged may be established by proof of its general reputation as such. (93 v. 145, sec. 6.)

Sec. 6400. Jurisdiction of courts; quo warranto; injunction.—The several courts of common pleas in the state are hereby invested with jurisdiction to restrain and enjoin violators of this chapter. For a violation of any provision of this chapter by a corporation or association mentioned herein, the attorney general, or the prosecuting attorney of the proper county, shall institute proper proceedings in a court of competent jurisdiction in any county in the state where such corporation or association exists, does business or has a domicile. When such suit is instituted by the attorney general in quo warranto, he may begin the same in the supreme court of the state, or the court of appeals of Franklin County. When such suit is instituted by the attorney general to restrain and enjoin a violation of any provision of this chapter, he may begin the same in the court of common pleas of Franklin County. Such proceedings to restrain and enjoin such violation, or violations, shall be by way of petition setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited.

Domestic corporations; dissolution by court.—Upon the filing of such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. In any action or proceeding in quo warranto by the attorney general or a prosecuting attorney against a corporation the court in which such action or proceeding is pending may, ancillary to such action or proceeding, restrain or enjoin the corporation and its officers and agents from continuing or committing during the pendency of the action the alleged act or acts by reason of which the action is brought. When, in a proceeding quo warranto by the attorney general or any prosecuting attorney, any corporation incorporated under the laws of this state is, on final hearing, found guilty of violating any of the provisions of this act, the court may

declare a forfeiture of all its rights, privileges and franchises to the state and may order the incorporation dissolved and appoint a trustee or trustees to wind up its affairs, as is provided in other cases in quo warranto (103 v. 425; 101 v. 275; 93 v. 114, sec. 2.)

Sec. 6400-1. Parties defendant; statute of limitation no bar to suit.—In any action or proceeding in quo warranto, injunction, or otherwise brought by the attorney general or a prosecuting attorney under this chapter, all persons parties to or participating in the trust or conspiracy against trade violative of the provisions of this chapter, may be made parties defendant and summoned, whether they reside in the county where such action is instituted or not. Proceedings in quo warranto and in injunction may be instituted simultaneously, or while one or another of them is pending, such suits being started in the proper court as provided in this chapter, and no suit in injunction shall be a bar to a suit in quo warranto, nor shall a suit in quo warranto be a bar to one instituted to restrain and enjoin. No statute of limitation shall prevent or be a bar to any suit, or proceeding, for any violation hereafter committed of any provision of this chapter. (101 v. 276.)

Sec. 6401. Witness not excused from testifying.—If a court of record or in vacation a judge thereof, in which is pending a civil, criminal, or other action or proceeding brought or prosecuted by the attorney general or a prosecuting attorney for the violation of any provision of this chapter, or an action or proceeding for a violation of a law, common or statute, against a conspiracy or combination in restraint of trade, so orders, no person shall be excused from attending, testifying, or producing books, papers, schedules, contracts, agreements, or other documents in obedience to the subpoena or order of such court or a commissioner, referee, or master appointed by such court to take testimony, or a notary public or other person authorized by the laws of this state to take depositions, when the order made by such court or judge includes a witness whose deposition is being taken before such notary public or other officer, for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a penalty; but no person shall be prosecuted or subjected to a penalty for or on account of a transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, before such court, person, or officer. (98 v. 313, sec. 6a.)

Sec. 6402. Cumulative provisions.—The provisions of this chapter shall be cumulative of each other and of all other laws in any manner affecting them. (93 v. 145, sec. 9.)

Judicial Decisions

Application of the Common Law.

One, who has been forced to discontinue his business of selling plumbing supplies because of an agreement between members of an association of plumbers to regulate price, source and production, and to withhold supplies from nonmembers, has a cause of action against the association. *Needles v. The Bishop & Babcock Co.*, 2 O. N. P. (ns) 77, 14 O. D. 445 (1904).

An association of tobacco warehousemen whose purpose was to reduce competition, fix prices, share in a guarantee fund, and to forfeit any interest in profits in case of any violation of its rules was held to be an illegal combination. The association was denied recovery in a suit against a member for breach of his contract. Valid portions of the agreement were not enforced, since the contract was held not separable. *Hoffman v. Brooks*, 6 O. D. Rep. 1215, 11 W. I. B. 258 (1884).

An agreement between 30 or more salt producers within a certain area to control the price, production and business methods of its members is in restraint of trade. That competition is not actually destroyed is no defense so long as there is evidence of a tendency to destroy competition. *Central Ohio Salt Co. v. Guthrie*, 35 O. S. 666 (1880).

A contract between members of an association of 95 percent of all candle manufacturers east of Utah, providing for price increases of commodities, decrease of production and division of profits earned from the association pool is illegal. A member will not be permitted to recover his share of the pool's profits since doing so would be giving effect to a contract in restraint of trade. *Emery v. The Ohio Candle Co.*, 47 O. S. 320, 24 N. E. 660, 21 A. S. 819 (1890).

A group of oil companies were precluded from placing the management of their businesses in control of a single company for the purpose of generally controlling production and price of petroleum products. The corporate fiction will be disregarded when all or nearly all of the stockholders place their stock in the hands of a single company for the purpose of creating a monopoly. Quo Warranto proceedings by the State is a proper remedy. *State v. Standard Oil Co.*, 49 O. S. 137, 30 N. E. 279, 34 A. S. 541 (1892).

An agreement between members of a combination, consisting of nearly all of the brick manufacturers in the city of Akron, to sell their products through a central office, the purpose being to increase price by reducing competition is against public policy and cannot be

defended on grounds that it was a partnership. Recovery against a member for breach of his contract with the association will not be granted in a suit by the association in its own name. *Jackson v. Akron Brick Ass'n*, 53 O. S. 303, 41 N. E. 257, 53 A. S. 638 (1895).

An injunction was granted to restrain a combination of cash register companies from attempting to destroy the English and Colonial business of another company. The combination resorted to the use of unfair trade practices. Among other things, it continually harassed the company with a number of unfounded law suits, thereby creating unfavorably publicity, resulting in restraint of trade. *National Cash Register v. Heyne et al.*, 10 O. N. P. (ns) 465, 26 O. D. 628 (1910).

A combination of wheel manufacturers engaged in allotting available trade among its members, fixing prices, limiting production, and further engaged in the purchasing of competing factories for the purpose of discontinuing their operation, is a trust contrary to public policy and illegal. Thus, where in pursuance of the illegal plan the price has been paid, but no possession taken under the contract for purchase of the factory, the court will leave the parties where it finds them. Possession will not be given to the combination. *Fisher et al. v. Flickinger Wheel Co. et al.*, 7 O. C. C. (ns) 533, 18 O. C. D. 501 (1906).

In a suit for injunction brought by a nonmember against an association to prevent the association from enforcing certain provisions of its bylaws, the court held that the bylaw of the association of insurance agents providing for the expulsion of members for dealing with nonmembers is not illegal, although the association intended to restrict competition and control price. Regardless of motive, an association as well as an individual may refuse to deal with whomsoever it chooses. *Runck v. Cloud*, 8 O. N. P. 436, 11 O. D. 344 (1901).

A bill for an accounting setting out a contract between two firms by which they agreed to divide gross profits at regular intervals, was held not demurrable. Such a contract is legal on its face, and will be upheld. *Fechteler et al. v. Palm Bros. & Co.*, 14 O. F. D. 369, 133 Fed. 462 (1904).

A contract between an automobile company and its sales agents providing that title to cars shall remain in the principal and be transferred only by his bill of sale, is not in restraint of trade. *Orebaugh v. Neu*, 28 O. C. D. 32, 38 O. C. C. (ns) 32, 28 O. C. A., 161 (1917).

Persons picketing a retailer persisting in making purchases of meat from a certain wholesaler alleged to be unfair to a labor union,

are engaged in an unlawful conspiracy. Activities resulting in a secondary boycott will be enjoined. *Meyer Packing Co. v. Butchers' Union*, 18 O. N. P. (ns) 457, 30 O. D. 438 (1916).

Quo warranto proceedings may be brought in any county by the attorney general against corporations engaged in a conspiracy in restraint of trade. *State of Ohio v. King Bridge Co.*, 7 O. C. C. (ns) 557, 18 O. C. D. 147 (1906).

Constitutionality of Statutes.

Sections 6390-6402 preventing combinations of refineries from engaging in price fixing practices are not unconstitutional. The act prohibits and punishes only such combinations and contracts in restraint of trade as were illegal at common law. *State v. Buckeye Pipe Line Co. et al.*, 61 O. S. 520, 56 N. E. 464 (1900).

Sections 6390-6402 represent proper exercise of the State's police power when invoked for punishment of individuals assisting associations to illegally interfere with competition in the sale of coal. *State v. Gage*, 72 O. S. 210, 73 N. E. 1078, 1 O. C. C. (ns) 221, 14 O. C. D. 724 (1905).

The penalty provisions contained in sections 6394-6397 as applied to persons and corporations are not unconstitutional. *State v. Hygeia Ice Co. et al.*, 4 O. N. P. (ns) 361, 16 O. D. 735 (1906); *State v. The General Fire Extinguisher Co. et al.*, 9 O. N. P. (ns) 438, 20 O. D. 240 (1910).

Section 6399 (R. S. secs. 4426-7) providing that the existence of an illegal trust may be established by evidence of general reputation violates the due process clause of the Federal Constitution. The legislature may not substitute such evidence, which is hearsay for the requirement of actual proof. *Hammond v. State*, 78 O. S. 15, 84 N. E. 416 (1908); *Hughes v. Ohio*, 9 O. C. C. (ns) 369, 19 O. C. D. 237 (1907) aff'd 77 O. S. 640, 84 N. E. 1132 (1908).

Application of Statutes.

As to Labor.

Sections 6390-6402 are applicable where strikers and a wholesaler of ice cream combine to boycott a retailer for selling to strike-breakers. *State v. Jacobs*, 7 O. N. P. 261, 10 O. D. 252 (1899).

Section 6397 is applicable to a combination of undertakers and a labor union to boycott another undertaker, who refused to join the combination, by circulating reports that he was unfair to union labor. *Henry Güldehaus Co. v. Busse*, 19 O. N. P. (ns) 263, 27 O. D. 13 (1916).

Section 6391 is applicable to a combination of craft unions which notified contractors and materialmen to discontinue selling supplies to one alleged to be unfair to union labor. *McAllister v. Trumbull*, 27 O. Abs. 167, 12 O. O. 179 (1938).

Sections 6390-6402 (R. S. secs. 4427-1 to 4427-12) were applied to a combination of horseshoers engaged in a scheme to fix uniform prices to be charged for labor of its members. Even though employers may do the same work as employees, the association is not a labor union. It is an association of employers, and the statute applies. *Peter Graf and Albert Graf v. Master Horseshoers' Protective Association*, 1 O. N. P. (ns) 423, 15 O. D. 18 (1904).

Combinations in Restraint of Trade.

Milk dealers, controlling 66 percent of the available milk supply, engaged in coercive measures against other dealers by selling below cost and adopting a "free bottle" plan for the purpose of restricting competition, violate sections 6390-6402. Equity will enjoin such a combination in a suit by dealers who are being injured. *Clover Meadow Creamery v. National Dairy Products Co.*, 29 O. N. P. (ns) 243, 40 O. L. R. 57 (1932).

A combination of wheel manufacturers engaged in allotting available trade to its members, fixing prices, limiting production, and in purchasing competing factories with intent to destroy competition is a trust within meaning of section 6391 (R. S. sec. 4427-1). *Fisher et al. v. Flickinger Wheel Co. et al.*, 7 O. C. C. (ns) 533, 18 O. C. D. 501 (1906). See also *State v. Ross*, 4 O. N. P. (ns) 377, 16 O. D. 704 (1906).

Insurance was held to be within the definition of "trust" in section 6391. *State v. Ross, supra*. But, in other decisions it has been held not to be "trade," "commerce," or "a commodity." *Minnie Foster v. Aukenbauer*, 14 O. N. P. (ns) 637, 24 O. D. 70 (1913); *State v. Bovee et al.*, 6 N. P. (ns) 337, 17 O. D. 663 (1907); *Runck v. Cloud*, 8 O. N. P. (ns) 436, 11 O. D. 344 (1901).

As to "Cold Storage Act."

The Cold Storage Act, sections 1155-1 to 1155-19 provides that storage of meat for more than 6 months is illegal. Storage of meat for 6 months in violation of this statute does not per se prove a conspiracy between the storage company and the one storing the meat, in violation of section 6390 et seq. The two statutes are not in "pari materia." An illegal combination must be shown and proven beyond all doubt. *Columbus Packing Co. v. State*, 106 O. S. 469, 140 N. E. 376 (1922), overruling *Columbus Packing Co. v. State*, 100 O. S. 285, 126 N. E. 291 (1919).

Procedural and Enforcement Provisions.

For conviction under section 6396 (R. S. secs. 4427-6), the indictment must charge that defendant had "knowledge" that he was employed by a conspiracy. A separate count for each day's existence of an illegal combination is not required. *Hughes v. Ohio*, 9 O. C. C. (ns) 369, 19 O. C. D. 237 (1907), aff'd 77 O. S. 640, 84 N. E. 1132 (1908).

An indictment under section 6396 (R. S. secs. 4427-6) is valid even though an overt act is not charged, the capacity of each defendant is not set forth, and persons other than the defendants, parties to the conspiracy, are not specified. A motion by several defendants to quash an indictment on these grounds was properly refused. *State v. Crystal Ice M'fg & Cold Storage Co.*, 5 O. N. P. (ns) 149, 17 O. D. 640 (1906).

Under sections 6390-6402, an indictment is not invalid for duplicity, because several offenses of the same character, committed at the same time and part of the same transaction, are charged in the same count. Knowledge of violation of the act need not be averred in the case of "any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission." Knowledge of violation of the act must be averred and proven against "any person who shall as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes or orders thereunder or in pursuance thereof." *State v. Ice Delivery Company*, 5 O. N. P. (ns) 89, 17 O. D. 515 (1907).

Damages.

One compelled to pay a higher price for commodities because of the existence of an illegal combination controlling prices, may set up a counterclaim for damages in a suit by the combination for the purchase price under section 6397. *Guyton v. Eastern Electric Co.*, 91 O. S. 106, 110 N. E. 189 (1914); cf. *Corn Products Refining Co. v. Runkle Co.*, 10 O. N. P. (ns) 596, 22 O. D. 663 (1910).

Damages may be recovered for acts expressly forbidden by section 6390 et seq., *Gildehaus Co. v. Busse*, 19 O. N. P. (ns) 263, 27 O. D. 13 (1916).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code Ann. (Throckmorton, 1936) Resale Price Maintenance

Sections 6402-2 to 6402-9 permitting the fixing of resale prices of branded commodities by contract, provides that the Antitrust Act, sections 6390 to 6402-1, shall not apply to such contracts. However, sections 6402-2 to 6402-9 are made inapplicable to contracts or agreements between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Sections 10186-23 and 10186-26 provide that no agricultural cooperative association organized under sections 10186-1 to 10186-30 shall be deemed a conspiracy or combination in restraint of trade, monopoly, or an attempt to lessen competition or arbitrarily fix prices. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperatives.

Marketing agreements entered into with cooperative marketing associations organized under sections 10186-23-26 are expressly excepted from application of the antitrust laws, section 6390 et seq. The statutes do not result in discrimination of a favored class, and are not in conflict with Const. sec. 26 nor the "due process" or "equal protection" clauses of the Federal Constitution. Conditions peculiar to the marketing of tobacco justify an exception to the operation of the antitrust laws. Tobacco growers are large in number while the buyers are limited. The great variety of quality in any given crop necessitates expert knowledge for grading and sorting not possessed by the individual grower. Without the aid of cooperatives a grower would be required to find a separate buyer for each grade. Therefore, a contract between a tobacco cooperative association and its members requiring members to sell all of their tobacco to the association for a period of 5 years is valid and will be upheld. *List v. Tobacco Growers' Cooperative Ass'n*, 114 O. S. 361, 151 N. E. 471 (1926). See also *Earley v. Cooperative Pure Milk Ass'n*, 115 O. S. 185, 152 N. E. 390 (1926); *Brannon v. Ohio Poultry Producers Cooperative Ass'n*, 27 O. App. 426, 162 N. E. 453 (1927); *Stark County Milk Producers Ass'n v. Tabeing*, 129 O. S. 159, 194 N. E. 16, 1 O. O. 472 (1934).

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****Code Ann. (Baldwin's Throckmorton, 1936)
Railroads**

Sections 8806-8808 provide that a railroad company may aid another, by stock subscription or otherwise, in the construction of its road for the purpose of forming a connection of such roads, if the road, when constructed, will not form a competing line. A railroad company may lease or purchase any part or all of a connecting road, if the two roads are not competing. Two or more connecting but not competing companies may enter into any arrangement for their common benefit.

Code Ann. (Baldwin's Throckmorton, Supp., 1939)

Sections 9025 to 9027 provide that a domestic railroad may consolidate with one or more domestic or foreign railroad companies when the roads so united will form a connected but not competing line and that a railroad company formed by consolidation or merger may make a further consolidation with either a domestic or foreign road owning or operating continuous or connected, but not parallel or competing lines.

Code Ann. (Baldwin's Throckmorton, 1936)

Section 10173 provides that when a railroad company erects or owns an elevator building and uses it for the purpose of receiving or delivering grain from or to any railroad company, as freight, carried or to be carried over its roads, or any part thereof, the railroad company may subscribe to or purchase share of its capital stock, to an amount not exceeding one-third of the entire capital stock of the elevator company, in the name of its president or other officer, and hold it as trustee.

Street Railway Companies

Sections 9127 and 9128 permit the consolidation of street railway companies owning and operating noncompeting lines. The provision concerning competing lines does not apply when such lines are nearby or are wholly situated in a municipal corporation of the state or the road of any company organized in the state is made, or in process of construction to the boundary line of the state or to a point within or without the state.

Section 9129 permits a street railway company formed by consolidation to consolidate with another street railway company, but expressly prohibits such consolidation when the lines are competing, unless such lines are nearby or are wholly situated within the limits of a municipal corporation of the state.

Section 9171 provides that magnetic telegraph companies may maintain lines, whether described in its original charter or not, and whether wholly within or partly beyond the limits of the State. Telegraph companies may join, lease, or hold interest in like companies. But no company shall contract for the exclusive use thereof.

Telegraph, Telephone, Electric Light, and Power Companies

Section 9190 provides that two or more telegraph companies whose lines are not parallel to or in competition with each other, may consolidate to form a continuous line. Telephone, electric light, and power companies shall have the same powers and be subject to the same restrictions as telegraph companies. (Secs. 9191 and 9192.)

Public Utilities

Section 614-14 provides that no public utility shall furnish any free service or service for less than actual cost for the purpose of destroying competition.

Milk and Cream Buying Companies—Discrimination

Section 6402-1 prohibits any person engaged in the business of buying milk, cream, or butterfat from discriminating between different localities of the state by purchasing at a higher price in one locality than in another after making due allowance for transportation costs, for the purpose of creating a monopoly, restraining trade, or limiting or preventing competition. Violation of this section subjects the offender to fine or imprisonment of not more than six months. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Bread, Butter, Eggs, Flour, Meat, or Vegetables

Section 6396 provides that when any violation of the Antitrust Act consists of a combination to control the price or supply or prevent competition in the sale of bread, butter, eggs, flour, meat, or vegetables, shall be punishable by fine or imprisonment for not less than one nor more than five years, each day's violation to constitute a separate offense. See *General Antitrust Laws, supra*.

Purchases by Municipalities

Section 4371 provides that the director of public safety of a city is empowered to make necessary contracts, but obligations over \$500 must be authorized by the council. All sales of city property must likewise be authorized by the council.

Section 3627. The municipal department of purchase, construction, and repair shall not undertake work except upon authority of the city council, and under laws regulating competitive bidding if the work is over \$500.

Gas Companies

Section 3982 provides that the city council may regulate the rates which gas, water, and electric companies charge to the public. The council may regulate the rental for meters or may provide that the price includes a meter, in which case no charge for use or repair shall be made.

Section 3989 provides that exclusive monopoly shall not be allowed to gas companies by cities, and the city council shall not surrender its right to control gas companies or to purchase such gas works.

Code Ann. (Baldwin's Throckmorton, Supp. 1939)

Liquor

Section 6064-24 provides that it shall be unlawful for any manufacturer to aid or assist the holder of any permit for sale at wholesale or for both such to aid or assist the holder of any permit for sale at retail by gift or loan of any money or property of any description or other valuable thing, or by giving of premiums or rebates; and it shall be unlawful for the holder of any such permit to accept the same: *Provided, however,* That a manufacturer or wholesale distributor may furnish to a retail permittee the inside signs or advertising and the tap signs or devices herein more specifically designated.

No manufacturer shall have any financial interest directly or indirectly by stock ownership or through interlocking directors in a corporation or otherwise in the establishment, maintenance, or promotion in the business of any wholesale distributor; nor shall either have any such interest in the establishment, maintenance, or promotion of the business of any retail dealer; nor shall they or any stockholder thereof acquire, after the effective date of this act, by ownership in fee, leasehold, mortgage, or otherwise, directly or indirectly, any interest in the premises whereon the business of any other person engaged in the trafficking in beer or intoxicating liquor is conducted.

Transactions between the above parties involving malt or brewed beverages or wine shall be on a cash basis only, except for credit or refunds for the return of containers or packages. No right of action shall exist to collect any claims for credit extended contrary to the provisions of this clause. No beer or malt beverages or wine manufactured in the U. S. A. shall be imported into the state unless the same shall have been purchased and paid for in cash. However, nothing herein contained shall prohibit a manufacturer from extend-

ing usual and customary credit for malt or brewed beverages or wine sold to customers or purchasers who live or maintain places of business outside of the state when the beverages so sold are actually transported and delivered to points outside of the state.

Section 6064-25 provides that the board of liquor control may suspend or revoke any permit issued pursuant to this liquor control act for the violation of any of the applicable restrictions of this act or of any lawful rule or regulation of the board or other sufficient cause.

Section 6064-65 provides that whoever violates any provisions of the liquor control act or the amendments thereto for which no criminal penalty is provided therein shall be deemed guilty of a misdemeanor, and upon conviction shall forfeit any permit granted to him or it by the department of liquor control, and shall be fined not less than \$25 nor more than \$50. See *Tying Contracts and Exclusive Dealing Arrangements, supra*.

2. Public Contract Provisions

Code Ann. (Baldwin's Throckmorton, 1936)

General

Section 4329 provides that if the Director of Public Service has reason to believe that there has been collusion or combination in bids on public contracts, the bids of those concerned shall be rejected. See projected vol. *Governmental Purchasing*.

Printing

Sections 759 and 760 provide that if the Commissioners of Public Printing are of the opinion that there was collusive bidding on contracts for public printing, they may reject any or all bids and contract with a responsible person who files a bond for the execution of the work. See projected Vol. *Governmental Purchasing*.

Patented Articles

Section 3811 prohibits a municipal corporation from adopting specifications for public improvements required to be let by competitive bidding, which require the exclusive use of a patented article or an article wholly controlled by any person, firm, corporation, or combination. See projected Vol. *Governmental Purchasing*.

Construction Contracts

Section 6602-21 provides that when a Board of County Commissioners has reason to believe that there was collusion or combination

among the bidders for the construction of county water supply systems, the bids of those concerned shall be rejected. See projected Vol. *Governmental Purchasing*, *MARKETING LAWS SURVEY*.

Judicial Decisions

Railroads.

Section 8806 (R. S. secs. 3300 and 3866) forbids a railroad from owning a controlling interest in the stock of a competing railway. *Manington et al v. Hocking Valley Railway Co.*, 9 O. N. P. (ns) 641, 20 O. D. 468, 8 O. L. R. 451, 183 Fed. 133 (1910). *State v. Hocking Valley Railway Co.*, 12 O. C. C. (ns) 145, 21 O. C. D. 192 (1909), aff'g 12 O. C. C. (ns) 49, 21 O. C. D. 175 (1909).

A railroad corporation is not permitted under section 8806 to purchase the entire stock of a coal-mining company. *Columbus, Hocking Valley & Toledo Railway Co. v. Burke et al.*, 10 O. D. Rept. 136 (1887).

Under section 8806 a railroad, although permitted by its charter to own stock in a coal corporation, may not own a controlling interest in a mine which produces more coal than the railroad requires for its own use. *State v. Hocking Valley Ry. Co.*, *supra*. Bonds of a coal company guaranteed by two railroad companies in consideration of its (coal company) promise to ship equal amounts of freight over the two railroad lines is ultra vires. *Ibid*.

Two railroads, having connections furnished by a third, are not authorized to consolidate under section 9025 (R. S. sec. 3379). Consolidation being permitted only where cars pass from one railroad to another "without break or interruption" to form a connected but not competing line; consolidation being permitted only where the carriage is continuous. Railroads which are parallel and competing in their general features cannot be consolidated under this statute. *State v. Vanderbilt*, 37 O. S. 590, 7 W. L. B. 141 (1882).

In an action brought by the State to prevent one railroad from purchasing another uncompleted railroad, the court held that sections 8806, 8807, 8808, and 9026, when construed together, prohibit such a consolidation, because the uncompleted road, after construction, would have been a competitor of the purchaser. *State v. Cleveland & Pittsburg Railway Co.*, 13 O. C. C. (ns) 145, 27 O. C. D. 147 (1910). See also *State v. Hocking Valley Railway Co.*, *supra*.

Two railroads, owning the majority of stock in three others, two of which were connecting and continuous but parallel to the third,

were temporarily enjoined from carrying only northbound freight over one and only southbound freight over the other, thus eliminating competition. The injunction was granted on petition of the minority stockholders of one of the three lines under authority of sections 6390-6402. *David R. Gould et al. v. The Chesapeake & Ohio Ry Co. et al.*, 10 O. N. P. (ns) 313, 21 O. D. 737 (1910); *id.*, 10 O. N. P. (ns) 129, 21 O. D. 733, 10 O. N. P. (ns) 591, 30 O. D. 481.

Telegraph and Telephones.

A contract between a telephone company and the owner of a patent limiting the extension of its use by other competing telegraph companies is against public policy. Sections 9171-9179 (R. S. secs. 3455-3462) apply to the use of a patented article, making it subject to state control when public welfare demands it. *State ex rel. The American Union Telegraph Co. v. Bell Telegraph Company*, 36 O. S. 296 (1880).

An agreement between two telephone companies providing that neither will operate in the territory of the other or connect with each other's competitors is in violation of the antitrust provisions. *Medina County Farmers Telephone Co. v. Medina Telephone Co.*, 12 O. N. P. (ns) 289, 30 O. D. 500 (1911).

An agreement between a telephone company handling only local calls and one handling only long-distance calls providing for an exclusive interchange of business does not violate section 9171 (R. S. sec. 3455), section 9190 (R. S. sec. 3470), and section 9191 (R. S. sec. 3471). The two companies are not competitors. This type of combination is essential for maintenance of proper public service. *U. S. Telephone Co. v. Middlepoint Home Telephone Co.*, 7 O. N. P. (ns) 425, 19 O. D. 202, 57 W. L. B. 103, 9 O. L. R. 626, 86 O. S. 319 (1908); *id.*, 13 O. C. C. (ns) 337, 22 O. C. D. 18 (1910); *cf. U. S. Telephone Co. v. Central Union Telephone Co.*, 171 Fed. 130 (1909), *aff'd.* 202 Fed. 66 (C. C. A. 6th, 1913).

Public Contract Provisions.

Application of the Common Law.

A contract between two independent bidders, providing that in the event the contract is awarded to one, the two shall divide the benefits, is enforceable. *Breslin v. Brown*, 24 O. S. 565 (1874).

A city may not require that the bids for a paving contract shall include the name of the manufacturer of the brick to be used. To select brick on the basis of a manufacturer rather than quality destroys competition. *Tucker v. City of Newark*, 19 O. C. C. 1, 10 O. C. D. 437 (1897).

Specifications for a city street improvement which require the use of a patented article do not restrict competition to such an extent as to make such a requirement illegal, if the article is to be obtained on the market. *Holbrook v. City of Toledo*, 8 O. C. C. (ns) 31, 18 O. C. D. 284 (1906); *State v. Miller*, 10 O. C. C. ns 406, 20 O. C. D. 460 (1907), aff'd 18 O. D. 218 (1908).

Application of the Statutes.

Sections 3982 and 3989 (R. S. secs. 2478 and 2485) do not authorize a municipality to award an exclusive contract to a gas company for an indefinite period, the terms of which provide that the quality and price shall be the same as in other cities. *Cincinnati Gas Light Co. v. Avondale*, 43 O. S. 257, 1 N. E. 527 (1885).

Under section 4329, providing the procedure under which the director of public service may receive bids, a city may receive bids from one who is the sole manufacturer of the required material, if this material is reasonable, best suited for the purpose of the city, and is not covered by patent rights. *McCourt v. City of Akron*, 13 O. N. P. (ns) 537, 23 O. D. 187, 58 W. L. B. 37 (1912).

A city may be enjoined, under sections 3811, 4329, and 4371, from purchasing a car when the specifications are taken from a catalogue furnished by a particular automobile manufacturer. This rule applies even though mechanics and operators of other cars can be changed to meet the specifications. *Fischer Auto & Service Co. v. City of Cincinnati*, 16 O. N. P. (ns) 369, 26 O. D. 103 (1914).

A city, whose charter requires competitive bids on public contracts, is not permitted to draw up specifications for boilers which can be met by a single manufacturer. *Mog & Mog v. City of Cleveland*, 18 O. N. P. (ns) 49, 27 O. D. 62 (1915).

Sections 3627 and 4329 provide for the procedure and conditions under which certain public officials may receive bids. Section 3811 authorizes a city to receive bids on fire-alarm boxes without adopting particular specifications. Bids being received from various manufacturers for several different types of fire-alarm boxes from which one type was selected conforms with the statutory requirement and is not open to criticism. *Patterson v. Zanesville*, 42 O. App. 428, 182 N. E. 352 (1932).

3. Anticoercive Financing Statutes

Code Ann. (Baldwin's Throckmorton, Supp., 1939)

Sec. 6302-1. Title of act; definitions.—This act shall be known and may be cited as the "automobile dealers' and salesmen's licensing act."

As used in this act:

"Persons" includes individuals, firms, partnerships, associations, joint-stock companies, corporations, and combinations of individuals of whatsoever form and character.

"Registrar" means the registrar of motor vehicles which office is created by section 6290-1 of the General Code.

"Motor vehicle" includes motor vehicle, trailer, and semitrailer as those terms are defined in section 6290 of the General Code.

"Business" includes any activities engaged in by any person or caused to be engaged in by him for the object of gain, benefit, or advantage either direct or indirect.

"Engaging in business" means commencing, conducting, or continuing in business as well as liquidating a business when the liquidator thereof holds himself out to be conducting such business. However, making a casual or isolated sale is not engaging in business.

"Retail sale" or "sale at retail" shall mean the act or attempted act of selling, bartering, or exchanging or otherwise disposing of a motor vehicle to a person for use as a consumer. Other forms of the same expression shall have the same meaning expressed in appropriate form.

"Retail installment contract" includes any contract in the form of a note, chattel mortgage, conditional sales contract, lease, agreement, or otherwise payable in one or more installments over a period of time and arising out of the retail sale of a motor vehicle.

"Farm machinery" means all machines and tools used in the production, harvesting, and care of farm products.

"Dealer" includes all persons as hereinbefore defined, regularly engaged in the business of selling, displaying, offering for sale, or dealing in motor vehicles at an established place of business which is used solely and exclusively for the purpose of selling, displaying, offering for sale, or dealing in motor vehicles. For the purpose of this definition, a place of business which is used for selling, displaying, offering for sale, or dealing in motor vehicles shall be deemed to be used solely and exclusively for those purposes even though farm machinery is sold or displayed for sale thereat, or if repair, accessory, gasoline and oil, storage, parts, service, or paint departments are maintained thereat if such departments are operated for the purpose of furthering and assisting in the business of selling, displaying, offering for sale, or dealing in motor vehicles. Places of business or departments in a place of business used to dismantle, salvage, or rebuild motor vehicles by means of using used parts are

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not considered as being maintained for the purpose of assisting or furthering the selling, displaying, offering for sale, or dealing in motor vehicles.

"Salesman" includes any person as hereinbefore defined who for a commission, compensation, or other valuable consideration, is employed by a dealer to sell, display, and offer for sale or deal in motor vehicles. Neither of the terms "dealer" or "salesman" hereinbefore defined includes public officers who are performing their official duties.

The provisions of this act shall not apply to persons engaging in the business of selling trailers and semitrailers incidental to the business of selling tangible personal property other than motor vehicles as herein defined. (117 v. Pt. 2, 2d s. ses. H. 773; 117 v. H. 531, sec. 1. Eff. Jan. 1, 1938.)

Section 6302-2 provides for the licensing of all retail dealers in motor vehicles and sets forth the requirements for and procedure in granting such licenses.

Sec. 6302-3. Refusal to issue license, when; appeal.—The registrar shall deny the application of any person for a license as a motor vehicle dealer and refuse to issue him a license as such if the registrar finds that such applicant (6) has entered into or is about to enter into a contract or agreement with a manufacturer or distributor of motor vehicles which is contrary to any provision of this act, * * *.

In case the applicant is a corporation or partnership, the registrar may refuse to issue a license if any officer, director, employee, or partner of the applicant has been guilty of any act or omission which would be cause for refusing or revoking a license issued to such officer, director, employee, or partner as an individual. The registrar's finding may be based on facts contained in the application or on any other information which he may have. Immediately upon denying an application for any of the reasons provided herein, the registrar shall enter a final order together with his findings and certify same to the motor vehicle dealers' and salesmen's licensing board hereinafter created.

An applicant who has been refused a license may appeal from the action of the registrar to the motor vehicle dealers' and salesmen's licensing board in the manner prescribed in section 10 of this act. (117 v. Pt. 2, 2d s. ses. H. 773; 117 v. H. 531, sec. 3. Eff. Jan. 1, 1938.)

Section 6302-3, subsections 1 to 5, 7 to 9 provide other grounds for refusing to issue a license to such dealers.

Section 6302-4 provides for the licensing of motor vehicle salesmen and sets forth the requirements for such licenses.

Sec. 6302-5. Refusal to issue license, when; appeal.—* * * The registrar may refuse to issue a salesman's license to an applicant who was salesman for or in the employ of a motor vehicle dealer at the time such dealer's license was revoked. The registrar's finding may be based on any statement contained in the application or any facts within his knowledge and immediately upon refusing to issue a salesman's license he shall enter a final order and shall certify such final order together with his findings to the motor vehicle dealers' and salesmen's licensing board. The applicant whose application for salesman's license has been denied may appeal to the board in the manner prescribed in section 10 of this act. (117 v. H. 531, sec. 5. Eff. Jan. 1, 1938.)

Section 6302-5, subsections 1 to 5 provide other grounds for refusing to issue a salesman's license.

Sections 6302-6 to 6302-9 contain other formal licensing requirements and provisions for a licensing board.

Sec. 6302-10. Appeals; suspension or revocation of license.—The board may upon its own motion and shall, upon the verified complaint in writing of any person, investigate the conduct of any licensee under this act and shall suspend or revoke or notify the registrar to refuse to renew any dealer's or salesman's license at any time, if any ground existed upon which such license might have been refused, or if a ground exists which would be cause for refusal to issue a license.

The board may suspend or revoke any license at any time if the licensee has in any manner violated the regulations issued pursuant to this act, or has violated any law relating to the selling of motor vehicles, or the taxing, licensing or regulation of sales of motor vehicles. (117 v. H. 531, sec. 10. Eff. Jan. 1, 1938.)

This section referred to in sections 6302-3, 6302-5.

Sections 6302-11 to 6302-14 set forth the powers and duties of the licensing board; provide for hearings, and appeals and set forth the duties of attorney general re prosecutions.

Sec. 6302-15. Agreement for sale of retail installment contracts unlawful.—No person, who is engaged in or about to engage in the business of selling motor vehicles at retail, shall enter into any contract, agreement or understanding, express or implied, with any manufacturer or distributor of motor vehicles that he will sell only to a designated person or class of persons all or any part of the retail installment contracts arising out of the sale by him of motor vehicles,

or that he will refuse to sell such retail installment contracts to any designated person or class of persons. Any such contract, agreement or understanding is hereby declared to be against the public policy of this state and to be unlawful and void. (117 v. H. 531, sec. 15. Eff. Jan. 1, 1938.)

This section referred to in section 6302-19.

Sec. 6302-16. Coercion, etc., by manufacturer or distributor prohibited.—No person, being a manufacturer or distributor of motor vehicles, or being an officer, agent or representative of such manufacturer or distributor, shall induce or coerce, or attempt to induce or coerce, any retail motor vehicle dealer or prospective retail motor vehicle dealer to sell or refuse to sell all or any portion of his retail installment contracts to any person or class of persons designated by such manufacturer or distributor, by means of any statement, suggestion, promise or threat, made directly or indirectly, that such manufacturer or distributor will in any manner injure or benefit such a dealer, or by means of any act of such manufacturer or distributor that has benefited or injured such dealer, or by means of any statement or representation, made directly or indirectly, that such dealer is under any obligation whatsoever to make or refuse to make such sale. (117 v. H. 531, sec. 16. Eff. Jan. 1, 1938.)

This section referred to in section 6302-19.

Sec. 6302-17. Purchase of retail installment contract prohibited, when.—No person engaged in the business of buying retail installment contracts from motor vehicle dealers in this state, and no officer, agent or representative of such person, shall purchase or attempt to purchase any such retail installment contract from any motor vehicle dealer in this state.

(a) When such dealer in consequence of any contract, agreement or arrangement between such person and a manufacturer or distributor supplying motor vehicles to such dealer has been induced or coerced to sell such retail installment contract by means of any statement, suggestion, promise or threat, made directly or indirectly, that the manufacturer or distributor supplying motor vehicles to such dealer would in any manner injure or benefit such dealer, or by means of any act of such manufacturer or distributor that has benefited or injured such dealer, or by means of any statement or representation, made directly or indirectly, that such dealer is under any obligation whatsoever to make such sale;

(b) When such person has received or has contracted to receive from any manufacturer or distributor supplying motor vehicles to such dealer, or has given or contracted to give to such manufacturer or distributor, any subsidy or thing of service or value, where the

effect of the giving or receiving of such subsidy or thing of service or value may be to lessen or eliminate competition in the business or purchasing retail installment contracts from motor vehicle dealers or tend to grant an unfair trade advantage or to create a monopoly in such person. (117 v. H. 531, section 17. Eff. Jan. 1, 1938.)

This section referred to in section 6302-19.

Section 6302-18 provides that any sale without a license constitutes a misdemeanor.

Sec. 6302-19. Violation of certain provisions a misdemeanor, penalty.—Whoever violates any of the provisions of section 15, 16, 17, or 18¹ of this act relating to sales or purchases of retail installment contracts shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars or more than one thousand dollars. (117 v. H. 531, section 19. Eff. Jan. 1, 1938.)

Sections 6302-20 to 6302-24 provide other penalties, and contain the separability clause.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to Sale of a Business.

Application of the Common Law.

A covenant not to compete by the seller of a candle business for a period of 3 years in the county or any other place in the United States is enforceable only as it applies to the county. The contract, being divisible, will not be enforced to include the territory of the entire country. *Lange v. Werk*, 2 O. S. 519 (1853). See also *Thomas v. Miles*, 3 O. S. 274 (1854); cf. *Empson v. Bissinger*, 8 O. D. Rept. 629, 9 W. L. B. 86 (1883).

A covenant by the seller of a measuring rule factory not to compete anywhere in the State or the United States for a period of 25 years is unenforceable. The contract is too restrictive and greater than interest in the business sold requires. It is unenforceable even though limited to the State because of its general restraint on trade. *Lufkin Rule Co. v. Fringeli*, 57 O. S. 596, 49 N. E. 1030, 63 A. S. 736, 4 O. D. 209, 3 O. N. P. 131 (1898).

¹ Secs. 6302-15 to 6302-18.

A covenant by the seller of an oil business not to engage in the business in the State for 5 years is enforceable, even though the sphere of the business sold encompasses but a single town. *Paragon Oil Co. v. Hall*, 4 O. C. D. 576 (1893).

A covenant by the seller of a jewelry business that he will not engage in competition with the vendee in that business in the county as long as the buyer was so engaged is enforceable. *Ewing v. Davis*, 2 O. C. C. (ns) 90, 15 O. C. D. 203 (1903), aff'd 71 O. S. 471, 74 N. E. 1135, 49 W. L. B. 457, 2 O. L. R. 271 (1904).

A seller of a transfer business covenanting not to engage in such business within a radius of 2 miles for a period of 5 years is bound by his covenant. *Schroeder v. Schultz*, 16 O. C. C. (ns) 303, 26 O. C. D. 570 (1908).

A covenant by the seller of a liquor business not to engage in such business within a radius of 2 miles for a period of 5 years is bound by the covenant. *Carr v. Walker Brewing Co.*, 3 O. L. R. 618, 17 O. D. 222 (1906).

A covenant by the seller of a candy store not to engage in such business in the city of Cincinnati for a period of 5 years is enforceable. *Empson v. Bissinger*, 8 O. D. Rept. 629, 9 W. L. B. 86 (1883).

A covenant by the seller of a local tire repair business together with certain patent rights on promising that he will not engage in such business anywhere in the United States during the life of the patent, is unenforceable. *Kew Manufacturing Co. v. Plu-Gum Co.*, 28 O. App. 514, 162 N. E. 816, 27 O. L. R. 533 (1928).

A covenant by the seller of a grocery that he will not engage in such business in a particular section of the city during the period while the lease on the store sold remains in effect is enforceable. *Anderson v. Joyce*, 3 O. L. R. 509, 16 O. D. 320 (1905).

A covenant by the seller of a brick plant not to engage in such business for 10 years within a radius of 50 miles is enforceable. *Robinson v. Suburban Brick Co.*, 127 Fed. 804 (1904).

The seller of a millinery business who covenants never to engage in that business in the same town is bound by the covenant. *Morgan v. Perhamus*, 36 O. S. 517, 30 A. R. 607 (1881).

A covenant by the seller of a bakery not to compete again within 4 blocks was held valid. *Peterson v. Schmidt*, 13 O. C. C. 205, 7 O. C. D. 202 (1896).

A covenant by the seller of a rope manufacturing plant that he will manufacture no rope anywhere for a period of 5 years is unenforceable. *The Field Cordage Co. v. The National Cordage Co.*, 6 O. C. C. 615, 3 O. C. D. 613, 27 W. L. B. 18 (1892).

Application of the Statute.

A covenant by a vendor ancillary to a sale of his interests in a business to a combination of wheel manufacturers under which the vendor agreed not to compete for 5 years in the territory west of New York City and east of Denver, is in violation of section 6393 (R. S. 4427-8). *Fisher et al. v. Flickinger Wheel Co. et al.*, 7 O. C. C. (ns) 533, 18 O. C. D. 501 (1906).

Restrictive Covenants Ancillary to a Partnership Agreement.

One who agrees with his associate in the beauty parlor business that he will not engage anywhere in a similar business for a period of 10 years is invalid and unenforceable as an unreasonable restriction. *Emler v. Ferne*, 23 O. App. 218, 155 N. E. 496, 4 O. Abs. 170 (1926).

Restrictive Covenants Ancillary to Employment.

An employee of a yeast company, employed on a month-to-month basis, agreed not to divert employer's customers during employment or for 6 months thereafter in a particular city, is bound by his agreement, though employment was terminated by his employer. *Red Star Yeast & Products Co. v. Hague*, 25 O. App. 100, 157 N. E. 393, 6 O. Abs. 59 (1927).

A tea salesman agreed not to enter or accept employment in the same business in a particular city for a period of 12 months after termination of his employment, is not bound by the agreement, since he was discharged without cause. *Jewel Tea Co. v. Wilson*, 20 O. C. C. (ns) 233, 31 O. C. D. 280 (1912).

A covenant by a salesman, whose territory included two States, that he will not engage or accept employment in the same business in his assigned territory for a period of 12 months after termination is valid. *Federal Sanitation Co. v. Frankel*, 34 O. App. 331, 171 N. E. 339, 8 O. Abs. 38 (1929).

Restrictive Covenants Not Ancillary to a Sale or Lease of a Business Interest.

In consideration of certain sums of money, a covenant by a competitor to discontinue the use of a building for theater purposes forever is enforceable. *Robey et al. v. Plain City Theatre Co.*, 126 O. S. 473, 186 N. E. 1, 37 O. L. R. 488, 13 O. Abs. 257 (1933).

A contract between two newspaper publishers under which one agrees not to publish an evening paper for a period of 2 years is enforceable. *The Age Publishing Co. v. Times Publishing Co.*, 4 O. App. 13, 21 O. C. C. (ns) 24, 25 O. C. D. 421 (1914).

An agreement to abandon a small oil business in consideration that the owner will be employed by a manufacturer of petroleum products is not a violation of section 6390 et seq. *H. C. Kevil v. Standard Oil Co.*, 8 O. N. P. 311, 11 O. D. 114 (1900).

A contract not to operate a laboratory in a particular location for a stated period, in consideration of a promise that the city drop its suit against him for operating a nuisance in a restricted area, is enforceable. The restraint was revocable, and as the owner was not prevented from operating his laboratory in another location, the covenant was upheld. A contract in restraint of trade is valid if (1) the restraint is partial, (2) the contract is founded on a valid consideration, and (3) the restraint is reasonable and not oppressive. *Grasselli v. Lowden*, 11 O. S. 349 (ns) (1860).

Restrictive Covenants Ancillary to the Conveyance of Real Property.

A covenant in a deed forbidding the use of the property for hotel purposes as long as other property in the vicinity owned by the grantor is used for that purpose is enforceable. *Stines v. Dorman*, 25 O. S. 580 (1874).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Throckmorton, 1936) Cooperatives

Section 10186-16 provides that any agricultural cooperative marketing association may enter into marketing agreements with its members, requiring them to sell, for any period of time not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities created thereby. Section 10186-26 provides that such contracts shall not be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exception to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Code Ann. (Baldwin's Throckmorton, Supp., 1939) Liquor

Section 6064-24 provides that no manufacturer or wholesale distributor shall have any financial interest, directly or indirectly, by stock ownership or through interlocking directors in a corporation, or otherwise, in the establishment, maintenance, or promotion of the

business of any retail dealer; nor shall any manufacturer or wholesale distributor, nor any stockholder thereof acquire, directly or indirectly, by ownership in fee, leasehold, mortgage, or otherwise, any interest in the premises whereon the business of any other person engaged in the business of trafficking in beer or intoxicating liquor is conducted; and all contracts, covenants, conditions, and limitations whereby any person engaged or intending or proposing to engage in the sale of beer or intoxicating liquors promises to confine his sales of a particular kind or quality of beer or intoxicating liquor to one or more product or products, or the product or products of a specified manufacturer or wholesale distributor, or to give preference to such product or products, shall to that extent be absolutely void and of no effect; excepting that the making of such promise in any such form shall be cause for the revocation or suspension of any permit issued to any party thereto. See *Special Anti-Trust Laws: Liquor, supra*.

Judicial Decisions

Exclusive Dealing Arrangements.

Application of the Common Law.

A covenant in a lease providing that the lessee shall influence his employees to deal only at the store of the lessor created an unlawful restraint of trade. *Crawford & Murray v. Wick*, 18 O. S. (ns) 190 (1868).

A lessee's covenant not to sell beer other than that manufactured by the lessor for a period of 5 years and within a radius of 1 mile is not too great a restraint of trade and is valid. *Huebner-Toledo Breweries v. Joseph Singlar et al.*, 77 O. S. 626, 84 N. E. 1128, 52 W. L. B. 638, 5 O. L. R. 527, reversing 8 O. C. C. (ns) 49, 18 O. C. D. 329 (1906).

A covenant in a mortgage restricting the sale of beer on the premises to a particular brand for a specified time is enforceable even after the mortgage is satisfied. *Cleveland and Sandusky Brewing Co. v. Demko*, 9 O. C. C. (ns) 130, 19 O. C. D. 102 (1907). See also *Cleveland Sandusky Brewing Co. v. Kraval*, 16 O. C. C. (ns) 292, 26 O. C. D. 557 (1908) aff'd. 82 O. S. 395, 92 N. E. 1118, 7 O. L. R. 623.

A provision that "we will protect you in the city of Cincinnati" in a contract for the sale of filter sheets is an exclusive agency arrangement, and is violated by shipment of such goods to other dealers in Cincinnati. *Filtro Import Co. v. Janszen Co.*, 36 O. App. 63, 172 N. E. 578 (1930).

A contract providing that a distiller cease producing whiskey in the State in consideration of a promise that he become an exclusive dealer of another distiller within that area is unenforceable as an attempt to stifle competition, thereby creating a monopoly. *Standard Distilling & Distributing Co. v. Block and Others*, 78 O. S. 448, 85 N. E. 1132 (1908), reversing 5 O. N. P. (ns) 386, 17 O. D. 601 (1907). See also *Diehl Brewing Co. v. Konst*, 12 O. C. C. (ns) 577, 20 O. C. D. 782 (1905), aff'd. 79 O. S. 469, 87 N. E. 1137, 54 W. L. B. 73, 60 O. L. R. 630 (1909).

OKLAHOMA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. II. Sec. 32. Perpetuities—Monopolies—Primogeniture—Entailments.—Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

Const. art. V. Sec. 44. Unlawful restraints of trade.—The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.

Const. art. V. Sec. 51. Exclusive rights, privileges, or immunities.—The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

Const. art. IX. Sec. 41. Ownership of stock in competitor—Banks and trust companies.—No corporation chartered or licensed to do business in this State shall own, hold, or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business, in or out of the State, except such stock as may be pledged in good faith to secure bona fide indebtedness acquired upon foreclosure, execution sale, or otherwise for the satisfaction of debt. In all cases where any corporation acquires stock in any other corporation, as herein provided, it shall be required to dispose of the same within twelve months from the date of acquisition; and during the period of its ownership of such stock it shall have no right to participate in the control of such

corporation, except when permitted by order of the Corporation Commission. No trust company, or bank or banking company shall own, hold, or control, in any manner whatever, the stock of any other trust company or bank or banking company, except such stock as may be pledged in good faith to secure bona fide indebtedness, acquired upon foreclosure, execution sale, or otherwise for the satisfaction of debt; and such stock shall be disposed of in the time and manner hereinbefore provided.

Const. art. IX. Sec. 45. Monopoly or destruction of competition—Discrimination prohibited.—Until otherwise provided by law, no person, firm, association, or corporation engaged in the production, manufacture, distribution, or sale of any commodity of general use, shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate between different persons, associations, or corporations, or different sections, communities, or cities of the State, by selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture.¹

Const. art. XVIII. Sec. 7. Control and regulation not divested—Surrender of powers—Exclusive franchises.—No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subdivisions, of their control and regulation of such use and enjoyment.

Nor shall the power to regulate the charges of public services be surrendered; and no exclusive franchise shall ever be granted.

STATUTORY PROVISIONS

Stat. Ann. (1937), tit. 79

Combinations in Restraint of Trade.

Prohibitory Provisions.

Sec. 1. Trust in restraint of trade illegal.—Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal. (R. L. 1910, sec. 8220.)

Sec. 2. Discriminations in buying and selling commodities unlawful.—It shall be unlawful for any person, firm, corporation, or association, engaged in the production, manufacture, distribution, pur-

¹ For further treatment of art. IX, sec. 45, see vol. *State Price Control Legislation: Antidiscrimination Legislation*.

chase, or sale, of any commodity of general use, or rendering any service to the public or engaged in the sale or furnishing of advertising or advertising service or space for advertisements in publications thereof, to directly or indirectly, either in person or by or through any agent or representative² discriminate between different persons, firms, associations, or corporations, or between different sections, communities, or cities of the state;

(A) By selling such commodity, or rendering such service at a lower price or rate in one section, community, or city than another, or at the same price or rate at a point away from that of production or manufacture as at the place of production or manufacture, after making due allowance, in either instance, for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition or restraining trade, or to destroy the competition of any regular established dealer in such commodity or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer;

(B) By selling such commodities, or rendering such service, or by selling or furnishing such advertising or advertising service or space for advertisements in publication thereof, at a lower price or rate to one person, firm, copartnership, corporation, or association than to another, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition or restraining trade, or to destroy the competition of any regular established dealer in such commodity or to prevent the competition of any person who, in good faith, intends and attempts³ to become such a dealer, or to destroy the competition of any person, firm, copartnership, corporation, or association who is engaged in furnishing such service, or in the sale or furnishing of such advertising, advertising service, or space for advertisements in publications thereof;

(C) By buying such commodity at a higher price in one section, community, or city than another, after making due allowance for the difference, if any, in the grade, quantity, or quality of the commodity and in the actual cost of its transportation from the point of purchase to the point where such commodity is to be sold by the purchaser, or to be consumed, or to be used in the manufacture of commodities or products, if the effect or intent thereof is to establish or maintain a virtual monopoly⁴ hindering competition or re-

² Probably should read "representative."

³ Probably should read "attempts."

⁴ Probably should read "monopoly."

straining trade, or to destroy the competition of any regular established dealer in such commodity or to prevent the competition of any person who, in good faith, intends or attempts to become such dealer;

(D) By buying such commodity in any section, community, or city of the state at a higher price from one person, firm, corporation, or association than from another, after making due allowance for the difference, if any, in the grade, quantity, or quality of such commodity, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition or restraining trade, or to destroy the competition of any regular established dealer in such commodity or to prevent the competition of any person who, in good faith, intends and attempts to become such a dealer. R. L. 1910, sec. 8227; Laws 1923, ch. 29, p. 41, sec. 1; Laws 1933, ch. 112, p. 224, sec. 1; Laws 1935, p. 338 (S. B. No. 172), sec. 1.) Effective on approval April 24, 1935.

Sec. 3. Combinations in restraint of trade unlawful.—It shall be unlawful for any person, partnership, firm, association, corporation, or joint stock company, or agent thereof, to issue, or to own, trust certificates, or for any person, firm, partnership, association, joint stock company, or corporation, agent, officer, employee, or the director or stockholders of any corporation, association, or joint stock company, to enter into any combination, contract, or agreement with any person, corporation or association, firm, or partnership, or with any stockholder, director or officer, agent or employee of the same, the purpose or effect of which combination, contract, or agreement shall be to place the management or control of such combination or combinations, or the conduct or operation of the same, or the output or manufactured product thereof, or the marketing of the same, in the hands of any trust or trustees, holding corporation or association, firm, or committee, with the intent or effect to limit or fix the price, or lessen the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit, or diminish the manufacture or output of any such article of commerce, use or consumption; and every person, firm, partnership, association, joint stock company, or corporation, or any agent, employee, officer, or director of the same, that shall enter into any such combination, contract, management, or agreement for the purpose aforesaid, shall be deemed and adjudged guilty of conspiracy in restraint of trade, and punished as provided for in Section 8228^b in so far as applicable: Provided, that this

^b Sec. 27 of this title.

section shall not be construed to extend beyond the scope and meaning of the first section of this article.⁶ (R. L. 1910, sec. 8232.)

Sec. 4. Public business defined—Duty to serve public.—Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold herein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this Article,⁷ said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates, and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business. (R. L. 1910, sec. 8235.)

Sec. 5. Previous and continuing violations included.—Any violation of this Article,⁸ committed before its passage, and continued in any illegal form after its passage, is within its terms. (R. L. 1910, sec. 8237.)

Sec. 6. Selling or furnishing advertising service at less than cost.—It shall be unlawful for any person, firm, corporation, or association, engaged in the sale or furnishing of advertising or advertising service or space for advertisements in publications thereof, to sell or furnish the same at a price less than cost, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition or restraining trade or to destroy the competition of any regular established publisher located and doing business in the same town, city, or community wherein said person, firm, corporation, or association is located and doing business. (Laws 1935, p. 339 (S. B. No. 172), sec. 2.) Effective on approval, April 24, 1935.

Sec. 7. Penalty for furnishing advertising service for less than cost.—Any person, firm, corporation, or association guilty of a violation of this Act⁹ shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than Fifty (\$50.00) Dollars, nor more than Five Hundred (\$500.00) Dollars, for each offense, and

⁶ Sec. 1 of this title.

⁷ Sec. 1 of this title.

⁸ R. L. 1910, ch. 79, art. 1, now incorporated in this title.

⁹ Secs. 2, 6, 7 of this title.

shall likewise be held civilly liable to pay all damages and costs incurred by a competitor who has sustained a loss or detriment by reason of the violation of this Act. (Laws 1935, p. 339 (S. B. No. 172), sec. 3.)¹⁰

Prosecution and Other Remedies.

Sec. 21. Proceedings by attorney general to prevent restraint of trade.—If the attorney general shall have sufficient evidence that the provisions of the constitution or any law pursuant thereto against the establishment or maintenance of any trust, monopoly, or unreasonable restraint of trade, or any of the provisions of this Article¹¹ are about to be or have been violated by any person, firm, corporation, or association engaged in any quasi public business or having a virtual monopoly of any commodity or business, with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this article, he may file information in the Supreme Court, and by proceeding as against nuisance, enjoin and restrain said combination or arrangement or any of its members, or by a proceeding analagous¹² to libel, cause any or all the personal property of said offending person, firm, or corporation, or association, used or to be used, in whole or in part, in any transaction which in effect or intent hinders competition, or produces unreasonable restriction of trade, to be forfeited to the State in the discretion of the court, together with all the commodities in the possession or control of such offending corporation, person, firm, or association, used or intended for such use, in violation of the constitution or laws pursuant thereto or this article; and he may take both said proceedings. (R. L. 1910, sec. 8221.)

Sec. 22. Restraining order in proceeding by Attorney General—Receiver.—Upon the filing of such petition or at any time thereafter the attorney general may apply for an injunction pending the action and the appointment of a receiver for any or all of the property of such person, firm, corporation, or association. Upon such application, the court, or a majority of the justices thereof, if in vacation, is authorized to issue a restraining order pending the action enjoining the defendant from changing in any way the business, records, books, instruments, or property to them belonging, or by them used, directly or indirectly, and to issue a rule to show cause why a receiver should not be appointed, and after notice of such rule shall have been served

¹⁰ For further treatment of secs. 6 and 7, see vol. *State Price Control Legislation; Prohibition of Sales Below Cost.*

¹¹ R. L. 1910, ch. 79, art. 1, now incorporated in this title.

¹² Probably should read "analogous."

on the defendant or defendants or any managing agent of said defendant or defendants within this State, and an opportunity to be heard having been given said receiver may be appointed in the discretion of the court, to take charge of the property of the defendant or defendants so notified. (R. L. 1910, sec. 8222.)

Sec. 23. Duty of receiver—Evidence—Process—Costs—Contempt.—Such receiver shall preserve said property free from any illegal arrangement until the termination of the litigation, and thereafter dispose of the same according to law, or any other remedy may be applied, or both, more effectually to produce and consummate such preservation or forfeiture, or both; and said court shall be authorized by appointed master in chancery, or otherwise, in its discretion, to receive evidence in any county in the State, according to the rules of civil procedure, and have findings of fact made thereon for said court; and said master in chancery shall have compulsory process for witnesses and the production of books and papers from any part of the State, and for this purpose, the executive officers of the said court, or any of the district courts of this State shall be empowered to serve mesne and final process; and the services of said master in chancery, or other person appointed by the court, shall be paid for as costs by the losing parties in said cause, in an amount equal to the fees that would have been earned therein if a notary public had received said testimony, together with a sum of not exceeding ten dollars per day, in the discretion of the court, and the actual expenses for each day that testimony is actually received, and testimony and evidence in such action may also be taken by deposition anywhere within or without this State, as in civil actions in the district court. In the event of a violation of any order of the court therein, and a proceeding grows out of the same in the nature of contempt, if the defendant demand a trial by jury, the court may transfer the said contempt proceedings to any district court of the State for trial by jury and a verdict, but the judgment, if any, shall be rendered by said supreme court, and sentence, if proper, passed by it. This proceeding shall be in addition to and cumulative as to any other provisions of the law applicable to the same situation. (R. L. 1910, sec. 8223.)

Sec. 24. Stay bond.—The appointment of such receiver may be stayed, or after appointment and possession taken the receiver shall be discharged, upon the defendant giving bond in an amount, and with sureties to be approved by said court or a justice thereof, conditioned for the payment of all damages and costs which may be assessed against the defendant in said proceeding in favor of the State, or any officer, or person. (R. L. 1910, sec. 8224.)

Sec. 25. Recourse of injured parties.—Any person, firm, corporation, or association, who shall be injured in his business or property by any other person, firm, corporation, or association, by reason of anything forbidden, or declared to be unlawful by this article, may sue therefor in the courts of this State, and shall recover threefold the damages by him sustained, and the cost of suit, and a reasonable attorney's fee to be fixed by the court. (R. L. 1910, sec. 8225.)

Sec. 26. Foreign corporations forfeit license by violation.—Every foreign corporation, as well as every foreign association exercising any of the powers, franchises, or functions of a corporation in this State, violating any of the provisions of this Article¹³ is hereby denied the right and prohibited from doing business in this State, and the Secretary of State, upon the order of the corporation commission, or any competent court, made after due notice and in due course of law, shall revoke the license of any such corporation or association heretofore authorized to do business in this State. (R. L. 1910, sec. 8226.)

Sec. 27. Punishment and recovery of penalty.—Any person who shall violate any of the provisions of this Article,¹³ or take part, or aid, or advise in any such violation provisions, or who shall, as officer, manager, director, agent, servant, or employe of any firm, corporation, or association knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information, knowingly, to assist in carrying out such purposes, or in pursuance thereof, in violation of said provisions, shall be punished by a fine of not less than fifty dollars nor more than ten thousand dollars, and by imprisonment not less than ten days nor more than ten years at the discretion of the court; and each day's violation of any of the provisions of this Article, shall constitute a separate offense. And any sum which might be assessed as a fine by way of punishment for a crime as herein provided, may be recovered by the State as a penalty in civil action in addition to, or irrespective of, the assessment and assessability of said fine, either before, after, or simultaneously with the pendency of said criminal action. (R. L. 1910, sec. 8228.)

Sec. 28. Indictment or information.—In any indictment or information for any offense named in this article, it is sufficient to state the purpose, or facts, of the trust, monopoly, or unlawful combination in restraint of trade or commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out

¹³ R. L. 1910, ch. 79, art. 1, now incorporated in this title.

its purpose without giving its name, or description, or stating how, when, or where it was created. (R. L. 1910, sec. 8229.)

Sec. 29. Witnesses—Subpoenas—Immunity.—It shall be the duty of the court before whom any proceeding under this article may be brought, upon the application of the attorney general, to cause to be issued by the clerk of said court subpoenas for such witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where or whither such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge, at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this article; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person so subpoenaed and examined, shall not be liable to criminal prosecution for any violation of this article about which he may testify, neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all the witnesses shall, at the option of the attorney general, be taken down and shall be transcribed and placed in the hands of the attorney general, and he shall be authorized to prosecute such violator, or violators, of this article as the testimony so taken shall disclose. Witnesses subpoenaed as provided in this act, shall be compelled to attend from any county in the State. (R. L. 1910, sec. 8230.)

Sec. 30. County attorneys, prosecutions by.—It shall be the duty of the county attorneys of the several counties of this State, as well as the attorney general of the State, to prosecute all actions to enforce the criminal provisions of this article. (R. L. 1910, sec. 8231.)

Sec. 31. Corporation owning stock of competitor—Penalty.—Every corporation which shall own, hold, or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business, in or out of this State, in violation of the Constitution and laws of this State, shall forfeit its charter or license to do business in this State, and shall be subject to a penalty of not less than one thousand dollars, nor more than ten thousand dollars, to be recovered at the suit of the State in any court of competent jurisdiction. (R. L. 1910, sec. 8233.)

Sec. 32. State to have lien on property of law-breaking corporation.—Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State, shall violate any law of this State, for the violation of which fines, penalties, or forfeitures are provided, all property of such cor-

poration within this State at the time of such violation, or which may hereafter come within this State, shall by reason of such violation, become liable for such fines or penalties and for all costs of suit, and of collection. The State of Oklahoma shall have a lien on all such property from the date that suit shall be instituted by the attorney general in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or cancelling the permit, of such corporation, or for the recovery of such fines or penalties; the institution of such suit for the recovery of such fines, penalties, or forfeitures shall constitute notice of such lien. (R. L. 1910, sec. 8234.)

Sec. 33. Proof required in prosecutions or proceedings.—In all prosecutions or proceedings under this article, it shall be sufficient to prove that a trust, monopoly, combination in restraint of trade or commerce, existed without the period not barred by the statute of limitations, and was continued in any form into and during any portion of the period not so barred, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. (R. L. 1910, sec. 8236.)

Sec. 34. Remedies cumulative.—Nothing in this article shall abridge or alter any remedy now existing, either at common law or by statute, but the provisions of this article are in addition to such remedies. (R. L. 1910, sec. 8238.)

Sec. 35. No recovery for goods sold in violation hereof—Compulsory testimony.—Any person purchasing provisions, feed, material, articles of merchandise, or any commodity from any individual, firm, partnership or corporation, transacting business in violation of the provisions of this Article,¹⁴ shall not be liable for the price or payment of any such article or commodity, and may plead this article as a defense in any suit for price or payment. In any civil action brought under the provisions of this section the court before whom such suit shall be pending may compel the plaintiff to testify, but if the plaintiff be a corporation, then the court may compel any officer, agent, or employe of such corporation to attend, appear, and testify, or compel the production of any contract or papers in evidence in such civil action: *Provided*, That the evidence so obtained shall not be used in any criminal prosecution against the person so

¹⁴ R. L. 1910, ch. 79, art. 1, now incorporated in this title.

testifying except in a criminal prosecution for perjury committed in giving such testimony. (R. L. 1910, sec. 8239.)

Sec. 36. Purchaser from violator may recover damages—Compelling testimony.—Any person who shall have purchased from any individual, firm, partnership or corporation, doing business in violation of the provisions, of this Article,¹⁵ any provisions, feed, fuel, lumber or other building material, articles of merchandise, or other commodity and paid for the same, may maintain a civil action to recover the full amount of damages sustained in consequence of any such violation of Article, together with a reasonable attorney's fee, to be fixed by the court, which attorney's fee shall be taxed and collected as part of the costs in such case. In any civil action brought under the provisions of this section, the court before whom such suit is pending may compel the defendant to testify, but if the defendant be a corporation, then the court may compel any officer, agent or employe of such corporation to attend, appear and testify or compel the production of any contract or papers as evidence in such civil action; *Provided*, That the evidence so obtained shall not be used in any criminal action against the person so testifying except in a criminal prosecution for perjury committed in giving such testimony. (R. L. 1910, sec. 8240.)

Sec. 37. County attorneys, enforcement by.—It shall be the duty of the county attorneys in their respective counties, to enforce the foregoing provisions of this article. (R. L. 1910, sec. 8241.)

Unfair Discrimination or Competition.

Sec. 81. Unfair discrimination defined.—Any person, firm, or corporation, foreign or domestic, doing business in the State of Oklahoma, and engaged in the production, manufacture or distribution of any commodity in general, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community, or city, or any portion thereof, than such person, firm or corporation, foreign or domestic, charges for such commodity in another section, community or city, or that shall discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community,

¹⁵ Secs. 81-87 of this title.

or city, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such commodity in another section, community, or city after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom, shall be deemed guilty of unfair discrimination, which is hereby declared to be a misdemeanor. (Laws 1913, ch. 114, p. 211, sec. 1.) Effective on approval March 29, 1913.

Sec. 82. Investigations of corporations—Actions—Revocation of charters and permits.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by act,¹⁶ he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if in his opinion sufficient grounds exist therefor, he may administer oaths, take testimony, and require the production of books or other documents, and if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and if in such action the court shall find that such corporation is guilty of unfair discrimination, as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state. (Laws 1913, ch. 114, p. 212, sec. 2.)

Sec. 83. Violations—Punishment.—Any person, or the managing agent or agents of any firm or corporation violating the provisions of section one (1) of this act¹⁷ shall upon conviction thereof, be fined not less than one hundred (\$100.00) dollars, nor more than five hundred (\$500.00) dollars for each offense. (Laws 1913, ch. 114, p. 212, sec. 3.)

Sec. 84. "Combination" of corporations defined.—Where two or more corporations engaged in the same lines of business shall have or may hereafter become associated together by the owning, holding, or controlling of certificates of stock, or other interest, in more than one of such corporations by one of such corporations, or any stockholder thereof, the same shall be deemed, and is hereby declared to be, a "combination," and all corporations so linked together, and all auxiliary corporations and business plants owned or controlled

¹⁶ Secs. 81-87 of this title.

¹⁷ Sec. 81 of this title.

by them, or either of them, directly or indirectly, are declared to be members of such combination. (Laws 1913, ch. 114, p. 212, sec. 4.)

Sec. 85. Price changes to detriment of financially weaker competitor prohibited—Exceptions.—Raising or lowering by such combination, or any member thereof, in the immediate territory of a financially weaker competitor, the price of a commodity handled by such competitor or lowering the price charged for services rendered the public by such competitor, while at the same time the same combination, or some member thereof, is engaged in buying or selling a like commodity for a different and more advantageous price, or is charging a greater rate for like services rendered the public at another point within the State of Oklahoma, is hereby declared to be unfair and destructive competition and is hereby prohibited; and the doing of any act which, directly or indirectly, brings about a similar effect on such weaker competitor shall be a violation of this act;¹⁸ provided, a proper allowance shall be made for grade or quality of product and freight rate. Provided nothing herein contained shall prevent such combination, or any member thereof, from meeting any price, made by any one not connected in any way with, or influenced by, any member thereof, at any point within this state without being required to make such price generally, so long as such outside party maintains such price in good faith, but no longer, if such point be within the immediate territory of a financially weaker competitor. (Laws 1913, ch. 114, p. 213, sec. 5.)

Sec. 86. Weaker competitor entitled to damages from "combination"—Ascertaining lost profits.—Every such weaker competitor injured by reason of any of the acts herein prohibited in the foregoing section¹⁹ may recover, as damages, of the offending combination, or any of the offending members thereof, three times the amount of actual damages sustained thereby, together with a reasonable attorney fee for collecting such damages. Lost profits may be recovered as damages, and lost profits may be ascertained by taking the difference in the price paid or received for a commodity or for services rendered the public in the territory of such weaker competitor and the price paid or received for a like commodity or like services rendered at any other point within this state by such combination, or any member thereof. Grade or quality of product and freight rate to be considered as in previous section. Suit for such damages and attorney fees may be brought in any court of competent

¹⁸ Secs. 81-87 of this title.

¹⁹ Sec. 85 of this title.

jurisdiction in the county wherein such damage may be sustained. (Laws 1913 ch. 114, p. 213, sec. 6.)

Sec. 87. Remedies cumulative.—Nothing in this act shall be construed as repealing any other act, or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law.²⁰ (Laws 1913, ch. 114, p. 214, sec. 7.)

Stat. Ann. (1937), tit. 17

Procedure and Appeals in Actions Under Antitrust Acts.

Sec. 141. Procedure and appeals in actions under the Anti-Trust Laws.—In all cases where not otherwise provided by specific legislation, for actions arising under the Antitrust Laws, and prosecuted before the Corporation Commission, to wit: Section 45, Article 9, Constitution of Oklahoma and Chapter 79, Sections 8220 to 8241, both inclusive, Revised Laws of Oklahoma, 1910 (secs. 1 to 5 and 21 to 37 of title 79) (secs. 529 to 551, both inclusive, Corporation Commission Laws, 1917), and Chapter 114, Session Laws, 1913 (secs. 81 to 87 of title 79) (secs. 552 to 558, both inclusive, Corporation Commission Laws, 1917), the same laws and rules as to procedure, notice and appeal shall apply as are prescribed for transportation and transmission companies in the Constitution of Oklahoma and other laws of the State applicable thereto. (Laws 1919, ch. 52, p. 86, sec. 1.)

Sec. 142. Enforcement of orders of commission.—The enforcement of any orders of the Corporation Commission made hereunder shall be governed by the laws relating to the enforcement of orders of the Corporation Commission made as to transportation and transmission companies. (Laws 1919, ch. 52, p. 87, sec. 2.)

Sec. 143. Procedure in cases under section 4 of title 79, Trusts and Pools—Enforcement of orders.—In all actions arising before the Corporation Commission under Section 8235, Revised Laws of Oklahoma, 1910 (sec. 545, Corporation Commission Laws, 1917) (sec. 4 of title 79) the same laws and rules as to procedure, notice of hearing and trial, and as to appeals to the Supreme Court shall apply as are prescribed for said Commission as to transportation and transmission companies; and the same laws and rules applicable to the enforcement of orders of the Corporation Commission as to transportation and transmission companies shall be applicable to the enforcement of any order or orders made under Section 8235, Revised Laws of Oklahoma, 1910 (sec. 545, Corporation Commission Laws, 1917). (Laws 1919, ch. 52, p. 87, sec. 3.)

²⁰ For further treatment of secs. 2, 7, and 81 to 87, see vol., *State Price Control Legislation: Antidiscrimination Legislation.*

Sec. 144. Other laws not affected except as stated.—Nothing in the Act (secs. 141 to 145 of this title) shall be construed to in any way modify or amend Section 8235, Revised Laws of Oklahoma, 1910 (sec. 545, Corporation Commission Laws, 1917), (sec. 4 of title 79) or to any other law mentioned herein, except as stated herein, and as relates to questions of procedure, notice, enforcement of orders of Corporation Commission, or appeals. (Laws 1919, ch. 52, p. 87, sec. 4.)

Sec. 145. Partial invalidity.—The invalidity of any section, subdivision, clause, or sentence of this Act (secs. 141 to 145 of this title) shall not in any manner effect the validity of the remaining portions thereof. (Laws 1919, ch. 52, p. 87, sec. 5.)

Stat. Ann. (1937), tit. 21
Conspiracy Statutes

Section 421 provides (in part) that it is illegal for two or more persons to conspire to commit any act injurious to trade or commerce.

Judicial Decisions

Application of the Common Law.

Execution of a lease was enjoined where the lessor corporation and one allied with it controlled 52 compresses, and through such leasing arrangements were rapidly expanding their business in a number of cotton States. In considering whether a contract is in restraint of trade, it is immaterial whether it was entered into with any evil intent. The material consideration is its injurious tendency and the power thereby given to control prices. *Anderson et al. v. Shawnee Compress Co. et al.*, 17 Okla. 231, 87 Pac. 315 (1906).

In order to vitiate a contract, it is not essential that the result shall be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages derived from free competition. *Id.*

Constitutionality of Statutes.

The antitrust statute of the Territory of Oklahoma (Wilson's Statutes of 1903, c. 83) was held valid. *Territory v. Long Bell Lumber Co. et al.*, 22 Okla. 890, 99 Pac. 911 (1908); *Wagner v. Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969 (1910).

Title 79, sections 1 to 5 and 21 to 37 taken in connection with title 40, section 166, exempting labor from the provisions of the antitrust laws

does not violate the "equal protection" or "due process clauses" of the Federal Constitution. *State v. Coyle*, 7 Okla. Cr. 50, 122 Pac. 243 (1912). Rehearing denied *State v. Coyle*, 8 Okla. Cr. 686, 130 Pac. 316 (1913).

Title 79, sections 1 to 5 and 21 to 37 are not void for uncertainty, *State v. Coyle, supra*.

The antitrust act does not embrace more than one subject in violation of Const. art. 5, sec. 57. *Oklahoma Light & Power Co. v. Corporation Commission et al.*, 96 Okla. 19, 220 Pac. 54 (1923).

Provisions for the enforcement of rates fixed by the Corporation Commission, pursuant to title 79, section 4, which as interpreted by the State courts could be tested only by disobeying the order and risking a penalty as high as \$500 a day for contempt if the rate was upheld, are in violation of the Fourteenth Amendment to the Federal Constitution. *Oklahoma Operating Co. v. Love, et al.* (members of the corporation commission), 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596 (1920); *Oklahoma Gin Co. v. Oklahoma*, 252 U. S. 339, 40 Sup. Ct. 341, 64 L. Ed. 600 (1920), rev'g *Oklahoma Gin Co. v. State*, 63 Okla. 10, 158 Pac. 629 (1916).

Article 10, section 87 (Comp. Stats. 1921), requiring accountants to hold themselves out as public accountants or auditors only after obtaining a certificate from the State was held unconstitutional (inter alia) as tending to create a monopoly. *State ex rel. Short, Attorney General et al. v. Riedell et al.*, 109 Okla. 35, 233 Pac. 684 (1924).

Application of Statutes.

In General.

When the territory of Oklahoma and other Indian Territories became transformed into the State of Oklahoma, section 3 of the Sherman Antitrust Act ceased to apply to commerce within the boundaries of the State. *State v. Coyle, supra*.

The Antitrust Act of 1908 continued the Territorial Antitrust Act in force except as it conflicted with the Act of 1908. *Id.*

In a suit to restrain defendants for maintaining a nuisance, a petition alleging that defendants became members of a combination to fix the price of lumber, coal, and grain and that defendants by controlling the distribution of such commodities in the territory thereby restricted competition, was upheld as proper grounds for relief. *Territory v. Long Bell Lumber Co. et al., supra*.

In a suit on a note, defendant pleaded that before the machinery sold was contracted for, plaintiff had become a party to a combination in restraint of trade in farm implements and was transacting business contrary to the antitrust laws of the Territory. The plea was held

good against demurrer under title 79, section 35. *Wagner v. Minnie Harvester Co., supra.*

The mere fact that a company dealing in commodities in two similarly situated communities in this State makes a sale of such commodities at a lower price in one is not, in the absence of other evidence showing an unlawful intent, sufficient to establish a discriminatory intent to destroy competition in violation of title 79, section 81. The evident purpose of the legislature in enacting this section was twofold: (1) To prevent discrimination for the purpose of strangling or thwarting competition; (2) in the absence of competition or otherwise, to prevent discrimination in selling as between two similarly situated communities. *Western Lumber Co. v. State*, 17 Okla. Cr. 427, 189 Pac. 868 (1920).

In stating a cause of action based on discrimination under title 79, the petition must allege acts which constitute unfair or unlawful discrimination as defined therein; the petition in this case was held not to fulfill that requirement. *James et al. v. Oklahoma Natural Gas Co.*, 181 Okla. 54, 72 Pac. 2d 495 (1937).

As to a Public Business.

In a case involving an order issued by the corporation commission fixing rates to be charged by a gas company operating in a city, it was held that title 79, section 4, does not authorize the Commission to fix utility rates. *Shawnee Gas & Electric Co. v. Corporation Commission of Oklahoma*, 35 Okla. 454, 130 Pac. 127 (1913).

This opinion, however, was criticized in narrowing the scope of section 4 in *Oklahoma Light & Power Co. v. Corporation Commission et al.*, 96 Okla. 19 at 22 and 23, 220 Pac. 54 at 56 and 57 (1923).

And, in a case involving rates fixed for a company supplying gas solely to industrial consumers, it was held that section 4 makes such an industry a public utility and subjects it to the jurisdiction and control of the corporation commission from which it cannot escape as long as it remains a public utility. *Eagle-Picher Lead Co. et al. v. Henryetta Gas Co. et al.*, 112 Okla. 65, 239 Pac. 890 (1925).

In a case involving the only ice plant in a city, the corporation commission was held to have jurisdiction to determine the necessity of regulating the price of ice. The extent of regulation under this section must be determined from the character of the business and the rights of the owner and consumers. *Oklahoma Light & Power Co. v. Corporation Commission et al., supra.* See also *Quinton Relief Oil & Gas Co. v. Corporation Commission et al.*, 101 Okla. 164, 224 Pac. 156 (1924); *Russell et al. v. Walker et al.*, 160 Okla. 145, 15 Pac. 2d 114 (1932).

In determining whether a business comes within purview of title 79, section 4, consideration must be given to such factors as the character of the commodity, extent of use by the public, supply, demand, prices, etc. An ice manufacturing company was held to conform to this definition because it was the sole manufacturer and sold to all within the city. *Consumers Light & Power Co. v. Phipps*, 120 Okla. 223, 251 Pac. 63 (1926).

Two companies were engaged in the manufacture of cement in Oklahoma. They were not charging unreasonable prices for their cement, and did not control the supply as they were in competition with 12 out-of-State manufacturers. It was held that title 79, sections 1 and 4 did not apply since the corporation commission was warranted in regulating the business of companies manufacturing products only when by reason of the nature and extent of such business, or the existence of a virtual monopoly therein, the public was forced to use commodities manufactured solely by such companies. *Oklahoma Portland Cement Co. et al. v. State et al.*, 87 Okla. 282, 210 Pac. 1031 (1922).

In a case involving a ginning monopoly, it was held that title 79, section 4, does not authorize the corporation commission to exact a fine of a corporation for violating the penal laws of the State. *Planters' Cotton & Ginning Co. v. West Bros. et al.*, 82 Okla. 145, 198 Pac. 855 (1921).

Enforcement.

The power to enforce the civil provisions of the antitrust laws on behalf of the State lies entirely with the attorney general. Suits of this class cannot be brought by the county attorneys. *State ex rel. Tankersley, County Attorney, v. Griffith et al.*, 171 Okla. 259, 42 Pac. 2d 861 (1935).

In a suit brought by a minority stockholder to have a receiver appointed for a corporation in violation of Const. art. IX, sec. 41, the court held (inter alia) that under this section it had no such jurisdiction, as suits for violation of the section are enforceable only by the State and not by a private individual. *Fehr v. Black Petroleum Corporation et al.*, 103 Okla. 241, 229 Pac. 1048 (1924). See also *State ex rel. Dabney et al. v. Carmeron & Co., Inc.*, 147 Okla. 1, 294 Pac. 104 (1930).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. Ann. (1936), tit. 78

Sections 41 to 45, constituting the Fair Trade Act permitting the fixing by contract of resale prices of trade-marked commodities, expressly provides, section 42, that this act shall not apply to contracts or agreements between producers, between wholesalers, or between retailers. See *State Price Control Legislation: Resale Price Maintenance*, MARKETING LAWS SURVEY.

Stat. Ann. (1936), tit. 2

Cooperatives

Section 354 provides that no association organized under the Agricultural Cooperative Marketing Association Acts of 1917, sections 331 to 354, shall be deemed a conspiracy or combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. To same effect see Stat. Ann. (Supp. 1939) tit. 2, sec. 361t, of the Agricultural Cooperative Marketing Association Act of 1937, sections 361 to 361y. See *Tying Contracts and Exclusive Arrangements*, *infra*. See also *Cooperatives* in projected study.

Stat. Ann. (1936), tit. 40

Labor

Section 166 provides that no combination or contract agreement between two or more persons in contemplation of or in furtherance of a trade dispute shall be deemed criminal if such act committed by one person would not be punishable as a crime. Such agreement shall not be considered as in restraint of trade or commerce.

Judicial Decisions

Cooperatives.

In a suit for damages and specific performance under title 2, sections 331 to 354 (L. 1917, c. 22, sec. 13), it was held that a cooperative marketing association cannot enforce the obligation of its members to sell through it, if it has denied them to right of withdrawing from the association. The statute having been violated, relief is denied. *Oklahoma Cotton Growers Assn. v. Salyer*, 114 Okla. 77, 243 Pac. 232 (1926). See also *Hoover v. Oklahoma Cotton Growers Assn.*, 118 Okla. 238, 247 Pac. 39 (1926); *Carmichael v. Oklahoma Cotton Growers Assn.*, 117 Okla. 24, 245 Pac. 598 (1926).

Title 2, sections 331 to 354 (L. 1917, c. 22, sec. 13), provide that damages for violation of a cooperative marketing agreement shall be reasonable. The agreement sued on was held to violate this section since it fixed an arbitrary sum of 5 cents a pound for its violation and deprived defendant of the right to a jury trial. For these reasons, the exclusive marketing agreement was held void and unenforceable. *Oklahoma Cotton Growers Assn. v. Salyer, supra.*

Labor Agreements.

Title 40, section 166, is constitutional. *State v. Coyle*, 7 Okla. Cr. 50, 122 Pac. 243 (1912); rehearing denied *State v. Coyle*, 8 Okla. Cr. 686, 130 Pac. 316 (1913).

Title 40, section 166, is clear, specific, and comprehensive in its provisions. It shields labor combinations from the interference of either civil or criminal process in their peaceable and legitimate endeavors to further their interests in trade disputes with their employers. Since this section is constitutional, a writ of habeas corpus was granted petitioner on the ground that the city ordinance under which she was arrested was invalid as being in conflict with the above statute enacted as an exception to the antitrust law. *Ex Parte Sweitzer*, 13 Okla. Cr. 154, 162 Pac. 1134 (1917).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Public Service and Railroad Corporations

Const. art. IX, sec. 8, provides that no public service corporation shall consolidate with, or lease or purchase, or in any way control any other public service corporation owning or having under its control a parallel or competing line, except by enactment of the Legislature upon the recommendation of the Corporation Commission. It is further provided, however, that the Legislature shall never enact a law permitting any foreign public service corporation to consolidate with, lease, purchase, or in any way control, any other foreign public service corporation having under its control in this State a parallel or competing line.

Const. art. IX, sec. 9, provides, however, that any foreign or domestic railroad transportation or transmission company, upon the consent of the corporation commission, may lease, buy, or otherwise acquire the property and franchises of any like company; provided, that the legislature may impose additional limitations upon the rights of any such companies to consolidate.

STATUTORY PROVISIONS

Stat. Ann. (1937), tit. 66

Railroads

Section 184 authorizes any railroad company, owning any railroad in the State, to sell or lease the whole or any part of its railroad, or any interest therein to any other railroad company, subject to the provisions of Const. art. 9, if the road so leased or sold will form a continuous line with the road of the company purchasing or leasing the same.

Grain Warehouses

Stat. Ann. (1937) tit. 81, sec. 12, prohibits any warehouseman, or agent, or manager of a public warehouse from entering into any combination, agreement, or understanding with any railroad, transfer, or other carrying corporation, or with any person, by which the property of any person is to be delivered to any public warehouse for storage, or other purpose, contrary to the direction of the owner, his agent, or assignee.

Stat. Ann. (1937), tit. 79

Publishing Companies—Advertising Service

Sections 6 and 7, a part of the general antitrust act, provide that it shall be unlawful for any company furnishing advertising space or service in publications thereof, to sell such space or service below cost, with the effect or intent of establishing a monopoly or of destroying competition of a regularly established publisher in the same community. Violation of this provision is a misdemeanor and subjects the offender to a fine, as well as civil liability for all damages and costs incurred by an injured competitor. See *General Antitrust Acts, supra*. See also Vol. *State Price Control Legislation: Prohibition of Sales Below Cost*.

Stat. Ann. (1937), tit. 52

Oil and Gas

Sections 201 to 211, constituting the Act ratifying the Interstate Compact to Conserve Oil and Gas, expressly provides, section 204, article V, that it is not the purpose of the compact to authorize the states joining therein to limit the production of oil or gas for the purpose of establishing or fixing the price thereof, or create or perpetuate monopoly, but is limited to the purpose of conserving oil and gas preventing the avoidable waste thereof within reasonable limitations. Under this compact, the states joining therein are bound to enact or continue in force, conservation statutes limiting the production of oil and gas wells and denying access to commerce of oil and gas produced in violation of such conservation acts.

Section 115 penalizes a conspiracy to violate the Oklahoma Oil and Gas Conservation Act, sections 84 to 135, or a conspiracy to produce more oil or gas than allowed under production quotas, by subjecting the offender to a fine or imprisonment for not more than five years, or both.

Oil Pipe Line Carriers

Section 57 provides that it shall be unlawful for any company engaged in the business of transporting crude oil or petroleum, or any products thereof, to own or operate, directly or indirectly, any oil well, oil leases, or oil holdings or interests in the State, and each such company shall divest themselves of all legal or equitable interests in such holdings.

2. Public Contract Provisions

Stat. Ann. (1937), tit. 79 Highway and Bridge Contractors

Sections 101 to 103 provide that it shall be unlawful for any bridge or other contractor or association of such contractors, for the construction of any bridge or road to be constructed under any law of the State, to enter into any agreement, contract, or combination for:

- The pooling of prices of different competing contractors;
- Dividing between them the aggregate or net proceeds of the earnings of such contractors;
- Fixing the price which any such contractor or association shall bid or charge for construction or furnishing material therefor; or
- The allotment of any territory which any other such contractor or association shall have for his or its exclusive territory.

The State, municipality, or person injured by any violations of these provisions may recover treble damages.

Violation also constitutes a felony, and subjects the offender to a fine, or imprisonment for not more than five years, or both. See *contracts not to Complete, infra*. See also projected Vol. *Governmental Purchasing*.

Stat. Ann. (1937), tit. 21 Public Contracts

Section 424 provides that it is illegal to conspire to commit an offense against or to defraud the state in any manner.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Public Utilities.

Const. art. IX, secs. 8 and 9 (relating to consolidation of railroad and public service corporations), do not apply retroactively. *St. Louis & San Francisco R. R. Co. v. Cross*, 171 Fed. 480 (1909) affd. *Harrison v. St. Louis & San Francisco Railroad Co.*, 232 U. S. 318, 58 L. Ed. 621, 34 Sup. Ct. 333 (1914).

L. 1925, c. 102, providing for the surrender of municipal utility franchises in exchange for permits revocable only by the State legislature, in such manner that no injustice shall be done to the holder of the permit, authorizes conversion of a limited into a perpetual franchise and is therefore unconstitutional violating Const. art. II, sec. 32 (prohibiting perpetuities and monopolies), and art. XVIII, secs. 5 (a) and 5 (b) (permitting the electors affected to vote on granting or renewing a utility franchise). *City of Okmulgee v. Okmulgee Gas Co.*, 140 Okla. 88, 282 Pac. 640 (1929). See also *Hominy Electric Light & Power Co. v. State ex rel. Corporation Commission et al.*, 141 Okla. 206, 284 Pac. 873 (1930); *City of Hominy v. Corporation Commission et al.*, 143 Okla. 32, 287 Pac. 1029 (1930); *City of Wynona v. Corporation Commission et al.*, 143 Okla. 32, 287 Pac. 1030 (1930); *City of Wynona v. Corporation Commission et al.*, 143 Okla. 33, 287 Pac. 1032 (1930); *In re Oklahoma Power Co.*, 141 Okla. 100, 284 Pac. 12 (1930); *City of Cushing v. Consolidated Gas Utilities Co.*, 141 Okla. 82, 284 Pac. 38 (1930); *Oklahoma Natural Gas Corp. v. State et al.*, 141 Okla. 80, 284 Pac. 40 (1930); and *In re Okmulgee Gas Co.*, 141 Okla. 98, 284 Pac. 70 (1930).

Any act of the legislature providing for the issuance of a license, irrevocable permit, indeterminate permit, or other instrument in the nature of a franchise, the existence of which is not limited in time, violates Const. art. II, sec. 32. *City of Okmulgee v. Okmulgee Gas Co.*, *supra*.

In a suit to restrain threatened interference with a perpetual franchise to operate a toll bridge, relief was denied by the United States Supreme Court following the construction of Const. art. II, sec. 32, as declared by the Oklahoma Supreme Court. *Hawks et al. v. Hamill et al.*, 288 U. S. 52, 77 L. Ed. 610, 53 Sup. Ct. 240 (1933); rev'g *Hamill et al. v. Hawks et al.*, 58 Fed. (2d) 41 (1932).

A municipal ordinance regulating the jitney buss business in a certain city was held void as it intended to grant an exclusive franchise in violation of Const. art. VII, sec. 18 (prohibiting exclusive franchises). *City of Tulsa et al. v. Thomas et al.*, 89 Okla. 188, 214 Pac. 1070 (1923).

L. 1933, c. 113, p. 188 (now repealed), requiring motor vehicle common carriers to secure a certificate of convenience and necessity from and be otherwise regulated by the corporation commission did not violate Const. art. V, sec. 51 (granting of exclusive privileges), or art. II, sec. 32 (granting of perpetuities or monopolies). *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125 (1924); *Ex parte Sales*, 108 Okla. 29, 233 Pac. 186 (1924).

Public Contract Provisions.

A secret agreement between M and C, proposed bidders on a public contract, that each bid in on separate portions of work, and in the event the bids were accepted, the profits resulting therefrom would be divided between them, was held void as contrary to public policy. However, the bank which loaned money to carry out the above contract was not barred from recovering the money so loaned, since it found out about the illegality of the contract some time after it had been consummated. *Citizens National Bank of Chickasha et al. v. Mitchell et al.*, 24 Okla. 488, 103 Pac. 720 (1909).

A city ordinance directing city officers to let an exclusive contract for disposal of garbage for a certain period is valid and does not unlawfully restrain trade. *Burns v. City of Enid et al.*, 92 Okla. 67, 217 Pac. 1038 (1923). See also *Bishop v. City of Tulsa*, 21 Okla. Cr. 457, 209 Pac. 228 (1922).

A contract between the State and a shirt manufacturer providing for the sale of all shirts made at the State penitentiary to the manufacturer was held valid. It did not violate either Const. art. II, sec. 32 (prohibiting perpetuities or monopolies), nor does it violate Const. art. V, sec. 51 (prohibiting the grant of an exclusive privilege). *Rice et al. v. State ex rel. Short, Attorney General*, 108 Okla. 4, 232 Pac. 807 (1924).

II. CONTRACTS NOT TO COMPETE

Stat. Ann. (1937), tit. 15

Sec. 217. Restraint of trade.—Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than as provided by the next two sections,¹ is to that extent void. (R. L. 1910, sec. 978.)

Sec. 218. Restraint of trade—Exception as to sale of goodwill.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof, so long as the buyer, or any person deriving title to the goodwill from him carries on a like business therein. (R. L. 1910, sec. 979.)

Sec. 219. Restraint of trade—Exception as to partners.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof. (R. L. 1910, sec. 980.)

Stat. Ann. (1937), tit. 79

Sections 101 to 103 make it a felony for any contractor or association of contractors for the construction of any public road or bridge to enter into any agreement to allot any territory which any such contractor or associates shall have for his or its exclusive territory. The State, municipality, or persons injured by such an agreement may recover treble damages. See *Special Antitrust Laws: Public Contract Provisions, supra*. See also projected Vol. *Governmental Purchasing*.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

An oral covenant not to compete in a certain city ancillary to the sale of the assets and goodwill of an insurance agency was held to be valid and not in restraint of trade. A suit for injunction against breach by the seller is the proper remedy. *W. S. Wolverson & Son v. Bruce & Butt*, 6 Ind. T. 135, 89 S. W. 1018 (1905).

A contract not to compete in the drug business or to engage in the practice of medicine within a radius of 10 miles of a certain city for

¹ Sections 218 and 219, post.

a period of 2 years made ancillary to the sale of a drug business is valid, and a breach thereof will be restrained. *Threkeld v. Steward*, 24 Okla. 403, 103 Pac. 630 (1909).

Ancillary to the sale of his livestock, shipping business, and goodwill, the covenant of a vendor not to compete "within the trade territory" is valid under title 15, section 218. *Graves v. Fitzpatrick*, 127 Okla. 124, 260 Pac. 10 (1927).

Where a contract provides for a number of distinct things to be done and for liquidated damages for breach thereof, the plaintiff can only recover actual damages for a partial breach of the contract. The liquidated damages clause must be held to be penal in nature regardless of title 15, section 215. *Ibid.*

A contract for the sale of the goodwill of a publishing business in which the seller agrees not to engage in a like business anywhere in the United States for 5 years is void under title 15, section 218, only to the extent that it prohibits the seller from engaging in a like business beyond the confines of a particular county. *Hartman v. Everett*, 158 Okla. 29, 12 Pac. 2d 543 (1932).

A covenant by the vendor of shares of stock in a corporation not to compete with the vendee (the corporation) so long as the vendee remains in business is valid under title 15, section 218. The owner of an appreciable interest in stock, property, and assets of a corporation has a proportionate vendible interest in the goodwill of that corporation, which if conveyed would sustain an agreement by the seller not to engage in business in competition with the corporation. *Key v. Perkins*, 173 Okla. 99, 46 Pac. (2d) 530 (1935).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

An agreement not to engage in the practice of medicine made in connection with the dissolution of a partnership containing no limitation as to time is void as in restraint of trade under title 15, section 217 and 219. *Hulen v. Earel*, 13 Okla. 246, 73 Pac. 927 (1903).

Ancillary to the sale of his tools, equipment, and furniture, a dentist's covenant not to practice in a certain city for 5 years is valid. The obvious intent of such a sale since coupled with an agreement not to compete is that the goodwill of the practice was included, thus validating the agreement under title 15, section 218. *Wall v. Chapman*, 84 Okla. 114, 202 Pac. 303 (1921).

An agreement "not to practice law in Oklahoma" ancillary to the sale of a law practice is invalid under title 15, section 218, insofar as the territorial limits exceed the confines necessary for the protection of the vendee's interest. The court upheld the covenant by restricting

it to the confines of the county only. *Wesley v. Chandler*, 152 Okla. 22, 3 Pac. (2d) 720 (1931). See also *Harrington v. Hackler*, 181 Okla. 396, 74 Pac. (2d) 288 (1937).

Restrictive Covenants Ancillary to the Lease of Property.

A cotton compress corporation undertook to lease all of its property for a period of years to another compress company and agreed not to compete within 50 miles of any plant operated by the lessee. In a suit by the stockholders to restrain execution of the contract, the court declared the contract invalid under title 15, section 218. *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 87 Pac. 315 (1906), aff'd., *Shawnee Compress Co., v. Anderson*, 209 U. S. 423, 52 L. Ed. 865, 28 Sup. Ct. 572 (1908).

In an action for the violation of an oral covenant not to compete in the soft drink business made ancillary to a written lease of certain business premises, it was held that the parol evidence to alter provisions of the written instrument was inadmissible. *Fuller v. Caraway*, 97 Okla. 110, 221 Pac. 79 (1924).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

An agreement not to equip and operate a competing motion-picture house in a particular building in consideration of \$1,000 in cash is not void as against public policy, where the agreement does not prevent the opening of a motion-picture house in any other place or building in town. *Horany v. Tresse*, 91 Okla. 264, 217 Pac. 396 (1923).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (1936), tit. 2 Cooperative

Section 343, a part of the 1917 Agricultural Cooperative Association Act (sections 331 to 354), provides that an association organized under that Act may enter into marketing agreements with its members requiring the latter to sell, for any period of time, not exceeding ten years, all or any specified part of their agricultural and horticultural products, or specified commodities, exclusively to or through the association, or any facilities created thereby. Section 354 provides that such agreements shall not be considered illegal as such, or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose. See *Exceptions to General Anti-trust Laws, supra*. See also *Cooperatives* in projected study.

Stat. Ann. (1938), tit. 2

Section 361, a part of the 1937 Cooperative Marketing Association Act (sections 361 to 361y) provides that members of a cooperative association meeting the requirements of this Act may be required to execute contracts as a condition of admission to such association, whereby they agree to patronize the facilities created by the association, or to sell or buy all or a specified part of their products and supplies to or through such association. In the absence of a provision for notice or withdrawal in the contract a member who is a natural person may withdraw at any time after three years. Section 361t provides that such agreements shall not be considered illegal nor in restraint of trade nor a part of a conspiracy or combination to accomplish an improper or illegal purpose, nor contrary to any statute enacted against pooling or combinations. See *Exception to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

A contract by a retailer of wallpaper to handle exclusively the products of a certain vendor for a period of 8 months in a particular locality was held valid. *Ripy & Son v. Art Wall Paper Mills*, 41 Okla. 20, 136 Pac. 1080 (1913). See also *Home Pattern Co. v. Mascho*, 46 Okla. 55, 148 Pac. 131 (1915).

The fact that a contract restricts a retailer's activity exclusively within a certain territory does not make it invalid as in restraint of trade. *Thomas et al. v. Belcher et al.*, 184 Okla. 410, 87 Pac. 2d 1084 (1939). See also *Delk et al. v. City National Bank of Duncan*, 85 Okla. 238, 205 Pac. 753 (1922).

A contract for the exclusive delivery and sale of commodities through a cooperative marketing association under title 2, section 343, is valid only insofar as such an agreement is entered into with members of the association. Such a contract with a nonmember is unenforceable. *Tulsa Milk Producers' Corporation Assn. v. Hart*, 145 Okla. 263, 292 Pac. 558 (1930).

OREGON



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

L. 1937, c. 215

Discriminations

Section 2 of the Antiprice Discrimination Act, sections 1 to 13, provides that it shall be unlawful for any person engaged in commerce and/or food commerce, to discriminate in price between different purchasers of commodities, or services, or output of a service trade, of like grade and quality or to discriminate in price between different localities, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. See *State Price Control Legislation: Antidiscrimination Legislation*.

Judicial Decisions

Application of the Common Law.

Where a group of individual tent and awning dealers merged into one corporation, each individual covenanting that he would not engage in a competing business within a certain area, the agreement was held invalid as a combination to prevent competition and fix prices. *Columbia Tent and Awning Co. v. Thiele*, 135 Ore. 511, 295 Pac. 501 (1931). See *Contracts not to Compete, infra*.

Constitutionality of Statutes.

Section 20-2104 provided that residents of a district could by majority vote exclude nonresidents of the district from grazing cattle on public grazing lands located therein. A nonresident who was ex-

cluded in accordance with said law instituted suit. The statute was declared invalid as empowering a group of citizens to create a monopoly. *Mendiola v. Graham, County Judge, et al.*, 139 Ore. 592, 10 Pac. (2d) 911 (1932).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code Ann. (Supp., 1935) as amended by L. 1937, c. 113 Resale Price Maintenance

Sections 70-401 to 70-405 permit the fixing by contract of resale prices of branded commodities, but expressly provide that such act shall not apply to any contracts between producers or distributors, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 25-822 provides that no cooperative association organized under sections 25-801 to 25-827 shall be deemed a combination in unlawful restraint of trade, or an unlawful monopoly, provided the association does not deal in the products of nonmembers to an amount greater in value than those handled for members. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Gasoline

Sections 55-1709 to 55-1713 provide that unfair discrimination in the sale and purchase of gasoline shall constitute a misdemeanor, punishable by fine or imprisonment for not more than one year, or both. Unfair discrimination is defined as, with the intent to suppress competition or create a monopoly, (1) selling at a lower rate in one locality than in another after making due allowances for grade, quality, and transportation costs; (2) discriminating in the sale of gasoline at wholesale between purchasers in any section of the state; (3) making or carrying into effect any contract, understanding, or agreement with any person, corporation, or association of persons, to fix prices with respect to the sale and distribution of gasoline. All contracts or agreements made in violation of this act shall be void. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Code Ann. (1930)

Milk and Cream Buyers—Discrimination

Sections 41-701 and 41-710 provide that any person engaged in the business of buying milk, cream, or butterfat for the purpose of

manufacture, who shall, with the intention of creating a monopoly, destroying the business of a competitor, or restraining in any manner an open competition in said business, discriminate between different localities of the state by buying such commodity at a higher price in one than in another locality, making due allowances for grade, quality, and actual transportation costs, shall be guilty of a misdemeanor and punishable by a fine or imprisonment for not more than one year, or both. See Vol. *State Price Control Legislation*.

Judicial Decisions

Cooperatives.

Sections 25-801 to 25-822 of the cooperative act were held valid as not tending to create a monopoly. *Oregon Growers' Co-op. Ass'n. v. Lentz*, 107 Ore. 561, 212 Pac. 811 (1923); *Oregon Growers' Co-op. Ass'n. v. Riddle*, 116 Ore. 562, 241 Pac. 1011 (1926). See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Code Ann. (1930) Insurance Companies

Section 46-140 provides that it shall be unlawful for any insurance company authorized to do business in the state, to enter into any contract, understanding, or combination, with any other insurance company, or to jointly and severally do any act, (1) for the purpose of controlling the rate to be charged, or commissions or compensations to be paid for insuring any risk; (2) for the purpose of discriminating against any company by reason of its method of doing business or affiliation or nonaffiliation with any association of insurance companies; or (3) for any purpose detrimental to free competition in the business.

If any such offending company does not discontinue such practice within thirty days of notice by the Insurance Commissioner to do so, its license shall be revoked and cannot be renewed for three years.

Livestock

Section 14-869 provides that it shall be unlawful for any person, firm, or corporation to enter into, or offer or attempt to enter into any agreement or arrangement with another person, firm, or corpora-

tion for the purpose of preventing competitive bidding upon any horses, cattle, mules, sheep, swine, or other livestock shipped to a wholesale or central stockyards for sale. Violation of this section constitutes a misdemeanor, and subjects the offender to a fine of not more than \$5,000.

Code Ann. (Supp. 1935)
Liquor

Section 15-1017 (4) as amended by L. 1937, c. 448, sec. 10, provides that the liquor commission may refuse to license any applicant if it has reasonable ground to believe that said applicant to sell and retail for consumption on the premises has been financed or furnished with money or property by, or has any connection with, or is a manufacturer of, or wholesale dealer in, alcoholic liquor.

Section 15-1020, as amended by L. 1937, c. 428, and L. 1939, c. 366, provides that it shall be unlawful for any wholesale licensee to have any right, title, lien, claim, or interest, financial or otherwise, in, upon, or to the premises, equipment, business, or merchandise of any retail licensee.

Section 15-1031, as amended, supra, provides that it shall be unlawful for any retail licensee to receive assistance financially or in any other material manner from a manufacturer or wholesaler of alcoholic liquor, or his agents; or for these latter to give such assistance.

Section 15-1031, as amended, supra, provides that any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, except in cases where the punishment is otherwise herein specifically provided, shall be punished by a fine of not more than \$500 or by imprisonment in the county jail for not more than six months, or by both, in the discretion of the court. For a second or subsequent violation of any kind of the provisions of this act not thus otherwise herein specifically provided for, such person shall, upon conviction, be punished by a fine of not more than \$1,000, and by imprisonment in the county jail for not more than one year, or both, in the discretion of the court.

L. 1937, c. 490

Section 1 provides that it shall be unlawful for any licensee not holding a farmer's winery license to sell or engage in the business of selling alcoholic liquors both at wholesale and retail.

Sections 2 and 3 provide that it shall be unlawful for any licensee authorized to manufacture or wholesale alcoholic liquors to have any right, title, lien, claim, or interest, financial or otherwise, in, upon, or

to the premises, equipment, business, or merchandise of any retail licensee; and vice versa.

Sections 4 and 5 provide that it shall be unlawful for any licensee authorized to manufacture or sell alcoholic liquors at wholesale to give, loan, or furnish any equipment, gratuities, rebates, money, or property, other than merchandise sold in the usual course of trade to any retail licensee; or for any such retail licensee to accept the same.

Section 7 provides that any person who shall violate any provision of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine not to exceed \$500 or by imprisonment in the county jail not to exceed six months, or by both. Section 6 authorizes the cancellation or suspension of any license when the Commission shall find such licensee guilty of a violation of any provision of this act.

2. Public Contract Provisions

Code Ann. (1930) General

Sections 14-865 to 14-867 provide that it shall be unlawful for any person, firm, or corporation bidding upon or entering into any public contract, to enter into any conspiracy or collusion with any person, firm, or corporation which tends to or does lessen or destroy free competition in the letting of such contract, or to pay or agree to pay to any other bidder, or any public officer, anything of value to obtain such contract, provided that any one or more of such persons has done any act to effect the object of such conspiracy or collusion.

Violation of these provisions constitutes a misdemeanor, punishable by fine or imprisonment for not more than six months, or both.

No witness shall be privileged from testifying on the ground that it might render him criminally liable, but such witness shall not be prosecuted for any offense connected with the matters to which he testifies.

Patented and Proprietary Articles

Section 67-1105 provides that no advertisement for supplies for public purposes shall ask for a bid on any article of a specific brand or mark, nor any patent apparatus or appliances, when such requirement would prevent proper competition on the part of dealers in other articles of equal value.

3. Anticoercive Financing Statutes

Code Ann. (Supp., 1935)

Sec. 55-2901. Policy of state declared.—It hereby is declared to be the policy of this state that free and unrestrained competition shall

prevail in the business of financing the purchase or sale of motor vehicles. (L. 1935, ch. 424, sec. 1, p. 749.)

Sec. 55-2902. Definitions.—As used in this act:

1. The term “person” shall mean any individual or individuals, firm, corporation, partnership, association, trustee, receiver, or assignee for the benefit of creditors.

2. The term “manufacturer” shall mean any person, firm, corporation, partnership, or association engaged either directly or indirectly in the manufacture or wholesale distribution of motor vehicles.

3. The term “dealer” shall mean any person, firm, association, or corporation or other organization of any kind, character, or nature, regularly engaged or intending to engage in the business of selling motor vehicles at retail within this state.

4. The term “financing” shall include the buying, selling, assigning, or dealing in conditional sales contracts, chattel mortgages, or leases arising out of the retail sale of motor vehicles.

5. The term “motor vehicle” shall mean every self-propelled vehicle moving over the highways of this state, whether patented or unpatented. (L. 1935, ch. 424, sec. 2, p. 749.)

Sec. 55-2903. Prohibited contracts.—It shall be unlawful for any manufacturer to sell or enter into a contract to sell any motor vehicle or vehicles to any dealer on the condition or under an agreement, either expressed or implied, that such dealer shall finance the purchase or sale of any such motor vehicle or vehicles only with or through a designated person, and any such condition, agreement, or undersanding hereby is declared to be void and against the public policy of this state. (L. 1935, ch. 424, sec. 3, p. 749.)

Sec. 55-2904. Threats of manufacturer to dealer—Prima facie evidence.—Any threat, expressed or implied, made directly or indirectly to any dealer by any manufacturer, or by any person who is engaged in the business of financing the purchase or sale of motor vehicles and is affiliated with or controlled by any manufacturer, that such manufacturer will cease to sell, or will terminate or refuse to enter into a contract to sell motor vehicles to such dealer unless such dealer finances the purchase or sale of any such motor vehicle or vehicles only with or through a designated person, shall be presumed to be made at the direction of and with the authority of such manufacturer and shall be prima facie evidence of the fact that such manufacturer has sold or intends to sell such motor vehicle or vehicles on the condition or under the agreement prohibited in section three (sec. 55-2903, Code Supp. 1935) of this act. (L. 1935, ch. 424, sec. 4, p. 749.)

Sec. 55-2905. Penalty for violation.—Any person who shall violate any of the provisions of this act, and any employee, agent, or

officer of any such person who shall participate, in any manner, in making, enforcing, or performing, or in aiding or abetting in the performance of any such contract, condition, agreement, or understanding, shall be deemed guilty of a crime and, upon conviction thereof, shall be punished for each offense by a fine of not more than five thousand dollars (\$5,000) or by imprisonment in the penitentiary for not more than five (5) years or in the county jail for not more than one (1) year, or by both such fine and imprisonment. (L. 1935, ch. 424, sec. 5, p. 749.)

Sec. 55-2906. Prohibited contracts void.—Any contract or agreement in violation of the provisions of this act shall be absolutely void and shall not be enforceable either in law or in equity. (L. 1935, ch. 424, sec. 6, p. 749.)

Sec. 55-2907. Provisions of act severable.—If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act. (L. 1935, ch. 424, sec. 7, p. 749.)

Judicial Decisions

Salmon Fishing.

A statute regulating salmon fishing provided for the issuance of licenses for specifically designated sites where licensees might maintain their fishing equipment. Under such a license a fishing company placed equipment at a designated site on a navigable river in such a manner that other fishermen were obstructed from using the site. The court held that it was not the intention of the statute to grant exclusive fishing privileges at the site designated in the license, and that licensees were compelled to keep the river clear for the use of others. *Eagle Cliff Fishing Co. v. McGowan et al.*, 70 Ore. 1, 137 Pac. 766 (1914).

Sailors' Boarding Houses.

Under a statute (Ore. Laws 1903, p. 238) providing for the regulation of sailors' boarding houses and creating a board of commissioners to issue licenses therefor, plaintiff was refused a license and sought a writ of mandamus to compel said board to issue a license to him. The validity of the statute was attacked on the ground that monopolistic powers were granted to the board of commissioners. The court held that since the said board had the power to refuse licenses to unfit persons for an occupation affected with a public interest, it could not arbitrarily grant a license to one person and exclude all others.

A grant of such power was not in restraint of trade and did not tend to create a monopoly. *White et al. v. Holman et al.*, 44 Ore. 180, 74 Pac. 933 (1904).

Public Contract Provisions.

A contract between two concerns agreeing that one shall bid on a public contract and that the work shall be performed by the other at 10 percent less than the contract price is void as against public policy and is in violation of Laws 1921, section 4433, requiring that contracts be let to the lowest responsible bidder. *Newport Const. Co. v. Porter et al.*, 118 Ore. 127, 246 Pac. 211 (1926).

An act of Congress provided that no land sold at auction should be sold except to one under oath that it is being purchased for his own use and occupation. Prior to the purchase of such land, an agreement was entered into by one to convey part of the land so purchased at auction price to another in consideration that the other refrain from bidding in at the sale. The contract was held invalid. *Kine v. Turner et al.*, 27 Ore. 356, 41 Pac. 664 (1895).

Under the Portland city charter requiring the letting of contracts for public improvement to the lowest responsible bidder, the city council adopted an ordinance for the improvement of streets by paving with certain "Hassam" products only. As only one person was entitled to the use of such material for pavement, the letting of a contract to such sole bidder, was held void. *Terwilliger Land Co. v. City of Portland*, 62 Ore. 101, 123 Pac. 57 (1912).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

It has been generally held in this State that contracts in partial restraint of trade, based upon valuable consideration and reasonable in their operation are legal. *Seeck v. Jakel et al.*, 71 Ore. 35, 141 Pac. 211 (1914); *Feenaughty v. Beall et al.*, 91 Ore. 654, 178 Pac. 600 (1919). *Coker et al. v. Richey*, 104 Ore. 14, 202 Pac. 551 (1921).

A vendor upon the sale of a stock of pianos and the goodwill of his business, agreed not to compete with the vendee in the same town

for a period of years. After consummation of the contract, the vendee refused to accept a shipment of pianos which had been ordered by the vendor but, being undelivered at time of sale were not included in the stock sold. In an action by the vendee to enforce the covenant, the vendor asserted that to the extent of selling this shipment only, he was released from his covenant. It was held, however, that the written contract was sufficiently definite in its terms and could not be construed to except the subsequent sale of stock not then received. The covenant not to compete in a specified area being ancillary to the sale of a business and the goodwill thereof, was valid and the sale by the vendor of the shipment in question constituted a violation thereof. *Coker et al. v. Richey, supra.*

A group of individual tent and awning dealers merged into one corporation each individual covenanting that he would not engage in competition with the new company within a certain area. The agreement was held invalid as a combination to prevent competition and fix prices. *Columbia Tent & Awning Company v. Thiele*, 135 Ore. 511, 295 Pac. 501 (1931). See *General Antitrust Laws, supra.*

In sale of a business, a vendor covenanted not to enter into any organization in the same line of business in a certain territory whereby the interest of the vendee might be endangered. The covenant was held to be too indefinite. Injunctive relief was refused. *Feenoughty et al v. Beals, supra.*

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

An optometrist sold his optical business to a corporation organized by himself and others, and contracted not to engage in the business in competition with said corporation in the State for 20 years. He subsequently violated his covenant. The court enjoined the violation, and held that contracts not to compete entered into by professional men were not to be distinguished from those entered into in connection with any other business. *Thompson Optical Institute v. Thompson*, 119 Ore. 252, 237 Pac. 965 (1925).

Restrictive Covenants Ancillary to Employment.

A contract of employment for milk drivers provided for the return of their entire routes without compensation upon termination of employment. The court held that a milk driver employed under such a contract and subsequently terminated cannot be prohibited from soliciting customers on his former employer's route. *Snow Cap Dairy Inc. v. Robanske*, 151 Ore. 59, 47 Pac. (2d) 977 (1935).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (1930)

Cooperatives

Section 25-801 provides that it shall be lawful for a cooperative association organized under sections 25-801 to 25-827 to enter into contracts with its members requiring them to transact the business covering all or any specified part of their products or commodities exclusively with or through the association.

Section 25-822 provides that such contracts shall not be considered unlawful or in unlawful restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Code Ann. (Supp., 1935)

Gasoline

Sec. 55-1714. Retailer's exclusive contract to sell—Injunction and specific performance.—In the event of any breach or threatened breach of any contract providing for the sale or consignment of gasoline to be thereafter sold or distributed by the vendee or consignee at retail, which provides that only the gasoline sold, manufactured, distributed, or marked by the vendor or consignor shall be sold by the vendee or consignee, either party to the contract shall be entitled either to an injunction, mandatory or otherwise, to prevent a further breach of such contract or to a decree of specific performance thereof, or to both. Pending the adjudication of such suit either party to the contract shall be entitled, in a proper case, either to a restraining order or to a preliminary injunction, mandatory or otherwise, or to both. (L. 1933, ch. 316, sec. 1, p. 490.)

Sec. 55-1715. Lease as part of exclusive contract—Injunction and specific performance.—In the event of any breach of any lease upon real property, which shall be a part of or in any way connected, directly or indirectly, with any contract within the purview of section 1 (sec. 55-1714, Code Supp. 1935) of this act, by any party who may be the vendor or consignor or vendee or consignee of gasoline covered by such contract to be thereafter sold or distributed at retail on such leased premises, the vendee or consignee or vendor or consignor of such gasoline shall be entitled either to an injunction, mandatory or otherwise, to prevent a further breach of the lease or to a decree of specific performance thereof, or to both. Pending the adjudication of such suit, the vendee or consignee or vendor or consignor shall be

entitled, in a proper case, either to a restraining order¹ to a preliminary injunction, mandatory or otherwise, against the vendor or consignor or vendee or consignee or to both. (L. 1933, ch. 316, sec. 2, p. 490.)

Judicial Decisions

Exclusive Dealing Arrangements.

A cooperative association organized under the cooperative act stipulated in its bylaws and in contracts with its members that members selling loganberries to persons other than the association during a period of 1 year would be restrained and would be liable for liquidated damages for all berries sold in violation of said contract. This provision was held valid and not in restraint of trade. *Oregon Growers' Co-op. Ass'n. v. Lentz et al.*, 107 Ore. 561, 212 Pac. 811 (1923); see also *Oregon Growers' Co-op. Ass'n. v. Riddle*, 116 Ore. 562, 241 Pac. 1011 (1926).

¹The word "or" apparently should appear between "order" and "to."

PENNSYLVANIA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Stat. Ann. (Purdon, 1931), tit. 18
Conspiracy Statute

Section 211 prohibits a conspiracy to cheat and defraud any person or body corporate of his or their money or other property or to do any dishonest, malicious or unlawful act to the prejudice of another.

Judicial Decisions

Application of the Common Law.

An agreement entered into by five corporations dividing among themselves in certain proportions the markets for bituminous coal of two coal regions and providing for the control of prices, determination of sales policies, and entry into certain agreements with anthracite coal dealers was held to be an unreasonable restraint of trade and illegal. *The Morris Run Coal Co. v. The Barclay Coal Co.*, 68 Pa. 173 (1871). That the true object of this combination was to lessen overhead expense, advance the quality of coal, and better serve their customers was immaterial in view of the wide scope, general influence, and injurious effects of the contract. *Ibid.* But see *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 288, 59 Atl. 1088 (1904), affirming the test of reasonableness in determining the legality of agreements, but questioning, whether on such facts, this court would have reached the same conclusion.

A bill in equity for an accounting sought by a member of a combination of 45 brewers whose object among other things, was to regulate and control the price of beer in their territory was dismissed because the combination was unlawful in tending to destroy competition and to create a monopoly in an article of daily consumption. *Nester et al. v. Continental Brewing Co. et al.*, 161 Pa. 473, 29 Atl. 102 (1894).

A provision in a traffic agreement between railroad companies restricting the contracting parties from encouraging or aiding in any manner the construction of competitive railway lines was held illegal. *Bald Eagle Val. R. R. Co., et al. v. Nittany Val. R. R. Co., et al.*, 171 Pa. 284, 33 Atl. 239 (1895). The court, however, did enjoin violation of another provision in the same agreement whereby the defendant agreed to give to the plaintiff line all of its traffic to and from their ore lands, furnace, and certain other railroad junctions. This provision does not restrain competition, and as it is separable from all other provisions of the agreement, the defendant is liable for its breach. *Ibid.*

When a contract between two connecting railroads for an arrangement of through rates was held reasonable, the injury suffered by a competing barge owner through loss of business is "*damnum absque injuria*." *Munhall v. Penn. Ry. et al.* (2 cases) 92 Pa. 150 (1879).

Defendant was an association of members selling building supplies; all members of defendant association but plaintiff resisted a strike called by a labor union. Whereupon, defendant association members refused to deal with plaintiff, and brought pressure to bear on other dealers so as to prevent plaintiff from obtaining building supplies. This action was brought against defendant members for damages. It was held that at common law, refusal to sell is not actionable and that the combination in this case was not a conspiracy to fix prices and restrain trade but a combined effort for the purpose of resisting the labor union's demand for increased wages which would ultimately result in higher prices to be paid by consumers. "The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice toward plaintiff or others is lacking, and this is the essential element on which are founded all decisions as to common law conspiracy in this class of cases." *Cote v. Murphy et al.*, 159 Pa. 420, 28 Atl. 190 (1894). See also *Buchanan v. Kerr et al.*, 159 Pa. 433, 28 Atl. 195 (1894).

Specific performance of a contract entered into by four nonparallel and noncompeting railroads to exchange traffic cars, sell coupon passenger tickets, make through bills of lading, apportion earnings on a mileage basis, and generally operate in harmony for the development of traffic between them was granted. Two of the parties

also agreed to send traffic "so far as they lawfully could" to destinations over the other two lines. The contract was held not to be in violation of the common law nor forbidden by the constitution. *Cumberland Val. R. R. Co. v. Gettysburg and H. Ry. Co.*, 177 Pa. 519, 35 Atl. 952 (1896).

Plaintiff corporation purchased numerous mines and acquired a number of coal-carrying vessels and towboats as well as a substantial number of coal landings. In acquiring such interests it obtained from the sellers contracts not to compete in the territory of the Monongahela, Ohio, and Mississippi Rivers and their tributaries for a period of 10 years. Defendant, one of the sellers entering into such agreement, began to compete with plaintiff in the restricted territory. In suit for a restraining order, court entered an order enforcing the covenant not to compete and restrained defendant because the contract in question was not an agreement in restraint of trade. Although plaintiff owned substantial interests, there was no intent on its part to monopolize. There was no attempt to control prices or suppress competition as limitless areas were as yet unexploited. *Monongahela River Consolidated Coal & Coke Co. v. Jutte, supra*. Compare the *Morris Coal Co.* case, *supra*. See *Contracts not to Compete, infra*.

The consolidation of a gaslight, gas heating, and electric company, in pursuance of statutory provisions for corporate consolidations, does not violate "any law or constitutional inhibition." *Motter v. Kennett Township Electric Co. et al.*, 212 Pa. 613, 62 Atl. 104 (1905).

The refusal by a public service commission to permit construction of additional routes to compete with another telephone company was sustained even though thereby creating a monopoly. *Perry County Tel. & Tel. Co. v. Public Service Commission*, 265 Pa. 274, 108 Atl. 659 (1919). In quasi public enterprises competition may tend to burden rather than to advance public interests. *Ibid*.

A combination of two newspapers organized to establish a single sales force to distribute their respective papers is not invalid. *Philadelphia Record Co. v. Curtis-Martin Newspapers, Inc., et al.*, 305 Pa. 372, 157 Atl. 796 (1931).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**Stat. Ann. (Purdon, Supp., 1938) tit. 73, c. 4
Resale Price Maintenance**

Sections 201 to 207 validate contracts fixing the resale price of branded articles. The statute is expressly inapplicable to horizontal agreements between wholesalers, between producers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****CONSTITUTIONAL PROVISIONS****Stat. Ann. (Purdon, 1930)
Public Utilities**

Const. art. XVII, sec. 4, provides that no railroad, canal, or other corporation, or lessees, purchasers, or managers of any railroad or canal corporation shall consolidate stock, property, or franchises of such corporation with, or lease or purchase works or franchises of, or in any way control any other railroad or canal corporation having under its control a parallel or competing line. It further prohibits such corporations from having officers in common.

Const. art. XVII, sec. 5, provides that no common carrier shall engage in mining or manufacturing articles for transportation over its works, nor engage in any other business save that of common carriers; but mining and manufacturing companies may carry its products on its own railroad or canal not exceeding 50 miles in length.

Const. art. XVI, sec. 12, provides that no telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.

STATUTORY PROVISIONS**Stat. Ann. (Purdon, 1931), tit. 67
Common Carriers**

Section 761 prohibits common carriers from directly or indirectly engaging in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly engage in any other business than that of common carrier, or hold or acquire lands, except as shall be necessary for carrying on its business; but

any mining or manufacturing company may carry the products of its mines or manufactories on its railroad or canal, not exceeding 50 miles in length. Violation of this statute shall constitute a misdemeanor punishable by fine of not more than \$1,000, nor less than \$500. Sec. 762.

Stat. Ann. (Purdon, Supp. 1938), tit. 47

Liquor

Section 744-602 (18) provides that it shall be unlawful for any hotel, restaurant, or club licensee, or any servant, agent, or employee of such licensee, to be, at the same time employed, directly or indirectly, by any other person engaged in the manufacture, sale, transportation, or storage of liquor, malt or brewed beverages or alcohol.

Section 744-602 (25) provides that it shall be unlawful for any licensee, or any officer, director, stockholder, servant, agent, or employee thereof, to be employed or engaged in or to own any interest, directly or indirectly, in any business which involves the manufacture or sale of any equipment, furnishings or fixtures to any hotel, restaurant, or club licensees licensed under this act, or to any importing distributors, distributors, package retailers, or retail dispenser licensed under any other act of this Commonwealth relating to liquor or malt or brewed beverages.

Section 744-609, as amended by L. 1939, act 357, provides that (a) no manufacturer, and no officer or director of any manufacturer, shall at the same time, be a holder of a hotel, restaurant, or club liquor license, nor be the owner or lessor of any place covered by any such license; (b) no manufacturer, importer, or sacramental wine licensee, and no officer or director thereof, shall own any stock or have any financial interest in any hotel or restaurant licensed under this act; (c) excepting as herein provided, no manufacturer, or officer, director, stockholder, agent, or employee thereof, shall in any wise be interested either directly or indirectly, in the ownership or leasehold in any property, or the equipment thereof, or any mortgage lien against the same, for which a hotel, restaurant, or club license is granted; nor shall a manufacturer, importer, or sacramental wine licensee or officer, director, stockholder, agent, or employee thereof, either directly or indirectly, lend any moneys, credit, or give any thing of value or the equivalent thereof, to, or guarantee the payment of, any bond, mortgage, note, or other obligation of any hotel, restaurant or club licensee, his servant, agent or employee, for equipping, fitting out, or maintaining and conducting, either in whole or in part, a hotel, restaurant or club licensed for the selling of liquor for consumption upon the premises; (d and e) restrictions similar in nature

to the above are made applicable to any interest, etc., which a hotel, restaurant, or club licensee may have in any of the other classes of business mentioned above.

The purpose of this section is to require a separation of the financial and business interests between manufacturers and holders of hotel or restaurant licenses, and, as herein provided, of club licenses. Nothing herein shall be construed to prohibit the ownership of property or any conflicting interest by a manufacturer in premises occupied by a licensee, where such ownership or conflicting interest existed at least five years prior to July 18, 1935: *Provided further*, That this clause shall not prohibit any hotel, restaurant, or club licensee from owning land which is leased to, and the buildings thereon owned by, a holder of a retail dispenser's malt or brewed beverages license; nor prevent the issuance of such a retail dispenser's license.

Section 744-610 provides that (a) any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than \$100 nor more than \$300, and, on failure to pay such fine, to imprisonment not less than one month nor more than three months, and for any subsequent offense shall be sentenced to pay a fine of not less than \$300 nor more than \$500 and to undergo imprisonment for a period of not less than three months nor more than one year; (b) the right of the board to suspend and revoke licenses granted under this act shall be in addition to the penalty set forth in this section.

Beer

Section 94 provides that the application for a distributors', importing distributors' and retail dispensers' licenses shall contain the following information and statements: (e) That the applicant is not, and in the case of a corporation that the officers and directors are not, in any manner pecuniarily interested, either directly or indirectly, in the profits of any class of business regulated under this act, except as hereinafter permitted; and (f) that the applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein during the continuance of the license, except as hereinafter permitted.

Section 100f provides that it shall be unlawful for any licensee, or his servants, agents, or employees, to be, directly or indirectly, employed by any person engaged in the manufacture, storage, transportation, or sale of spirituous or vinous liquors, alcohol, or malt or brewed beverages.

Section 100f provides that it shall be unlawful for any licensee or any officer, director, stockholder, servant, agent, or employee thereof, to own any interest, directly or indirectly, in or be employed or engaged in any business which involves the manufacture or sale of any equipment, furnishings or fixtures to importing distributors, distributors or retail dispensers, or to hotel, restaurant or club licensees licensed under any other act of this Commonwealth relating to liquor or malt or brewed beverages; provided, however, that the provisions of this subsection shall not apply to such a conflicting interest if it has existed for a period of not less than three years prior to January 1, 1937, and receives the approval of the board.

Section 100k provides that (a) no manufacturer, and no officer or director of any manufacturer, shall, at the same time, be a distributor, importing distributor, or retail dispenser, or an officer, director, or stockholder or creditor of any distributor, importing distributor, or retail dispenser, nor, except as hereinafter provided, be the owner, proprietor, or lessor of any place for which a license has been issued for any importing distributor, distributor or retail dispenser under this act, or for which a hotel, restaurant, or club liquor license has been issued under any other act of this Commonwealth;

(b) No distributor or importing distributor, and no officer or director of any distributor or importing distributor, shall, at the same time, be a manufacturer, a retail dispenser, or a liquor licensee, or be an officer, director, stockholder, or creditor of a manufacturer, a retail dispenser, or a liquor licensee, or, directly or indirectly, own any stock of, or have any financial interest in, or be the owner, proprietor, or lessor of any place covered by any other malt or brewed beverage or liquor license;

(c) No licensee licensed under this act, and no officer or director of such licensee, shall, directly or indirectly, own any stock of, or have any financial interest in, any other class of business licensed under this act;

(d) Excepting as hereinafter provided, no manufacturer, importing distributor, or distributor shall in anywise be interested, either directly or indirectly, in the ownership or leasehold of any property, or in any mortgage against the same, for which a liquor or retail dispenser's license is granted; nor shall a manufacturer, importing distributor, or distributor, either directly or indirectly, lend any moneys, credit, or equivalent thereof to, or guarantee the payment of any bond, mortgage, note, or other obligation of, any liquor licensee or retail dispenser in equipping, fitting out, or maintaining and conducting either in whole or in part an establishment or business oper-

ated under a liquor or retail dispenser's license, excepting only the usual and customary credits allowed for returning original containers in which malt or brewed beverages were packaged for market by the manufacturer at the place of manufacture;

(e) Excepting as hereinafter provided, no manufacturer shall in any wise be interested, either directly or indirectly, in the ownership or leasehold of any property, or any mortgage lien against the same, for which a distributor's or importing distributor's license is granted; nor shall a manufacturer, either directly or indirectly, lend any moneys, credit, or their equivalent, to or guarantee the payment of any bond, mortgage, note, or other obligation of, any distributor or importing distributor in equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment or business where malt or brewed beverages are licensed for sale by a distributor or importing distributor, excepting only the usual credits allowed for the return of original containers in which malt or brewed beverages were originally packaged for the market by the manufacturer at the place of manufacture;

(f) No distributor, importing distributor, or retail dispenser shall, in anywise, receive either directly or indirectly, any credit, loan, moneys, or the equivalent thereof, from any other licensee, or from any officer, director or firm member of any other licensee, or from or through a subsidiary or affiliate of another licensee or from any firm, association, or corporation, except banking institutions, in which another licensee or any officer, director, or firm member of another licensee has a substantial interest or exercises a control of its business policy for equipping, fitting out, payment of license fee, maintaining and conducting, either in whole or in part, an establishment or business operated under a distributor's, importing distributor's, or retail dispenser's license excepting only the usual and customary credits allowed for the return of original containers in which malt or brewed beverages were packaged for the market by the manufacturer at the place of manufacture.

The purpose of this section is to require a separation of the financial and business interests between the various classes of business regulated by this act, and no person or corporation shall by any device whatsoever, directly or indirectly, evade the the provisions of this section. But in view of existing economic conditions, nothing contained in this section shall be construed to prohibit the ownership of property or conflicting interest by a manufacturer of any place occupied by a distributor, importing distributor, or retail dispenser after the manufacturer has continuously owned and had a

conflicting interest in such place for a period of at least five years prior to July 18, 1935.

The term "manufacturer," as used in this section, shall include manufacturers as defined in this act, and any person manufacturing any malt or brewed beverages outside of this Commonwealth.

Section 1001 provides that (a) any person, copartnership, association, or corporation, or any officer, director, servant, employee, or agent of any copartnership, association, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not less than \$100 nor more than \$300, and, on failure to pay such fine, to imprisonment for not less than one month nor more than three months for the first offense, and for any second or subsequent offense shall be sentenced, upon conviction, to pay a fine of not less than three hundred dollars nor more than five hundred dollars, and shall be sentenced to imprisonment for a term of not less than three months nor more than one year; (b) upon proof being made that any licensee, or any servant, agent, or employee of such licensee, under this act has violated any of the provisions of this act, or regulations of the board, or any of the laws of the Commonwealth relating to liquor, alcohol, or malt or brewed beverages, or the payment of tax thereon or the laws of the United States of America relating to the payment of tax on liquor, alcohol, or malt or brewed beverages, the board may, in its discretion, revoke or suspend any license issued under this act to any such licensee. The right to suspend or revoke licenses as herein set forth shall be an additional penalty to those set forth in paragraph A of this section. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

2. Public Contract Provisions

Stat. Ann. (Purdon, 1931), tit. 36

Bridges

Section 3054 provides that any person who shall do or permit any act which interferes with fair competition among bidders or who submits a collusive bid for any construction, repairing, or rebuilding of a county bridge, shall be guilty of a misdemeanor punishable by a fine not exceeding \$1,000, or imprisonment for a term of two years, or both. See projected Vol. *Governmental Purchasing*.

Stat. Ann. (Purdon, 1931), tit. 53

Patented Articles

Section 9539 provides that in no case shall a municipal contract for any patented material, machinery, or process or the supply of

which is controlled by one person or company, be let with the contract for work or other material or machinery. See projected Vol. *Government Purchasing and Distribution*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Public Utilities.

"Railroad" in Const. art. XVII, secs. 4 and 5, does not include street passenger railways. *Jesse Gyger v. Philadelphia etc. Ry. et al.*, 136 Pa. 96, 20 Atl. 399 (1890); *Shipley v. The Continental R. R. Co.*, 13 Phila. 128 (1879); *Gyger v. The Philadelphia City Passenger Ry.*, 17 Phila. 86 (1883).

Ownership by a railroad of stock in a parallel and competing railroad constitutes "control" within the meaning of Const. art. XVII, sec. 4, and consequently constitutes a violation thereof. *Penn. R. R. Co. et al. v. Commonwealth* (3 cases), 3 Sad. 83, 7 Atl. 368 (1886).

A parallel or competing "line" as used in Const. art. XVII, sec. 4 means an "intended railroad" which, when completed and in operation, would actually compete with the road seeking control. *Penn. R. R. Co. et al. v. Commonwealth, supra*. Obtaining control of such a projected railroad by another railroad is in violation of the constitutional provisions. *Ibid*.

"Telegraph" companies within purview of Const. art. XVII, sec. 12 do not include telephone companies. *Mitchell v. Public Service Commission*, 276 Pa. 390, 120 Atl. 447 (1923); *Shaffer v. Public Service Commission et al.*, 268 Pa. 456, 111 Atl. 877 (1920). Cf. *Cochran-ton Tel. Co. v. Public Service Commission*, 263 Pa. 506, 107 Atl. 23 (1919), citing Const. art. VI, sec. 12, but apparently intending to refer to Const. art. XVI, sec. 12.

A preliminary injunction sought by stockholders of a railroad leased by the defendant railroad company in alleged violation of Const. art. XVII, sec. 4 was denied. *Gummere et al. v. Lehigh Valley R. R. Co. et al.*, 12 Pa. CC. 106 (1861).

A preliminary injunction enjoining a threatened violation of Const. art. XVII, sec. 4 was continued where the evidence showed an agreement between the defendant and a parallel and competing road for the purchase of the latter's stock. *Penn. R. R. Co. v. Commonwealth, supra*.

The construction of a line parallel to another small line which the constructing railroad virtually owns by a 999-year lease does not violate Const. art. XVII, sec. 4. *Catawissa R. R. Co. v. Phila. & Reading*, 14 Pa. CC. 280 (1894). The object of this section is not to prevent extension of one's own business. *Ibid.*

Ownership by a railroad of practically all the stock of a mining corporation is not of itself such an act as to be considered engaging in the mining business in violation of Const. art. XVII, sec. 5. *Hartwell v. Buffalo, R. & P. Ry.*, 19 Pa. C. C. 231 (1897).

A canal company no longer serving as common carrier can avail itself of statutory permission to convert the water supply theretofore used as water highways for domestic manufacturing and commercial purposes without violating Const. art. XVII, sec. 5. *Commonwealth etc. v. Delaware Division Canal Co. et al.*, 332 Pa. 53, 1 Atl. (2d) 672 (1938). See also *Commonwealth etc. v. New York, L. E. & W. R. Co. et al.*, 132 Pa. 591, 19 Atl. 291 (1890).

Public Contracts.

A contract restraining competition between bidders for the privilege of irrigating and reclaiming certain public lands was held unenforceable. Consequently, the plaintiff could not recover in an action for the consideration promised for withdrawing his bid. Although no actual harm may have resulted, such transactions because of their general tendency for evil, irrespective of results in any special case, are against public policy. *Kuhn et al. v. Buhl*, 251 Pa. 348, 96 Atl. 977 (1916).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business or Professional Practice.

Contracts not to compete entered into as part of a sale of business and goodwill are valid at common law when reasonably restrictive in time and place. *Gompers et al. v. Rochester*, 56 Pa. 194 (1867); *McNutt v. McEwen*, 10 Phila. 112 (1874); *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251 (1886); *Gaul v. Hoffman*, 5 Pa. C. C. 355 (1888); *Patterson et al. v. Glassmire et al.*, 166 Pa. 230, 31 Atl. 40 (1895);

Cleaver v. Lenhart, 182 Pa. 285, 37 Atl. 811 (1897); *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 288, 59 Atl. 1088 (1904); *Pittsburg Stove & Range Co. v. Penn Stove Co. et al.*, 208 Pa. 37, 57 Atl. 77 (1904); *Richards et al. v. Shipley*, 257 Pa. 134, 101 Atl. 456 (1917); *Sklaroff et al. v. Sklaroff et al.*, 263 Pa. 421, 106 Atl. 793 (1919); *Kunin v. Weller et al.*, 296 Pa. 161, 145 Atl. 719 (1929); *Hollanā et al. v. Brown et al.*, 304 Pa. 545, 156 Atl. 168 (1931); *Fisher v. Hager*, 310 Pa. 398, 165 Atl. 655 (1933).

Certain contracts limited in time and space have been held reasonable. *Gompers et al. v. Rochester, supra* (not to engage in same business of merchandise within 10 miles of the town for 5 years); *Cleaver v. Lenhart, supra* (not to engage in milk or butter business within 5 miles of two creameries for 3 years); *Monongahela River Consol. Coal & Coke Co. v. Jutte, supra* (not to carry on mining and shipping business in territory traversed by the Monongahela, Ohio, and Mississippi rivers and their tributaries for 10 years); *Pittsburg Stove & Range Co. v. Penn. Stove Co. et al., supra* (not to engage in manufacture and sale of stoves, ranges, furnaces, and kindred products in States of Pennsylvania, Ohio, and West Virginia for 5 years); *Richards et al. v. Shipley, supra* (not to engage in coal business in same city for 2 years, or within a radius of 2 miles from a former place of business for 5 years); *Kunin v. Weller et al., supra* (not to engage in grocery and delicatessen business within a radius of 5 city blocks for 5 years).

Certain contracts limited in space only have been held reasonable. *McNutt v. McEwen, supra* (not to practice the medical profession in the "neighborhood"—the court allowed introduction of affidavits to show extent of the defendant's practice to clarify space limitations); *Smith's Appeal, supra* (not to engage in the manufacture of ochre in the county or elsewhere—court limited the restraint to the county); *Gaul v. Hoffman, supra* (not to practice medicine within 8 miles of a city); *Patterson et al. v. Glassmire et al., supra* (not to engage in business of hairdressing within 8 squares of the place of business sold); *Sklaroff et al. v. Sklaroff et al., supra* (not to engage in business of fish curing and smoking in Pennsylvania and New Jersey); *Holland et al. v. Brown et al., supra* (not to engage in dairy business within radius of 10 miles from a city); *Fisher v. Hager, supra* (not to engage in furniture business within a radius of 25 miles from any point or place where the plaintiff may be established—court construed this limitation to mean the vicinity where the plaintiff was established at the time of the agreement, hence not giving the plaintiff a right to move from place to place

and excluding defendant from competition in the areas surrounding each successive location).

Restrictive Covenants Ancillary to Sale and Licensing of Articles.

Contracts not to compete entered into as part of a sale or licensing of an article are valid at common law when the restraints on trade are reasonable. *Gillis v. Hall et al.*, 7 Phila. 422 (1870); *Henschke et al.*, v. *Moore et al.*, 257 Pa. 196 (1917).

Contracts unlimited in time and space have been held unreasonable. *Gillis v. Hall et al.*, *supra* (not to engage in manufacture of any article similar to the hair restorer sold); *Henschke et al. v. Moore et al.*, *supra* (license to manufacture and use a patented device with an agreement not to engage in the business of manufacturing or selling the same or any competing material anywhere in the United States).

Restrictive Covenants Ancillary to Employment.

Contracts not to compete entered into as part of employment agreements are valid at common law when the restraints are reasonable. *Stofflet v. Stofflet*, 160 Pa. 529, 28 Atl. 857 (1894); *Harbison v. Mawhinney*, 8 Pa. Dist. 697 (1899); *Seward v. Shields*, 9 Pa. Dist. 583 (1900); *Cooper et al. v. Edeburn*, 198 Pa. 229, 47 Atl. 1116 (1901); *Erie County Milk Ass'n. v. Ripley*, 18 Pa. Sup. 28 (1901); *American Ice Co. v. Luff*, 12 Pa. Dist. 381 (1903); *Philadelphia Towel Supply & Laundry Co. v. Weinstein*, 57 Pa. Sup. 290 (1914); *Srolowitz v. Roseman*, 263 Pa. 588, 107 Atl. 322 (1919).

Contracts limited in time and space have been held reasonable. *Harbison v. Mawhinney*, *supra* (not to supply milk to any customers with whom he became acquainted while employed, for 1 year after termination of employment); *Erie County Milk Ass'n. v. Ripley*, *supra* (not to peddle or furnish milk in a city or vicinity, for 1 year); *American Ice Co. v. Luff*, *supra* (not to sell or deliver ice in territory covered by his route nor within five squares from any point in or on his route for 1 year); *Philadelphia Towel Supply & Laundry Co. v. Weinstein*, *supra* (not to engage in laundry business in the district assigned to him, for 1 year); *Srolowitz v. Roseman*, *supra* (not to engage in meat business in city for 1 year). Cf. *Seward v. Shields*, *supra*, where the court refused to restrain an employee who had agreed not to service any of his employer's laundry customers for a period of 1 year after termination of employment.

Certain contracts limited in space only have been held reasonable. *Stofflet v. Stofflet*, *supra* (upon termination of a photography business partnership not to open a competing gallery in the city); *Cooper et al.*

v. *Edeburn*, *supra* (upon withdrawal from partnership, not to engage in business of civil and mining engineering and surveying in the county).

Contract unlimited in time and space was held unreasonable. *Keeler v. Taylor*, 53 Pa. 467 (1866) (upon termination of employment to pay plaintiff \$50 for every scale made by employee for third persons).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Stat. Ann. (Purdon, 1931), tit. 14 Nonprofit Associations Without Capital Stock

Section 53 provides that the bylaws of nonstock cooperative associations organized under sections 41 to 63 may require their members to sell all, or any part of their specifically enumerated agricultural products, or to buy all, or any part of their specifically enumerated supplies exclusively through the association. See *Cooperatives* in projected study.

Associations Having Capital Stock

Section 90 provides that cooperative agricultural associations organized under sections 81 to 106 may make contracts with their stockholders and other patrons requiring them to sell all or any specified part of their products exclusively to or through the association. See *Cooperatives* in projected study.

Stat. Ann. (Purdon, Supp. 1933), tit. 47 Liquor

Section 744-602 (29) provides that it shall be unlawful for any licensee, or his servants, agents, or employees to offer, pay, make, or allow, or to solicit or receive, any allowance or rebate, refunds, or concessions whether in the form of money or otherwise, to induce the purchase of liquor or malt or brewed beverages or any other commodity manufactured or sold by the licensee. Section 100f (XIX) makes similar provisions for beer and wine licensees.

Section 744-602 (30) provides that it shall be unlawful for any licensee, or any agent, employee, or representative of his, to give or permit to be given, directly or indirectly, money or anything of substantial value in an effort to induce agents, employees, or repre-

sentatives of consumers or prospective consumers to influence their employer or principal to purchase or contract to purchase liquor or malt or brewed beverages from the donor of such gift, or to influence such employers or principals to refrain from dealing or contracting to deal with other licensees. Section 100f (XVII) makes similar provisions for beer and wine licenses. See *Special Antitrust Laws: Liquor, supra*.

Judicial Decisions

Exclusive Dealing Arrangements.

A condition in the lease of a saloon providing for its termination upon failure of the lessee to sell a designated brand of beer was held against public policy. *Muller v. Bohringer*, 3 Pa. C. C. 144 (1887).

An agreement to carry on a business of selling cattle at a particular stockyard, and not a competing one, for a period of 1 year is reasonable and legal. *Fuller v. Hope*, 163 Pa. 62, 29 Atl. 779 (1894).

An agreement giving a single express company the exclusive right to use the railway's facilities for all express purposes during a 3 year's period was held illegal. It is not within the power of a railroad corporation under its franchise rights to create a monopoly of or within any of its branches. *Sandford v. Railroad Co.*, 24 Pa. 378 (1855).

In settlement of a patent litigation, the Bell Telephone Co. agreed to give to Western Union exclusive use of its facilities. Plaintiff, a competing telegraph company applied for use of the facilities, and the telephone company in denying it such use claimed that the license of its patent rights to Western Union prevented it from granting similar rights to plaintiff company. The court held that the agreement was not in fact a license of patentee rights, but a contract to prevent others from entering into competition with Western Union. The contract being in restraint of trade is therefore illegal and void. *Bell Telephone Co. of Philadelphia v. Commonwealth*, 2 Sad. 299, 3 Atl. 825 (1886).

RHODE ISLAND



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Rev. Gen. Laws (1938), c. 621

Section 1 provides that every act which is an offense at common law and for which no punishment is prescribed may be prosecuted and punished as an offense at common law.

Judicial Decisions

Application of the Common Law.

Combinations not monopolistic in character, organized for the purpose of obtaining mutual benefits and advantages for their members and not in restraint of trade, are lawful. The test is whether or not within a given trade or business the field is open to competition. Three New England companies engaged in the manufacture of oleo-margarine consolidated as a corporation. Each of the three agreed not to compete with the corporation for a period of 5 years. Defendant, former head of one of the three companies, engaged in competition with the corporation in violation of the agreement. As a defense to an action for an injunction, the defendant alleged that the corporation was an unlawful combination in restraint of trade. The court enjoined the defendant since there was no evidence of an attempt to stifle competition. Consolidation is not in itself unlawful. *Oakdale Manuf'g Co. v. Garst*, 18 R. I. 484, 28 Atl. 973 (1894).

An indictment charging conspiracy to fix the price of coal is defective. Price fixing is not in and of itself detrimental to the public welfare. The law prohibits a combination organized for the purpose of creating a monopoly, destroying competition, and controlling prices to the detriment of the public. The indictment, therefore, must so charge. *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1 (1908).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Rev. Gen. Laws (1938), c. 393 Resale Price Maintenance

Sections 1 to 7 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between wholesalers, between producers, or between retailers. See Vol. *State Price Control Legislation*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Rev. Gen. Laws (1938), c. 218 Milk

Sections 9 and 13 declare that the Department of Agriculture and Conservation may decline to grant a license or may revoke a license already granted to a milk-gathering station or to any buyer of milk where the Chief of the Division of Animal Industry and Milk Control is satisfied there has been a combination to fix prices.

Rev. Gen. Laws (1938), c. 163 Liquor

Section 17 provides that it shall be unlawful, except as herein otherwise provided, for any holder of a manufacturer's or wholesaler's license to have any direct or indirect interest in any retailer's license or in the business carried on under a retailer's license, provided that if by operation of law the holder of a manufacturer's or wholesaler's license acquires an interest in such a license or business, he shall within thirty days thereafter report the same to the division of intoxicating beverages and shall dispose of such interest in accordance with directions of the division. Any person wilfully violating the provisions of this section shall forfeit his manufacturer's license and his interest in the retailer's license.

Section 10 provides that upon violation of any of the provisions of this title, by any licensee, his license shall be revoked and said licensee shall be disqualified from holding any other liquor license for a period of five years thereafter.

2. Public Contract Provisions

Rev. Gen. Laws (1938), c. 5
General

Section 14, clause E, provides that if all bids received on a pending State contract are for substantially the same unit price or total amount, the State Purchasing Agent shall have the authority to reject all bids. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A contract not to engage in the pharmacy business within one quarter of a mile for 1 year after the sale of a partnership interest by the promissor was held valid and violation was enjoined. *Rotman v. Mushlin*, 114 Atl. 535 (1921).

The defendant was an officer and large stockholder in the plaintiff corporation, a cleaning and dyeing business located at Revere, Mass., which serviced many points in New England. The defendant sold his interest in the business to plaintiff for a substantial sum and contracted not to engage in the business for a period of 7 years within the territory served by the plaintiff, defined as an area within a radius of 200 miles of Revere. A bill to enjoin the defendant from engaging in the business at Providence, R. I., in violation of the contract was granted. Under the circumstances, the contract was reasonable. Rhode Island being within the territory served by the plaintiff, the defendant was enjoined from competing with the plaintiff. *North Shore Dye House v. Rosenfeld*, 53 R. I. 279, 166 Atl. 846 (1933).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

The defendant sold his medical practice to the plaintiff and agreed not to engage in the practice of medicine within the city. A demurrer to the plaintiff's bill for an injunction was overruled. The contract was held valid even though without time limitation. *French v. Parker*, 16 R. I. 219, 14 Atl. 870 (1888).

Restrictive Covenants Ancillary to Employment.

The plaintiff, the director of a school of languages in Providence, employed the defendant as a teacher of languages under a contract providing that after the termination of his employment the defendant would not engage in the teaching of foreign languages anywhere in the State of Rhode Island for 1 year. A demurrer to an action for breach of the restrictive agreement was sustained. The contract is not invalid simply because it runs throughout the State; the test of validity is its reasonableness. Reasonableness is determined by the necessity of protecting the party in whose favor the contract was made, the hardship upon the promissor, and the interest of the public. Here the contract went beyond the requirement of the situation and unduly restricted the defendant. *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712 (1890).

The plaintiff brought action to restrain the defendant, after termination of his employment by plaintiff as a dentist, from practicing dentistry within the same county in violation of his contract. The defendant's demurrer was overruled. *Tillinghast v. Boothby*, 20 R. I. 59, 37 Atl. 344 (1897).

An agreement not to compete with plaintiff corporation within its territory was held valid where the defendant was a minority stockholder in a corporation which was purchased by the plaintiff, the plaintiff agreeing also to employ the defendant for a certain period. Although vague in terms, the contract will be enforced to prevent defendant from regaining the business formerly engaged in by the corporation which the plaintiff purchased. *Koppers Product Co. v. Radio*, 197 Atl. 441 (1938).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Gen. Laws (1938), c. 117
Cooperatives

Section 5 provides that each cooperative association organized under sections 1 to 16 shall have power and authority to enter into contracts with its members requiring them to sell or market all or a specified part of their products to or through the association for periods not exceeding ten years. See *Cooperatives* in projected study.

Judicial Decisions

Several members of a cooperative association, having entered into contractual relations with the association in accordance with chapter 117, section 5, engaged a driver to deliver their products to dealers not authorized as association distributors. The driver was enjoined from making such deliveries even though he did not induce the breach of the cooperative contract and was not a party thereto. *Local Dairy-men's Cooperative Association v. Potvin*, 54 R. I. 430, 173 Atl. 535 (1934).

SOUTH CAROLINA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. IX. Sec. 13. Trusts, combinations, etc.—The General Assembly shall enact laws to prevent all trusts, combinations, contracts, and agreements against the public welfare; and to prevent abuses, unjust discriminations, and extortion in all charges of transporting and transmitting companies; and shall pass laws for the supervision and regulation of such companies by commission or otherwise, and shall provide adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their franchises.

Const. art. IX. Sec. 19. Corporations cannot do act prohibited through controlling interest in other corporations.—Nothing prohibited in this Article shall be permitted to be done by any corporation or company, persons or person, either for its or their own benefit or otherwise, by its or their holding or controlling in its or their own name or otherwise, or in the name of any other person or persons, or other corporation or company whatsoever, a majority of the capital stock, or of bonds having voting power, of any railroad or transportation company, or corporation created by or existing under the laws of this State, or doing business within this State.

STATUTORY PROVISIONS

Code (1932)

Sec. 6620. Trusts and combinations declared against public policy.—All arrangements, contracts, agreements, trusts, or combinations between two or more persons as individuals, firms, or corporations made with a view to lessen, or which tends to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations de-

signed or which tend to advance, reduce, or control the price or the cost to the producer or to the consumer of any such product or article, and all arrangements, contracts, trusts, syndicates, associations, or combinations between two or more persons as individuals, firms, corporations, syndicates, or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premium, or prices in any branch of trade, business, or commerce, are hereby declared to be against public policy, unlawful, and void. (Civ. C. '22, sec. 2530; Civ. C. '12, sec. 2437; Civ. C. '02, sec. 2845; 1897, XXII, 434.)

Sec. 6621. Charter of corporation violating to be forfeited—How.—Whenever complaint is made upon sufficient affidavit or affidavits showing a prima facie case of violation of the provisions of section 6620 by any corporation, domestic or foreign, it shall be the duty of the Attorney General to begin an action against such domestic corporation to forfeit its charter; and for the purpose of such forfeiture he shall apply to any court of competent jurisdiction for an order restraining such offending corporation, and in cases where in his discretion it is necessary, for the immediate appointment of a receiver for such offending corporation where such forfeiture affects a creditor or creditors of such offending company; and in case such violation shall be established the court shall adjudge the charter of such corporation to be forfeited, and such corporation shall be dissolved, and its charter shall cease and determine; and in the case of such showing as to a foreign corporation an action shall be begun by the Attorney General in said court against such corporation to determine the truth of such charge; and in case such charge shall be considered established, the effect of the judgment of the court shall be to deny to such corporation the recognition of its corporate existence in any court of law or equity in this State. But nothing in this section shall be construed to affect any right of action then existing against such corporation. (Civ. C. '22, sec. 3531; Civ. C. '12, sec. 2438; Civ. C. '02, sec. 2846; 1897, XXII, 434; 1902, XXIII, 569.)

Sec. 6622. Injured party may recover damages—Witnesses.—Any person or persons or corporations that may be injured or damaged by any such arrangement, contract, agreement, trust or combination described in section 6620 may sue for and recover, in any court of competent jurisdiction in this State, of any person, persons, or corporation operating such trust or combination, the full consideration or sum paid by him or them for any goods, wares, merchandise, or articles the sale of which is controlled by such combination or trust.

Any and all persons may be compelled to testify in any action or prosecution under sections 6620 to 6622, inclusive: *Provided*, That such

testimony shall not be used in any other action or prosecution against such witness or witnesses, and such witness or witnesses shall forever be exempt from any prosecution for the act or acts concerning which he or they testify. (Civ. C. '22, sec. 3532; Civ. C. '12, sec. 2439; Civ. C. '02, sec. 2847; 1897 XXII, 434.)

Section 6623 provides for rights and remedies of employees of street railways.

Sec. 6624. Conspiracies in restraint of trade prohibited.—Any corporation organized under the laws of this or any other State or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association, or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and to be subject to the penalties as provided by sections 6624, 6625 and 6634 to 6639. (Civ. C. '22, sec. 3534; Civ. C. '12, sec. 2441; 1902, XXIII, 1057.)

Sec. 6625. Monopolies defined.—A “monopoly” is 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, by or between persons, firms, or corporations, or associations of persons, firms, or corporations, whereby any one of the purposes or objects mentioned in sections 6624, 6625, and 6634 to 6639 is accomplished, or sought to be accomplished, or whereby any one or more of said purposes are promoted, or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a “monopoly” as thus defined and contemplated, includes not merely such combinations by and between two or more persons, firms, or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations, or incorporations of capital, skill, credit, assets,

property, custom, trade, or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation, or an incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition, or control of shares or certificates of stocks or bonds, or other corporate property or franchises, and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade, or corporate or firm belongings of two or more firms or corporations or companies, are especially declared to constitute monopolies, within the meaning of sections 6624, 6625, and 6634 to 6639, if so created or entered into for any one or more of the purposes named in sections 6624, 6625, and 6634 to 6639; and a "monopoly," as defined in this section, is hereby declared to be unlawful and against public policy; and any and all persons, firms, corporations, or associations of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in sections 6624, 6625, and 6634 to 6639. (Civ. C. '22, sec. 3535; Civ. C. '12, section 2442; 1902, XXIII, 1057.)

Sec. 6626. Unlawful to discriminate unfairly to destroy competitor's business.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of South Carolina, and engaged in the production, manufacture or distribution of any commodity in general use, that for the purpose of injuring or destroying the business of a competitor in any town, village, city or locality discriminate between different purchasers of such commodity in general use in such village, town or cities in this State, or discriminate between such purchasers in different sections, communities, cities or towns of this State, by selling such commodity at a lower rate to one purchaser in the same city, town, section, community than is charged for said commodity by a person, firm, company, association or corporation in another section of said city, town, community or locality in this State, after making due allowance for the difference, if any, in the grade, or quality, and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful: *Provided*, That any plan, scheme, device, or agreement which would take away or affect to an appreciable extent the business of a competitor and thus make it unreasonable financially for such competitor to compete with or meet the prices of such seller, shall be deemed and considered unfair discrimination under the terms of this section, and each separate sale or transaction at the price or under the plan complained of shall be

deemed a separate offense under the provisions of sections 6626 to 6633, inclusive: *Provided further*, That all proceedings under this section shall be brought in the manner hereinafter required and provided, tried in a court of competent jurisdiction in the same manner that proceedings at law are now tried and heard in such courts. (Civ. C. '22, sec. 3536; Civ. C. '12, sec. 2443; 1909, XXVI, 19; 1927, XXXV, 115.)¹

Sec. 6627. Penalty for violation of preceding section.—Any person, firm, company, association, or corporation violating any of the provisions of the preceding section, and any officer, agent, or receiver of any firm, company, association, or corporation, or any member of the same, or any individual guilty of a violation thereof, shall be liable for a penalty of not less than five hundred dollars (\$500), nor more than five thousand dollars (\$5,000), to be recovered at the suit of the State in the court of Common Pleas of any county in the State; the Attorney General may allow one-half of the penalties herein provided to anyone who may conduct the suit. (Civ. C. '22, sec. 3537; Civ. C. '12, sec. 2444; 1909, XXVI, 19.)

Sec. 6628. Validity of trust agreements.—All contracts or agreements made in violation of any of the provisions of sections 6626 to 6633 shall be void. (Civ. C. '22, sec. 3538; Civ. C. '12, sec. 2445.)

Sec. 6629. Attorney General to enforce law.—It shall be the duty of the Attorney General to enforce the provisions of sections 6626 to 6633 by appropriate actions in courts of competent jurisdiction. (Civ. C. '22, sec. 3539; Civ. C. '12, sec. 2446; 1909, XXVI, 19.)

Sec. 6630. Duty of Secretary of State.—If complaint shall be made to the Secretary of State that any corporation authorized to do business in this State is guilty of unfair discrimination within the terms of sections 6626 to 6633, it shall be the duty of the Secretary of State to refer the matter to the Attorney General, who may, if the facts justify it, in his judgment, institute proceedings in the courts against such corporation. (Civ. C. '22, sec. 3540; Civ. '12, sec. 2447; 1909, XXVI, 19.)

Sec. 6631. Charter of guilty corporation to be revoked.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, within the terms of sections 6626 to 6633, it shall be the duty of the Secretary of State to immediately revoke the permit of such corporation to do business in this State. (Civ. C. '22, sec. 3541; Civ. C. '12, sec. 2448; 1909, XXVI, 19.)

¹ For further treatment of sec. 6626, see vol. *State Price Control Legislation: Antidiscrimination Legislation.* MARKETING LAWS SURVEY series.

Sec. 6632. Duty of Attorney General in case of continued violation.—If, after revocation of its permit, such corporation, or any other corporation not having a permit and found guilty of having violated any of the provisions of sections 6626 to 6633, shall continue or attempt to do business in this State, it shall be the duty of the Attorney General, by a proper suit in the name of the State of South Carolina, to oust such corporation from all business of every kind and character in this State. (Civ. C. '22, sec. 3542; Civ. C. '12, sec. 2449; 1909, XXVI, 19.)

Sec. 6633. Other law not repealed.—Nothing in sections 6626 to 6633 shall be construed as repealing any other laws, or parts of laws, but the remedies herein provided shall be cumulative to all other remedies provided by law. (Civ. C. '22, sec. 3543; Civ. C. '12, sec. 2450; 1909, XXVI, 19.)

Sec. 6634. Sales at less than cost of manufacture, for purpose of injuring competitors, prohibited.—If any person, persons, company, partnership, association, or corporation engaged in the manufacture, sale, or distribution of any commodity in general use in this State shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell at less than cost of manufacture, or at less than the cost of such commodity brought in the open markets plus the freight and other charges to point of destination, or give away such product for the purpose of driving out competition, or financially injuring competitors engaged in the manufacture, sale, or distribution of such commodity in this State, said person, persons, company, partnership, association, or corporation, resorting to this method of securing a monopoly in the manufacture, refining, sale, or distribution of such commodity in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and further deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful: *Provided*, That suit shall be brought in the manner hereinbefore provided in section 6627 and the same penalties therein provided shall apply, and the Attorney General shall be authorized to proceed as provided in sections 6624, 6625, and 6634 to 6639 to enforce the provisions thereof: *Provided*, That each sale so proven under the provisions of this section shall be considered a separate offense. (Civ. C. '22, sec. 3544; Civ. C. '12, sec. 2451; 1902, XXIII, 1057; 1927, XXXV, 115.)²

Sec. 6635. Penalty for violation.—Any person, partnership, firm, or association, or any representative or agent thereof, or any cor-

²For further treatment of sec. 6634, see vol. *State Price Control Legislation: Prohibition of Sales Below Cost*.

poration or company, or any officer, representative, or agent thereof, violating any of the provisions of sections 6624, 6625, and 6634 to 6639, shall forfeit not less than two hundred dollars, nor more than five thousand dollars, for every such offense, and each day such person, corporation, partnership, or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney General or the solicitor of the judicial circuit within which the offense was committed; the moneys thus collected to go into the State Treasury, and to become a part of the general fund except as hereinafter provided. The amount of the forfeit to be fixed by the judge before whom the case is tried in each case, within the aforesaid limits; the collection of which penalty shall be enforced as the collections of fines against defendants upon conviction of a misdemeanor. (Civ. C. '22, sec. 3545; Civ. C. '12, sec. 2452; 1902, XXIII, 1057.)

Sec. 6636. Conspiracy to defraud by boycott, etc., limiting competition in trade.—If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association, or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or a party to such pool, trust, agreement, combination, confederation, association, or understanding; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement, combination, confederation, association, or understanding, any such article or thing aforesaid, it shall be a violation of sections 6624, 6625, and 6634 to 6639; and any person, firm, corporation, or association of persons committing such violation shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in said sections. (Civ. C. '22, sec. 3546; Civ. C. '12, sec. 2453; 1902, XXIII, 1057.)

Sec. 6637. Forfeiture of corporate franchise or right to do business.—Any corporation created or organized by or under the laws of this State which shall violate any of the provisions of the sections 6624, 6625, and 6634 to 6639 shall hereby forfeit its corporate rights and franchise; and its corporate existence shall, upon the proper proof being made thereof in any court of competent jurisdiction in the State,

be by the court declared forfeited, void and of none effect, and shall thereupon cease and determine; and any corporation created or organized by or under the law of any other State or country which shall violate any of the provisions of sections 6624, 6625, and 6634 to 6639, shall thereby forfeit its right and privilege thereafter to do any business in this State; and upon proper proof being made thereof in any court of competent jurisdiction in this State, its rights and privileges to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State has been, while acting as such agent and in the name, behalf or interest of such foreign corporation, violating any provisions of sections 6624, 6625, and 6634 to 6639, shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State. (Civ. C. '22, sec. 3547; Civ. C. '12, sec. 2454; 1902, XXIII, 1057.)

Sec. 6638. Duty of Attorney General and Solicitors to prosecute.—It shall be the duty of the Attorney General and the prosecuting attorney of each circuit where the offense is committed, respectively, to enforce the provisions of sections 6624, 6625, and 6634 to 6639. The prosecuting attorney or Solicitor shall institute and conduct all suits begun in the Circuit Courts, and upon appeal the Attorney General shall prosecute said suits in the Supreme Court. (Civ. C. '22, sec. 3548; Civ. C. '12, sec. 2455; 1902, XXIII, 1057.)

Sec. 6639. Provisions of article cumulative.—The provisions of the foregoing sections, and the pains and penalties provided for violations of sections 6624, 6625, and 6634 to 6639 shall be held and construed to be cumulative to all laws now in force in this State: *And provided*, That the provisions of sections 6624, 6625, and 6634 to 6639 shall not exempt from punishment or forfeiture any person, firm, association of persons or corporations who may have violated or offended against any law now in existence that may be or may be construed to be repealed by sections 6624, 6625, and 6634 to 6639 or in conflict herewith: *And provided, further*, That nothing in sections 6624, 6625, and 6634 to 6639 shall be deemed or construed to affect any suits or prosecutions now pending or hereafter to be instituted upon any course of action, forfeiture or penalty accruing or to accrue prior to the date of the taking effect of sections 6624, 6625, and 6634 to 6639, but all such rights to maintain, institute, or prosecute all such causes of action are hereby reserved to the State in the same manner and with the same effect as if this law had not been passed. (Civ. C. '22, sec. 3549; Civ. C. '12, sec. 2456; 1902, XXIII, 1057.)

Sec. 6640. Proceedings for discovery in aid of actions to enforce antitrust laws.—Whenever the Attorney General has determined to commence an action or proceeding, under the Act entitled “An Act to prohibit trusts and combinations and to provide penalties,” or any Acts amendatory thereto, or any Acts now or hereafter of force, relating to the prohibition or prevention of trusts, combinations or monopolies, or against corporations, foreign or domestic, for any violation of any Acts now or hereafter of force of this State, he may present to any justice of the Supreme Court, or any circuit judge, either before or after beginning such action or proceeding, an application in writing for an order directing the persons mentioned in the application to appear before a justice of the Supreme Court, a circuit judge, or a referee designated in such order, and answer such questions as may be put to them or to any of them and produce such papers, documents and books concerning any alleged illegal contract, arrangement, agreement, trust, monopoly, or combination or corporate acts in violation of law; and it shall be the duty of the justice of the Supreme Court, or the circuit judge, to whom such application for the order is made, to grant such application. The application upon the proper showing of the necessity of such showing for such order made by the Attorney General must show upon information and belief, or otherwise, that the testimony of such person or persons is material and necessary. The order shall be granted by the justice of the Supreme Court, or the circuit judge, to whom the application has been made, with such preliminary injunction or stay as may appear to such justice or circuit judge to be proper and expedient, and shall specify the time when, and place where, the witnesses are required to appear, and such examination shall be held either in the city of Columbia or in the judicial district in which the witness resides, or in which the principal office, within this State, of the corporation affected is located. The justice, judge, or referee may adjourn such examination from time to time, and witnesses must attend accordingly. The testimony of each witness must be subscribed by him, except in case the testimony be taken and subscribed by a sworn stenographer, and all such testimony must be filed in the office of the clerk of the county in which such order for examination is filed. (Civ. C. '22, sec. 3550; Civ. C. '12, sec. 2457; 1902, XXIII, 1061.)

Sec. 6641. Service of order on witness—Endorsement—Subpoena duces tecum.—The order for such examination must be signed by the justice or judge making it, and the service of a copy thereof, with an endorsement by the Attorney General, signed by him, to the effect that the person named therein is required to appear and

be examined at the time and place, and before the justice, circuit judge, or referee specified in such endorsement, shall be sufficient notice for the attendance of witnesses. Such endorsement may contain a clause requiring such person to produce on such examination all books, papers, and documents in his possession, or under his control, relating to the subject of such examination. The order shall be served upon the person named in the endorsement aforesaid, by showing him the original order, and delivering to and leaving with him, at the same time, a copy thereof endorsed as above provided, and by paying or tendering to him the fee allowed to witnesses subpoenaed to attend trials of civil actions in a court of record in this state. (Civ. C. '22, sec. 3551; Civ. C. '12, sec. 2458; 1902, XXIII, 1061.)

Sec. 6642. Witness compelled to give testimony—Protected from criminal prosecution.—No person shall be excused from answering any questions that may be put to him, or from producing any books, papers, or documents on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him, but no person shall be prosecuted in any criminal action or proceedings, or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said justice, judge, or referee appointed in the order for his examination, or in obedience to the subpoena of the court, or referee acting under such order, or either of them, or in any such case of proceeding. (Civ. C. '22, sec. 3552; Civ. C. '12, sec. 2459; 1902, XXIII, 1061.)

Sec. 6643. Powers of referee.—A referee appointed as provided in sections 6640 to 6644, inclusive, possesses all the powers and is subject to all the duties of a referee appointed under the Code of Civil Procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in sections 6640 to 6644, inclusive, for nonattendance or refusal to be sworn or to testify, or to produce books, papers and documents according to the direction of the endorsements aforesaid, in the same manner and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law. (Civ. C. '22, sec. 3553; Civ. C. '12, sec. 2460; 1902, XXIII, 1061.)

Sec. 6644. Sections cumulative.—Sections 6640 to 6644, inclusive, shall be deemed and taken as cumulative of all statutes of this State. (Civ. C. '22, sec. 3554; Civ. C. '12, sec. 2461; 1902, XXIII, 1061.)

Section 3118 provides that whenever complaint has been made to the Attorney General or he has reason to believe that there is violation

of the law relating to and regulating trusts and combinations and unlawful and unfair discrimination to destroy competitor's business, as defined in Article 14 of Chapter 138, the Attorney General, in addition to the authority already conferred upon him by law, is hereby given the power and authority to investigate such alleged violation of law and in making such investigation he shall have the power and authority to summon and require the attendance of witnesses at such time and place as he may designate in the same manner as witnesses are now required to appear and testify in the trial of cases in courts of this State. (1930, XXXVI, 1396.)

Consolidation and Merger

Section 7763 provides that no consolidation or merger of corporations permitted by sections 7757 to 7762 shall render valid any matter or thing declared unlawful under any provision of sections 6620 to 6644 of the antitrust laws, or any amendment thereof, and no consolidation or merger shall be deemed to be lawfully accomplished if in contravention of sections 6620 to 6644 or any amendment thereof.

Judicial Decisions

Constitutionality of the Antitrust Laws.

Section 6620, then section 2845 of the Code of 1902, was declared constitutional in *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544, 51 S. E. 455 (1904).

The defendant company, a large manufacturer of fertilizer, incorporated in New Jersey, doing business in this State attempted to monopolize the domestic industry, and in accordance with this plan purchased controlling interests in a member of competing corporations. On demurrer it was objected that the antitrust laws were unconstitutional (1) since they violated the Fourteenth Amendment; (2) that these acts are in contravention of State and Federal Constitution providing that no State shall pass a law impairing the obligations of a contract; (3) that the acts in question are in violation of the interstate commerce clause. The lower court overruled the demurrer and on appeal the decision confirming the constitutionality of the statute was affirmed in toto, following the principles enunciated by Mr. Justice Brewer in his concurring opinion in the *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679 (1904) and held that the statute must be construed as prohibiting only unreasonable restraints. The court also indicated that it would scrutinize the intent of the defendant very carefully to see whether the entire plan came within the aegis of the statute. *Ibid.*

An agreement between producers and wholesalers of ice to keep out of one another's territory was held to be reasonable and valid upon the complaint of a retailer that he was the victim of a conspiracy. *Howle v. Mountain Ice Company*, 167 S. C. 41, 165 S. E. 724 (1932).

Application of Statutes.

In a proceeding to enjoin land condemnation otherwise authorized by defendants charter, the court will not go into the question whether the defendant intends to violate the antitrust laws by a plan of which the condemnation is no integral part. *Augusta Power Co. et al. v. Savannah River Electric Co.*, 163 S. C. 541, 161 S. E. 767 (1931).

The antitrust laws forbid only unreasonable restraints upon trade. *State v. Virginia-Carolina Chemical Co.*, *supra*. *South Carolina Cotton Growers' Cooperative Ass'n v. English*, 135 S. C. 19, 133 S. E. 542 (1926). *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.*, 75 S. C. 378, 55 S. E. 973 (1906). See *Contracts not to Compete*.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code (Supp., 1938) Resale Price Maintenance

Sections 6044-1 (1) to (6) validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements as to sale or resale prices between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Code (1932) Cooperatives

Section 6523 provides that no cooperative association organized under sections 6499 to 6527 shall be deemed to be a combination in restraint of trade, an illegal monopoly, an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperatives.

Marketing contracts entered into by cooperatives are exempt from the operation of antitrust laws. Defendant was a member of the plaintiff cooperative association. Defendant agreed to deliver cotton

produced for year 1923 to the plaintiff; on failure to do so, the association brought suit for specific performance. The defendant contended that the agreement was in restraint of trade, but the court held that it was not in violation of either the State or Federal anti-trust laws in view of purposes of organization which are for promotion of cooperative cotton marketing, and in view of the express exemption of such associations from the operation of the State anti-trust laws. *South Carolina Cotton Growers' Cooperative Ass'n. v. English, supra.* This case relies on section 6523.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Transportation and Transmitting Companies

Const. art. IX, sec. 7, provides that no railroad, or other transportation company, and no transmitting corporation, or the lessees, purchasers, or managers of such corporation shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or other transportation, telegraph, or other transmitting company owning or having under its control a parallel or competing line.⁸

STATUTORY PROVISIONS

Code (1932)

Railroads

Section 8230 provides that any railroad company organized under South Carolina laws and operating in part or wholly in South Carolina may merge and consolidate its capital stock, franchises, and property with those of any other railroad company whenever two or more railroads of the companies proposed to be consolidated are continuous or are connected with each other or connected by any intervening road: *Provided*, That nothing herein contained shall authorize any merger or consolidation inconsistent with the constitution and laws of this State with regard to parallel or competing lines.

Section 8238 provides that no corporation, individual, or association shall purchase or lease any railroad, or any interest therein, or shall operate the same where such purchaser or lessee already owns, operates, or is interested in a line or lines which can compete between any

⁸ See also *General Antitrust Laws*, Const. art. IX, secs. 13, 19, *supra*.

two or more points within State, and any such purchase, lease, or acquisition is null and void; nor shall any individual owning or exercising a controlling interest in any such competing company either directly or indirectly purchase or lease in whole or in part any such railroad; the corporation or individuals so offending by making such acquisition shall forfeit any franchise or license to operate or hold the competing road which they own, operate, or are interested in, and the company owning the railroad so to be controlled shall forfeit its charter, franchise, or license.

Section 8239 provides that no corporation owning and controlling a line of railroad which can compete shall make any consolidation, amalgamation, or merger of stocks, or franchises, or of railroads or interests, and any control or agreement for the same shall be null and void.

Section 8241 provides that no corporation, individual, or association owning or operating directly or indirectly any railroad wholly or partly in South Carolina, or owning or controlling at the time either solely or in conjunction with others, a majority of the stock of the corporation owning or controlling by stock, ownership, or otherwise, any such railroad, shall own or be interested in the stock of any corporation chartered by the State of South Carolina which owns or leases in whole or in part, or is otherwise interested in any railroad which competes in the manner set forth in section 8239 with the railroad first mentioned. Purchase or acquisition of the stock of a company controlling said last-named company by stock ownership is prohibited. Acquisition of such stock, or an interest therein, will cause the forfeiture of charter of the domestic corporation owning such last-mentioned railroad and the withdrawal of its franchises ipso facto.

Section 8478 provides that any railroad company owning, leasing, or operating competing lines shall be subject to a penalty of \$100 for every day such competing lines are owned, leased, or operated.

Insurance

Section 6624 provides that any corporation conducting business in this State shall become a party to any combination to fix the price or premium of any kind of insurance policy shall be guilty of a conspiracy to defraud. See *General Antitrust Laws, supra*.

Exclusive Franchise—Public Amusements

Section 6326 provides that cities having population of between 6,000 and 6,500 are empowered to grant exclusive franchises to operators of motion pictures and to other like forms of public amusements but such franchises shall not be for longer than 20 years.

Judicial Decisions

Application of Constitutional Provisions.

Under section 8238, a foreign corporation may not purchase a competing railroad in the State. *Edwards v. So. Ry.*, 66 S. C. 277, 44 S. E. 748 (1903). Section 8238 was not repealed by article IX, section 8, requiring foreign corporations to incorporate within the State before consolidation is permitted.

"The constitution (art. IX, sec. 13) requires the legislature to enact laws to prevent agreements against the public welfare. The legislature must primarily determine what requirements are against the public welfare." *Henderson v. McMaster, Ins. Commissioner, et al.*, 104 S. C. 268, 88 S. E. 645 (1916) (overruling constitutional objections to Stat. 1916, XXIX 673, pertaining to fire insurance companies, which was repealed by Stat. 1917, XXX 353).

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Application of Common Law.

The court has accepted the prevailing view "that such contracts in partial restraint of trade will be generally upheld and enforced if (1) supported by valuable consideration, (2) if reasonably limited as to time, and (3) if reasonably restricted as to place or territory, that is, where the time is no more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Metts et al. v. Wenberg*, 158 S. C. 411, 155 S. E. 734 (1930). See also *Bolt v. Ligon*, 144 S. C. 218, 142 S. E. 504 (1927) (sale of retail-drug business and agreement not to compete for 5 years within Spartanburg, S. C.).

An agreement not to engage in the barbering business in a designated city "now or hereafter" was held unreasonable for failure of limitation of time. *Carroll v. Giles*, 30 S. C. 412, 95 S. E. 522 (1889).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code (1932) Cooperatives

Section 6515 provides that cooperative associations and their members may make and execute marketing contracts, requiring the members to sell all or any part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association for any period of time, not over 10 years. Marketing contracts between an association and its members shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Application of Common Law.

In the following cases the court held exclusive arrangements reasonable, and consequently not illegal according to the common law. *McMaster v. Ford Motor Co., et al.*, 122 S. C. 244, 115 S. E. 244 (1921) (agreement by agencies not to handle patented device of third party). *South Carolina Cotton Growers' Cooperative Assn. v. English, supra* (Contract to deliver all cotton crops for 4 years).

An exclusive arrangement was held unreasonable in *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434, 48 S. E. 460 (1904) (agreement to use one telephone system exclusively). See also *State ex rel. Gwynn v. Citizens Telephone Co.*, 61 S. C. 83, 39 S. E. 257 (1901).

Application of Statute.

In the following cases, the court held exclusive arrangements reasonable and consequently not in violation of antitrust statute. In an action to recover for contract price of certain farm machinery based on an exclusive sales contract, it was contended that the agreement was void as in restraint of trade. The court held that even though the contract was made with a view to lessen competition, since there

was a clause providing that reasonable diligence would be used to prevent others from making sales of machines covered by the contract, an intent to affect competition and prices to a reasonable extent is not within the prohibition of the statute. *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.*, 75 S. C. 378, 555 E. 973 (1906), construing section 6620. In *Packard & Field v. Byrd*, 73 S. C. 1, 51 S. C. 678 (1905), involving the same statutory provision, an exclusive agency to sell shoes within a city was considered illegal.

SOUTH DAKOTA

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. XVII. Sec. 20. Monopolies and trusts shall never be allowed in this state and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any copartnership or association of persons, or in any manner whatever to fix the prices, limit the production, or regulate the transportation of any product or commodity so as to prevent competition in such prices, production, or transportation or to establish excessive prices therefor.

The legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose, may, as a penalty, declare a forfeiture of their franchises.

STATUTORY PROVISIONS

S. D. Comp. Laws (1939)

Sec. 13.1801. Unlawful trust or monopoly—Defined.—Within the meaning of this chapter a trust or monopoly is a combination of capital or skill by two or more persons or groups of persons:

- (1) To create or carry out restrictions in trade;
- (2) To limit the production or to increase or reduce the price of commodities;
- (3) To prevent competition in the manufacture, transportation, sale, or purchase of merchandise, produce, or commodities; or,
- (4) To fix any standard or figure whereby the price to the public shall be in any manner established or controlled.

Source: Sec. 4352 Rev. Code 1919, revised in form only to remove redundancy.

Sec. 13.1802. Production, price, competition—Unlawful influence on by single persons or combinations; penalty; forfeiture corporate rights.—It shall be unlawful for any person acting alone or persons or groups of persons acting in combination, directly or indirectly, or in any manner whatsoever, whether within or without this State or partly within and partly without this State, directly, indirectly, or otherwise to fix prices, limit production, or regulate the transportation of any product or commodity so as to obstruct, delay, or prevent competition within this State of the production, sale, purchase, distribution, or transportation of such product or commodity, or to make any combination, contract, or agreement for the purpose of doing any of said things.

Every person and group of persons and every officer, agent, or employee of any of the same whether acting as part of a trust or monopoly or singly and alone, violating any provision of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined for the first offense not more than five thousand dollars and for any subsequent offense not more than ten thousand dollars.

Any corporation organized under the law of this State which shall violate any provision of this section shall forfeit its charter or franchise to be a corporation, and any foreign corporation authorized to do business in this State violating any provision of this section shall forfeit its right to do business in this State.

Source: Secs. 4353, 4354, 4355, 4356, 4357, and parts of secs. 4359 and 4360 Rev. Code 1919, revised and combined to remove repetition and to unite cognate subject matter.

Sec. 13.1803. Discrimination in selling—Defined.—Any person doing business in this State, and engaged in the production, manufacture, or distribution of any commodity in general use, who intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this State by selling such commodity at a lower rate in one section, community, or city, or any portion thereof than such person or corporation charges for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom, shall be deemed guilty of unfair discrimination.

Sec. 13.1804. Discrimination in buying—Defined.—Any person doing business in this State and engaged in the production, manufacture, or purchase of any commodity or product in general use, who, with intent and for the purpose of destroying competition by

any regular established dealer in such commodity or product, shall discriminate between different sections, communities, or cities of this State by paying for such commodity or product a higher price in one section, community, or city than such person or corporation is at the same time paying for such commodity or product in another section, community, or city within the State, after equalizing the distance from the point of purchase and transportation charges therefrom, and the grade and quality thereof, shall be deemed guilty of unfair discrimination: *Provided, however,* That any person or corporation buying such commodities in more than one section, community, locality, or city, may raise prices in any given section, community, locality, or city, to but not above the prices paid by other persons or corporations buying such commodities in such section, community, locality, or city, when necessary to meet actual legitimate competition in such section, community, locality, or city, without being held to have violated the provisions of this chapter.

Source: Sec. 4366 Rev. Code 1919, revised in form only.

Sec. 13.1805. Penalty for unlawful discrimination selling or buying.—Any person violating the statutes against discrimination in buying or selling shall upon conviction be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

Source: Sec. 4367 Rev. Code 1919, revised in form only.

Sec. 13.1806. Fraudulently influencing market price, misdemeanor.—Every person who willfully makes or publishes any false statement, spreads any false rumor, or employs any false or fraudulent means or device, with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

Sec. 13.1807. Prosecution—Rights and duties of private persons, state's attorneys, attorney general.—It shall be the special duty of the state's attorney, upon the affidavit of any person showing that any person has violated any provision of this chapter, or without such affidavit, when he has reason to believe that any provision of this chapter has been or is being violated, to make complaint and cause the arrest of such person and to prosecute such action in the court having jurisdiction thereof, and it shall be the duty of such state's attorney immediately upon making such complaint to notify the attorney general thereof and it shall thereupon be the duty of the attorney general to aid in such prosecution: *Provided,* That the provisions of this chapter shall not be construed to prevent any person from making complaint of any violation of the provisions of this chapter to any court of competent jurisdiction, and in such case the court shall issue a warrant and proceed the same as though the state's attorney had made the complaint, and the court may also permit

any attorney and counselor at law of this State, whom the complainant may employ, to appear and prosecute such action at any stage of the proceedings therein: *Provided further*, That the provisions of this section shall not be construed in any manner to prevent the attorney general of this State from making a complaint in any court of competent jurisdiction for any violation of the provisions of this chapter and prosecuting the same in the same manner and with the same powers as herein provided for state's attorneys.

Source: Sec 4358 Rev. Code 1919, revised in form only to remove redundancy.

Sec. 13.1808. Corporations—Forfeiture rights; injunctions.—Whenever any corporation doing business in this State shall violate any of the provisions of this chapter, in addition to the criminal penalties provided, it shall forfeit its charter, franchise, or right to do business within this State as the case may be and it shall be the duty of the state's attorney of any county in which jurisdiction exists and of the attorney general to prosecute an action in the name of the state by quo warranto or other proper proceeding against such offending corporation to forfeit its corporate rights of existence or doing business within this State.

In addition to or independently of the criminal penalties and forfeiture of rights of corporations as herein provided, any person interested or any state's attorney or the attorney general, in behalf of the public, may invoke the remedy of injunction against any corporation violating any of the provisions of this chapter, and any judge of the circuit court or of the supreme court may in like manner enjoin and restrain any corporation organized under the laws of this State from carrying on any manufacturing or wholesale or retail business, being conducted or carried on in this State in violation of any provision of this chapter or its spirit and intent, and all final restraining orders may be perpetual or for such period and upon such terms and conditions as the court or judge thereof shall determine. All laws, rules, and regulations relative to applications for and granting of orders of injunction in force in this State shall apply to proceedings under the provisions of this chapter so far as the same are not in conflict with the provisions of this chapter.

The order of injunction mentioned herein may be issued upon affidavit showing to the satisfaction of the court or judge thereof that such corporation has violated some provision of this chapter and may be served in the manner now provided by law for service of such orders, and in absence of the defendant may be served on the authorized agent for service of process or upon any officer or managing agent of the corporation.

Source: Part of sec. 4359 and sec. 4360 Rev. Code 1919, revised in form only and combined to remove repetition and unite cognate subject matter.

Sec. 13.1809. Special procedure for precedence certain cases and as to parties, all cases.—Whenever any suit in equity is brought in any court under this chapter wherein the State is complainant, the attorney general or the state's attorney may file with the clerk of such court a certificate that in his opinion the case is of general public importance, a copy of which shall be immediately furnished by such clerk to the judge of the court in which said case is pending. Thereupon such case shall be given precedence over others and in every way expedited and be assigned for hearing on the earliest practicable day.

Whenever it shall appear to the court before which any civil or criminal proceeding under this chapter shall be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be summoned whether they reside in the county where the court is held or not.

Source: Secs. 4362 and 4363 Rev. Code 1919, revised in form only and combined to unite cognate subject matter.

Sec. 13.1810. Witnesses and evidence, competency, when self-incriminating—Immunity from use of evidence or prosecution; contempt for refusal.—In all prosecutions, hearings, and proceedings under the provisions of this chapter, whether civil or criminal, no person shall be excused from attending and testifying or from producing records, documents, or other evidence before the courts of this State or in obedience to the subpoena of the same, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to penalty or forfeiture; but if compelled to testify or produce evidence, neither such testimony nor evidence shall be used against him in any action or proceedings, civil or criminal, nor shall he be thereafter punished or prosecuted for the offense with reference to which such testimony or evidence was given. Any person, officer, or agent in the service or employment of any corporation, partnership, or association of persons, who shall neglect or refuse to make returns, attend, and testify or answer any lawful requirement hereinbefore provided for, or produce records, documents, or other evidence, if in his custody, control, or power to do so, in obedience to the subpoenas of the courts, shall be deemed guilty of contempt and be punished as provided by law.

Source: Sec. 4361 Rev. Code 1919, revised in form to remove superfluous words and amended to include "real evidence," to strengthen statute.

Sec. 13.1811. Remedies cumulative.—The remedies provided for in this chapter shall be construed as cumulative and not exclusive.

Source: Sec. 4369 Rev. Code 1919.

Sec. 37.1913. Unlawful trust or monopoly—Damages against; violation of trust and monopoly laws.—Any person, corporation, partnership, or association of persons, who may suffer damage by reason of the unlawful operation as provided by sections 13.1801, 13.1802, 13.1803, 13.1804, 13.1805, and 13.1806, of any person, pool, trust, or combination may maintain a civil action therefor in any of the courts of this State having jurisdiction thereof, and may recover the amount of damages sustained, together with the costs of the suit, including a reasonable attorney fee to be fixed by the court.

Source: Sec. 4364 Rev. Code 1919, revised to include right of damages against single person violating statute, so as to conform to the wording and intent of the statute.

Foreign Corporations

Sec. 11.2106. Unlawful trusts, combinations, monopolies; violation by foreign corporation; license revoked.—Any foreign corporation which shall enter into any combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this State or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced, or sold in this State or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall upon proof thereof in any court of competent jurisdiction have its license or authority to do business in this State canceled and annulled.

Source: Sec. 8914 Rev. Code 1919.

Sec. 11.2107. Antitrust affidavit; filing required with articles and annual report; necessary to qualification.—No foreign corporation shall be authorized to file its charter or articles of incorporation or association with the secretary of state or be authorized to do business in this State unless it shall at the time of making application therefor file with the secretary of state an affidavit executed by its president, secretary, or general managing officer stating that such corporation has not violated any of the provisions of the preceding section and every such corporation shall upon filing its annual statement with the secretary of state make and attach thereto the affidavit of its president, secretary, or general managing officer

fully stating the facts in regard to the matters specified in the preceding section.

Source: Sec. 8915 Rev. Code 1919.

Discrimination

Sections 13.1803–13.1806 provide that it shall be unlawful for any person purchasing or selling commodities to discriminate as to price between different localities when such discrimination is for the purpose of destroying competition. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Comp. Laws (1939) Conspiracy Statute

Section 13.0301 provides (in part) that it is illegal to conspire to commit any act injurious to trade or commerce.

Judicial Decisions

Application of Statutes.

In a proceeding under sections 4352 to 4364 (Comp. Laws (1939) secs. 13.1801 to 37.1913, an indictment charging that the defendants, consisting of substantial lumber interests, entered into a conspiracy to control prices and suppress competition was held to be sufficient; an allegation of an overt act in furtherance of this unlawful combination is not essential. *State v. Fullerton Lumber Co. et al.*, 35 S. D. 410, 152 N. W. 708 (1915).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Comp. Laws (1939) Resale Price Maintenance

Sections 54.0401 to 54.0407 validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to horizontal agreements between producers or distributors, between wholesalers, or between retailers as to sale or resale prices.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Laws****CONSTITUTIONAL PROVISIONS****Railroads**

Const. art. XVII, sec. 14, provides that no railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line, and penalty for any attempt to evade this provision shall work a forfeiture of its charter.

STATUTORY PROVISIONS**Comp. Laws (1939)****Common Carriers**

Section 52.0211 provides that no common carrier shall enter into any contract, agreement, or combination with any other common carrier for the pooling of freight, express, or messages by telegraph or telephone of different and competing lines, or divide between them the aggregate or net proceeds of earnings of such lines. A common carrier shall be liable to person injured for amount of damages sustained, if received without suit; if received by suit, common carrier shall be liable for not to exceed twice the amount of damages sustained. Sec. 52.0214. Violation shall be deemed a misdemeanor punishable by fine or imprisonment in the state penitentiary not exceeding two years, or both. Sec. 9516.

Telephone and Telegraph

Section 52.1312 provides that no association, corporation, or individual organized for purpose of owning, maintaining, or operating lines or telephone or telegraph shall consolidate with or hold a controlling interest in the stock or bonds of any telephone or telegraph company owning a competing line, or acquire by purchase or otherwise any competing line of telegraph without the consent of the Board of Railroad Commissioners.

Chamber of Commerce, Exchanges

Section 54.0803 provides that every Chamber of Commerce, Board of Trade or Exchange operating a trading place in which members buy, sell, or exchange livestock, grain, or other farm products, which shall adopt any rule, or refuse or delay any applicant membership, or refuse to trade with any member or permit any member to deal with any other member is declared to be a monopoly in restraint

of trade and guilty of a misdemeanor, and further trading by the organization or any member thereof shall be unlawful.

Gasoline—Discrimination

Section 54.0901 provides that anyone engaged in business of selling gasoline or kerosene and shall intentionally for purpose of creating a monopoly, or of destroying the business of a regularly established competitor in any locality discriminate by selling above commodities at a lower rate in one community than in another after making due allowance, if any, in the grade or quality, and the cost of transportation from the refinery shall be guilty of unfair discrimination.

Fire Insurance

Sections 31.2310 and 31.9919 provide that any combination between fire-insurance companies relating to rates to be charged, fixing the minimum premium, the amount of commission to be paid agents, or manner of transacting business of fire insurance within the state is unlawful and any company, officer, or agent violating this section is guilty of a misdemeanor, and subject to a fine of not less than \$100 or more than \$500 for each offense. Every fire-insurance company must file annual affidavit stating it has not violated provisions of the statute. The Commissioner of Insurance has authority to examine officers and employees of fire-insurance companies suspected of violation of the statute, and, if upon examination, the Insurance Commissioner shall determine that such company is guilty he shall issue an order revoking its authority to do business in the state and company shall not be permitted to transact business at any time within one year from date of revocation.

Warehouses

Section 60.0313 provides that it shall be unlawful for any proprietor, lessee, or manager of any public warehouse to enter into any agreement or combination with any railroad or other corporation or with any individual by which the property of any person is to be delivered to any public warehouse for storage contrary to the direction of owner, his agent or consignee. Violation of the Act constitutes a misdemeanor punishable by fine or imprisonment for not exceeding 30 days, or both. Sec. 60.9906.

Milk, Cream, and Butter—Discrimination

Section 4.1801 provides that it shall be unlawful for any person engaged in the business of buying milk, cream, butter, or other dairy products to discriminate as to price between different localities

with the intention and for the purpose of injuring or destroying the business or trade of a competitor. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Grains—Discrimination

Section 4.1701 provides that it shall be unlawful for any person engaged in the purchasing of grain or flaxseed to discriminate as to price between different localities, with the intention and for the purpose of destroying competition. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Liquor

Section 5.0118 provides that no manufacturer or wholesaler shall, directly or indirectly, supply, furnish, lease, give, or pay for any furniture, fixtures, fittings, or equipment of any kind or description, directly or indirectly, on or about or in connection with the premises of any retailer of high point or nonintoxicating beer, in the handling, sale, or distribution of such beer; nor take any chattel mortgage or conditional sales contract as to any such property; nor pay or furnish money for any license fees or taxes payable by any such retailer; nor be otherwise financially interested in the business of any such retailer other than by reason of sales to such retailer. No such retailer shall be a party to any violation of the provisions of this section.

Section 5.9907 provides that whoever shall violate any of the provisions of this title for which a specific penalty is not provided in this chapter, shall be guilty of a misdemeanor and punished by a fine not exceeding \$300, or by imprisonment in the county jail not exceeding sixty days, or by both.

2. Public Contract Provisions

Comp. Laws (1939)

Section 13.0301 provides (in part) that if two or more persons conspire to prevent competitive bidding upon any contract proposed to be let by the State or any subdivision thereof they shall be deemed guilty of a felony.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

Comp. Laws (1939)

Section 10.0706 provides that every contract restraining exercise of a lawful profession, trade, or business is void to that extent, except (a) one selling the good-will of a business may agree to refrain from carrying on a similar business in same city or town, (b) partners upon dissolution of a partnership may agree that none of them will carry on a similar business in same city or town, and (c) employee may agree with employer not to engage in same business as that of employer for a period not to exceed 10 years and within a specified territory not exceeding 25 miles from principal place of business of the employer. Such contracts between employee and employer shall apply only to those engaged in some profession the practitioners of which must be duly licensed in South Dakota.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

In General.

Restrictive covenants in this State are closely controlled by sections 898 to 900 (Comp. Laws (1939) sec. 10.0706). Such contracts are valid when ancillary to the sale of the goodwill of a business, but are limited in geographical extent by section 899 to a specified county or city and in time to the continuance of the business by the vendee or his successor. Section 900 controls such contracts when ancillary to the dissolution of a partnership or to employment. A real estate partnership was dissolved, one partner selling to the other his entire interest in the business and its goodwill. A week later they entered into another agreement whereby the retiring partner sold to the other the abstract books, iron safe, and letterpress and agreed not to engage in the abstract business in the county. In an action upon the contract not to compete it was held to be in violation of section 898 and void. Since the parties were not partners at the time of its execution, it was not within the scope of section 900, and since no sale of goodwill was included, it was not permitted by section 899. *Prescott v. Bidwell*, 18 S. D. 64, 99 N. W. 93 (1904). However, where a sale was made of the stock of drugs of a pharmacy business, together with the building in which it was carried on, and the

seller contracted not to practice pharmacy or medicine in the town for 5 years, and distributed public notices advising his patients that the purchaser was to be his successor and that he was retiring, the court stated that there was ample evidence to show a sale of goodwill, although it was not specifically mentioned in the bill of sale, and that the restrictive covenant was valid under section 899. *Brown v. Edsall*, 23 S. D. 610, 122 N. W. 658 (1909).

The defendant and another actively managed and owned the majority of the stock of a publishing company. They sold to the plaintiff all the assets and goodwill of the company and agreed not to engage in the publishing business in the county for 10 years. The restrictive covenant was held valid under section 899, even though the actual transfer of goodwill was made by the corporation. The defendant was a real party in interest to the transaction. *Public Opinion Pub. Co. v. Ransom*, 34 S. D. 381, 148 N. W. 838 (1914).

Assignability.

A valid restrictive covenant is enforceable by the assignee of the vendee. *Public Opinion Pub. Co. v. Ransom*, *supra*.

Remedy.

Although a contract not to compete provides liquidated damages for its breach, they will not be awarded unless the breach is substantial. Where the promissor agreed not to practice medicine or pharmacy in competition with the promise, the treatment of one former patient at his request is not a substantial breach. *Brown v. Edsall*, *supra*.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Comp. Laws (1929)
Cooperatives

Section 8007 S provides that agricultural cooperative associations and their members may make and execute marketing contracts, requiring the members to sell all or any specified part of their agricultural products for any period of time, not over ten years.

Judicial Decisions

A contract whereby defendant retailer agreed to sell patterns of the plaintiff manufacturer exclusively was held valid. Whether regarded as a sales or agency contract, such a contract is not in restraint of trade, since other persons are at liberty to handle similar products of other companies in direct competition. The contract did not create a monopoly, nor did it violate the antitrust provisions. *Sullivan v. Rime*, 35 S. D. 75, 150 N. W. 556 (1915).

TENNESSEE



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. I, sec. 22. That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed.

STATUTORY PROVISIONS

Code Ann. (Michie, 1938)

Sec. 5880. Trusts and combinations are unlawful and void.—All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful and void. (1889, ch. 250, sec. 1; 1891, ch. 218, sec. 1; 1897, ch. 94, sec. 1; 1903, ch. 140, sec. 1.)

Sec. 5881. Same.—Any arrangements, contracts, and agreements that may be made by any corporation or person, or by and between its agents and subagents, to sell and market its products and articles, manufactured in this state, or imported into this state, to any producer or consumer at prices reduced below the cost of production or importation into this state, including the cost of marketing, and a reasonable and just marginal profit, to cover wages or management, and necessary incidentals, as is observed in the usual course of general business, and the continuance of such practice under such contracts and arrangements for an unreasonable length of time, to the injury

of full and free competition, or any other arrangements, contracts or agreements, by and between its agents and sub-agents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purposes, are declared to be against public policy, unlawful and void. (1927, ch. 60, sec. 1.)¹

Sec. 5882. Violation is a conspiracy against trade; punishment by fine or penitentiary.—Any violation of the provisions of either of the two preceding sections is declared to be destructive of full and free competition and a conspiracy against trade, and any person who may engage in any such conspiracy or who shall, as principal, manager, director, or agent, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in furtherance of such conspiracy, shall upon conviction be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years; or in the discretion of the court, by either such fine or imprisonment. (1889, ch. 250, sec. 2; 1891, ch. 218, sec. 2; 1897, ch. 94, sec. 3; 1903, ch. 140, sec. 3; 1927, ch. 60, modified.)

Sec. 5883. Violation forfeits charter, and excludes foreign corporation; duty of attorney general.—Any corporation chartered under the laws of the state which shall violate any of the provisions of either of said two sections shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease. Every foreign corporation which shall so violate is denied the right to do, and is prohibited from doing, business in this state. It is made the duty of the attorney general to enforce these provisions. (1899, ch. 250, sec. 4; 1891, ch. 218, sec. 4; 1897, ch. 94, sec. 2; 1903, ch. 140, sec. 2, modified.)

Sec. 5884. Debts, joint and several, liability for.—All persons and corporations, and the officers, and the stockholders of all corporations, that shall become or continue to be members of, or in any way connected with or concerned in, any such trust, contract, agreement, or combination, shall be jointly and severally liable to pay all the debts, obligations, and liabilities of each and every person and corporation that may become or continue a member thereof, connected therewith, or concerned therein, as fully as if all were partners in the creation of such debts, obligations, and liabilities. (1891, ch. 218, sec. 3.)

¹ For further treatment of sec. 5881, see Vol. *State Price Control Legislation: Prohibition of Sales Below Cost* LVII MARKETING LAWS SURVEY Series.

Sec. 5885. Trust or combination may be pleaded in abatement or bar of suits.—When action at law or suit in equity shall be commenced in any court, it shall be lawful, in the defense thereof, to plead in bar or in abatement of the action that the plaintiff, or any other person or corporation interested in the prosecution of the action, is a member or connected with, and the cause of action grows out of, some business or transaction with such trust, pool, contract, arrangement, or combination as described in either the first two sections of this chapter. (1889, ch. 250, sec. 3; ch. 218, sec. 5.)

Sec. 5886. Damages against operators of trust or combination.—Any person who may be injured or damaged by any such arrangement, contract, agreement, trust, or combination, described in this chapter, may sue for and recover, in any court of competent jurisdiction, of any person operating such trust or combination, the full consideration or sum paid by him for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust. (1891, ch. 218, sec. 6; 1897, ch. 94, sec. 5; 1903, ch. 140, sec. 4; 1927, ch. 60, modified.)

Sec. 5887. Witnesses, who may be; matters criminating.—Upon the trial of any civil action against any person for a violation of any preceding section in this chapter, all officers, stockholders, and agents of such corporation, person, or copartnership shall be competent witnesses against the defendant, as such, on trial; and such officers, stockholders, and agents may be compelled to testify against such defendant, and produce all books, and papers in their custody or control pertinent to the issues in such action at or before the time of trial, and shall not be excused from producing any books or papers because the same might tend to criminate such witnesses; but nothing which such witness shall testify to, and no books or papers produced by him, shall in any manner be used against him in any criminal action to which he is a party. (1891, ch. 218, sec. 7.)

Corporations

Section 4084 provides that all private corporations for profit may hold stock in other corporations except that this power shall not be construed to authorize the creation of monopolies, trusts, or combinations in restraint of trade.

Code Ann. (Michie, 1932)

Conspiracy Statute

Section 11064 provides (in part) that it is illegal to conspire to commit any act injurious to trade or commerce.

Judicial Decisions

Application of the Common Law.

A nonprofit corporation was organized by a majority of plumbers in a city. One of the bylaws of the corporation provided that each member of the association was required to report in open meeting what work he had done during the week, and if it developed that such work was done in competition with any other member, the member having done the work was to pay into the treasury of the association a fixed sum, according to a schedule of rates agreed upon and made part of the bylaw. Such a bylaw at common law was held to be in restraint of trade as its purpose was to prevent full and free competition thereby injuriously affecting trade and commerce. *Bailey v. Association of Master Plumbers*, 103 Tenn. (19 Pick.) 99, 52 S. W. 853, 46 L. R. A. 561 (1899).

Where a bylaw of an association is found to be in restraint of trade, it is not the number of those who may be implicated, or extent of territory included, but the existence of injury to the public, that determines the illegality of the restraint of trade. *Ibid.*

Application of Constitutional Provisions.

A statute (L. 1899, c. 205, "Uniform Textbook Act") created a State textbook commission empowered to select and adopt uniform textbooks for use in the free public schools; award to the lowest bidder the exclusive privileges for a specified period of furnishing such books; and regulate their distribution. This act does not create a monopoly in violation of Const. art. 1, sec. 22, and is valid. *Leepeer v. State*, 103 Tenn. 500, 53 S. W. 962 (1899).

A creamery company erected its own power lines through streets of city to connect with lines of a power company outside the city which did not have a franchise to do business within the city. A permanent injunction was sought by the power company which had been granted a State-approved franchise to do business in the city. The authority given the State Public Utilities Commission to approve or disapprove grants by municipalities, or franchises over their streets, does not create a monopoly in the sale of electricity and is not in violation of Const. art. 1, sec. 22. *Holston River Electric Co. v. Hydro Electric Corp.*, 17 Tenn. App. 122, 66 S. W. 2d, 217 (1933).

The city of Memphis, under statutory authorization, entered into contracts with the Tennessee Valley Authority for purchase of electricity, and with the Federal Public Works Administration for a

loan in connection with the erection and operation of a municipal electric plant. The sale of such electricity by the city would be in competition with a power company which held a nonexclusive franchise granted by the city for distribution of electricity in Memphis. The contracts of the city, it was held, do not create a monopoly in violation of Const. art. 1, sec. 22, because an exclusive right to distribute electricity had not been conferred upon the city by the statutory authorization and there was no interference with the power company's right under its nonexclusive franchise. *Memphis Power & Light Co. v. City of Memphis*, 172 Tenn. 346, 112 S. W. 2d, 817 (1937).

In denying the grant of an exclusive franchise for the establishment of a slaughterhouse, the court held that the legislature does not have the power to confer upon any municipality the power to grant an exclusive franchise as to any occupation or business which is of common right, because even the legislature is forbidden to create a monopoly, under Const. art. 1, sec. 22. *Noe v. Mayor*, 128 Tenn. (1 Thomp.) 350, 161 S. W. 485 (1913); cf. *City of Memphis v. The Memphis Water Co.*, 52 Tenn. (5 Heisk.) 495 (1871).

Constitutionality of Statutes.

Sections 5880 et seq. (L. 1889, c. 250, sec. 1) are constitutional. The equal protection and due process clauses of both the Federal and State Constitutions are not abrogated. *State ex rel. Astor v. Schlitz Brewing Co., et al.*, 104 Tenn. (20 Pick.) 715, 59 S. W. 1033 (1900). See also *State v. Witherspoon*, 115 Tenn. (7 Cates) 138, 90 S. W. 852 (1906).

Although the general language used in sections 5880 et seq. is broad enough to be construed as an attempt to regulate interstate commerce, only those provisions as affect intrastate commerce will be enforced. Those relating to interstate commerce will not vitiate the entire act. The act applies solely to intrastate commerce and to that extent is a valid exercise of the State's police power. *Standard Oil Co., et al. v. State*, 117 Tenn. (9 Cates) 618, 100 S. W. 705 (1907); *State v. Standard Oil*, 120 Tenn. (12 Cates) 86, 110 S. W. 565 (1908), aff'd, *Standard Oil v. State*, 217 U. S. 413, 30 Sup. Ct. 543, 54 L. Ed. 817 (1910).

Application of Statutes.

In General.

The Antitrust Act was not intended to prohibit only those contracts and combinations which had a tendency to destroy all competition, but those also which are injurious to the whole people. The number of persons engaged in the conspiracy, the extent of the territory af-

fect, the degree which it was intended or has a tendency to lessen competition, the extent of the injury to the public or whether it be permanent or temporary in its character, are not material elements of the offense. The form of the combination is also a matter of indifference. It is enough that the contract was made with a view to lessen competition in the sale of an article of commerce of prime necessity, and that it is injurious to the public, however limited and restricted it may be in its scope, effect, and duration. It is its purpose, tendency, and effect that makes it unlawful. *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705 (1907).

The phrase "importation or sale of articles imported into this State," section 5880 (L. 1903, c. 140), includes and describes among the articles of commerce to be protected those which had been imported from other States and countries, but which have become commingled with the common mass of property in this State and are no longer articles of interstate commerce. The charge upon which appellants were indicted, tried, and convicted was the alleged making of an unlawful contract and agreement to lessen and destroy competition in the sale of coal oil, which appellant corporation had imported into the State and had, at the time of the agreement, stored in its storage tanks at a city in the State, and there offered for sale. The illegal agreements resulted in cancellations of orders obtained by a competitor for oil to be imported into the State. The charge in the indictment referred to oil "imported into the State." This was construed to mean oil already imported by appellant corporation which had come to rest and not the oil to be imported by the competitor, as that oil was only the occasion, the incentive, of the conspiracy charged. The agreement with an oil company whereby the merchant received a gift of a quantity of oil in consideration of his countermanding an order given a competitor of the oil company, made the merchant a party to the conspiracy and subjected him to the penalty prescribed by the act, Sec. 5882. *Standard Oil v. State*, 117 Tenn. (9 Cates) 618, *supra*; followed in *State ex rel. v. Standard Oil*, 120 Tenn. (12 Cates) 86, *supra*.

Section 5882 (L. 1897, c. 94) provides that a violation of such act, on conviction, shall be punished by a fine of not less than \$100 or more than \$5,000, in the discretion of the court. The word "court" as used in the act includes both judge and jury and hence is not obnoxious to the State Const. art. 6, sec. 14, which prohibits a judge from levying a fine of more than \$50, not assessed by a jury. *State ex rel. Astor v. Schlitz Brewing Co.*, 104 Tenn. (20 Pick.) 715, 59 S. W. 1033 (1900).

The words "person or persons" as used in section 5882 (L. 1903, c. 140, sec. 3) are not intended to embrace corporations; corporations cannot be indicted under said section. *Standard Oil Co. v. State*, 117 Tenn. 618, *supra*.

Section 5886 provides a civil remedy against both corporations and natural persons. The legislature may provide a civil remedy against corporations and a penal remedy against natural persons. *State v. Standard Oil Co.*, 120 Tenn. 86, *supra*.

Sections 5880 et seq. are inapplicable to public utilities. *State v. Nashville Ry. & Light Co.*, 151 Tenn. (24 Thomp.) 77, 268 S. W. 120 (1925).

A corporation was the owner of a patent covering an eraser attachment for lead pencils. A license agreement was entered into with the defendant whereby he could manufacture and sell lead pencils embodying said patented device. The agreement also provided that defendant could not sell such pencil, using the patented device, at prices lower than those authorized by plaintiff, which price scale varied from time to time. The contract is not in violation of sections 5880 et seq. A monopoly, insofar as it is lawful and authorized under the patent laws of the United States, cannot be penalized by the State Antitrust Act. *American Lead Pencil Co. v. Musgrave Pencil Co., Inc.*, 170 Tenn. (6 Bealer) 60, 91 S. W. 2d, 573 (1936).

Two manufacturing corporations agreed to combine certain of their interests by creating a third corporation. Each was to run its own plant and pay its own expenses, up to the point of production. But the third corporation was to be the sole distributing agency for their combined products. Promotional schemes, sales devices, and prices were to be fixed by the new corporation, and as this was an attempt to prevent and stifle competition, the court held it in violation of sections 5880 et seq. (L. 1891, c. 218). *American Handle Co. v. Standard Handle Co.*, 2 Tenn. Ch. App. 676, 59 S. W. 709 (1900).

Rights of Creditors.

Creditors of a bankrupt corporation may recover moneys paid to a third person under a contract held void as in restraint of trade. The trustee in bankruptcy as assignee of the creditors rights may bring this suit to recover the funds illegally paid by the bankrupt corporation. *Adcock v. New Crystal Ice Co.*, 144 Tenn. (17 Thomp.) 511, 234 S. W. 336 (1921).

Sufficiency of Indictment.

An indictment for violating sections 5880 and 5882 charged that the defendant as president, director, and agent of a certain domestic corporation did unlawfully, etc., carry out the terms of an agreement,

combination, and conspiracy entered into by such corporation with another, made with a view to lessen, and which tended to, and did in fact lessen, full, and free competition in the importation and sale of articles imported into this State, and the manufacture and sale of articles of domestic growth and domestic raw materials, which tended to, and did advance and control the price and cost of such product and article to the consumer and buyer. This indictment, which failed to state the terms of the agreement, or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth, was fatally defective. But in a prosecution for violation of the Antitrust Act the indictment need not charge the means by which the unlawful agreement and conspiracy was intended to be effectuated, and the evidence tending to prove the unlawful agreement need not to be set out. *State v. Witherspoon*, 115 Tenn. (7 Cates) 138, 90 S. W. 852 (1906). For a bill held not defective for failure to state terms of the agreement, arrangement, or combination alleged as violative of the Antitrust Act, see *State v. Standard Oil*, 120 Tenn. (12 Cates) 86, 110 S. W. 565 (1908).

The officials of competing railroads met and mutually adopted an agreement as to policies to be followed by such railroads for the handling of cotton shipments out of Memphis, Tenn. In a bill for injunction alleging that the terms of the agreement entered into at such meeting were unknown to complainants, but that the tenor of the agreement was to restrain trade, in violation of the antitrust Act, the charge was sufficient to admit evidence as to what was done at the meeting, what policies were outlined, and what division was made of the traffic, the terms of the division, and the circumstances connected with it. *Post v. Southern Ry. Co.*, 103 Tenn. 184, 52 S. W. 301 (1899).

Parties to Conspiracy.

Corporations and their officers and agents who engage in a conspiracy in violation of the Antitrust Act, section 5880 (L. 1903, c. 140), must be held as parties to such conspiracy and can be counted in computing the necessary number to constitute a conspiracy. Although a corporation is not indictable under the Antitrust Act, that fact does not prevent it from being a party to a criminal conspiracy. *State v. Standard Oil*, 117 Tenn. (9 Cates) 618, 100 S. W. 705 (1907).

Foreign Corporations.

The Antitrust Act, section 5883 (L. 1897, c. 94), provides that foreign corporations violating such act are prohibited from doing business in the State. The legislature was clearly within the scope

of its constitutional power in prescribing such a penalty. *State v. Schlitz Brewing Co.*, 104 Tenn. (20 Pick.), 715 59 S. W. 1033 (1900).

In an action to restrain a foreign corporation from doing business in the State for a violation of sections 5880 and 5883 (L. 1897, c. 94), the resident agent of such foreign corporation is a proper and necessary party to said action. *Ibid.*

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Code Ann. (Michie, 1938) Resale Price Maintenance

Sections 6770 (1) to 6770 (5) validate contracts fixing the resale prices of branded commodities bearing a trade-mark. The statute is expressly inapplicable to horizontal agreements between producers, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 3826 provides that cooperative marketing associations organized under sections 3784 to 3830 shall not be deemed to be conspiracies in restraint of trade or illegal monopolies. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Judicial Decisions

Cooperatives.

Formation of cooperative marketing associations under the Cooperative Marketing Act (sec. 3826) does not violate the Antitrust Act, sections 5880 et seq. Contracts thus entered into by the association with its members for the sale and distribution of its products through the association are valid and will be upheld, as the act is not in violation of either the "equal protection" or "due process" clauses of the State or Federal Constitutions. *State v. Burley Tobacco Growers Co-op. Ass'n.*, 2 Tenn. App. 674 (1926). See also *Dark Tobacco Growers Co-op. Ass'n v. Mason*, 150 Tenn. (23 Thomp.) 228, 263 S. W. 60 (1924); *Dark Tobacco Growers' Co-op. Ass'n. v. Dunn*, 150 Tenn. (23 Thomp.) 614, 266 S. W. 308 (1924).

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts**

Code Ann. (Michie, 1938)

Railroads

Section 2607 provides that sections 2605 and 2606, authorizing the consolidation of railroads, shall not be applicable to competing lines.

Section 4080 provides that sections 4076 to 4079, granting to quasi public corporations the power to lease and dispose of their property and franchises, do not authorize the lease or purchase of a railroad by another that is in competition with it.

Interurban Railroads and Street Railways

Section 4032 provides that any street railway company may acquire the stocks or bonds of a noncompeting interurban railroad.

Section 4033 provides that an interurban railroad may sell its stocks or bonds to a noncompeting street railway company.

Common Carriers and Cotton

Sections 5524 to 5526 provide that it shall be unlawful for any common carrier to become a party to any combination or monopoly for the purpose of controlling the compression of cotton, in bales, in the interest of special individuals, firms, or companies. Such common carriers shall receive compressed cotton for shipment at scheduled rates without discrimination as to shippers. Violation of the statute is a misdemeanor punishable by fine.

Dairy Products—Discrimination

Sections 6562 and 6563 make it a misdemeanor for any person purchasing or selling dairy products to discriminate as to price between different localities where the effect would be to injure the business of a competitor. See vol. 1, *State Price Control Legislation: Antidiscrimination Legislation*.

Agricultural Cooperatives

Section 5891 makes it the duty of the Commissioner of Agriculture to file a complaint against any cooperative marketing association which he has reason to believe monopolizes or restrains trade to such an extent that the price of any agricultural product is thereby unduly enhanced. The Commissioner shall hold hearings and shall issue a cease-and-desist order if he finds restraint resulting in unduly enhanced prices. If the association fails to comply with the order, the attorney general

shall then take appropriate court action, and the court may enforce the order by injunction. See *Cooperatives* in projected study.

Musical Compositions

Sections 7912 (1) to 7912 (11) provide that it shall be unlawful for any person without the consent of the owner to perform for profit any copyrighted work or to sell knowingly a substantial copy of such copyrighted work. Two or more persons holding separate copyrighted works are forbidden to combine for the purpose of fixing the prices for the use of their works or for the purpose of collecting fees or issuing blanket licenses for the right to perform their works. Any two or more holders of separate copyrighted musical works combining in any way must file once a year with the Secretary of State a complete list of their copyrighted works together with a list of prices to be charged. Individual owners of copyrighted works not connected with any combination are exempted from filing such lists. In case a defendant persists in defying court orders, the court shall appoint a receiver for the copyrighted works and property of defendants. The court shall determine a fair and just rate that the receiver should charge for the public performance of each copyrighted work. If after one year defendants still continue to disobey the orders of the court, then the property shall escheat to the state. In addition to other penalties, violation of the Act shall be deemed a gross misdemeanor, punishable by fine, or imprisonment in the county jail for not more than six months, or both.

Coal

Section 5888 provides that it shall be a misdemeanor punishable by fine of not less than \$1,000 to enter into any agreement for the purpose of raising the price of coal by limiting the output of coal, or by some other means.

Liquor

Section 5735 (1) provides that no brewer or wholesaler of beer of alcoholic content of not more than five percent by weight or any other beverage of like alcoholic content, or their agents, shall be permitted to make any loan or furnish any fixtures or have any interest, direct or indirect, in the business of any retailer of such beverages, or in the premises occupied by such retailers.

Section 5735 (21) provides that any violation of this act, or any rule or regulation pursuant thereto, shall be a misdemeanor, and where the punishment is not otherwise fixed, the offender shall be punished by a fine of not more than \$500 and imprisonment for not more than six months in the discretion of the Court.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

Code Ann. (Michie, 1938)

Sections 6553 (1) to 6553 (7) are identical in text with the Louisiana statute except that:

(1) Sections 6553 (2) to 6553 (5) add "or class of persons" to those that may not be designated (cf. La., secs. 1 to 4).

(2) Section 6553 (5) substitutes "chancery" court for "district" court (cf. La., sec. 4).

(3) Section 7 of the Louisiana act is omitted. See La. Gen. Stat. Ann. (Dart, 1939), secs. 5332.1 to 5332.8, set forth in full at p. 272, *supra*.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

The vendor of a mercantile business after having conveyed the "goodwill" and assigned his lease to the premises was under an implied obligation not to interfere with the purchaser in his use of the business premises and control of the lease assigned. It was a breach of good faith on his part, during the existence of the lease, to obtain a new lease running to him to commence on expiration of the one assigned. But the seller is not precluded from setting up a precisely similar business at another stand in the same locality. If the purchaser of the business desired to forestall such step, he should have expressly stipulated against it in the contract of sale. *Fine v. Lawless*, 139 Tenn. 160, 201 S. W. 160 (1918).

A contract, conveying a "Piggly-Wiggly" self-serving grocery store business, with patents, copyrights, trade-marks, and inventions made or to be made for the purpose of such business, precludes the vendor from using any future inventions in competition with those conveyed. The contract does not, however, preclude the vendor from using methods, practices, and store arrangements which were in common use in

self-serving stores at the time of the conveyance and which were not covered by patents, trade-marks, trade names, etc., conveyed thereby. *Piggly-Wiggly Corp. v. Saunders*, 1 Fed. (2d), 572, 582 (1924).

An agreement not to compete in a certain town for 5 years ancillary to the sale of the stock of goods and fixtures of a mercantile business does not violate section 5881 (Acts 1903, c. 140, sec. 1). *Baird v. Smith*, 128 Tenn. 410, 161 S. W. 492 (1913).

One partner in an auto-wrecking and metal business sold his interest to the other partner and agreed in the contract of sale not to compete in same business in the same county for a period of 2 years. There was a liquidated damages clause setting damages for breach as \$2,000. Defendant started to operate a competing business and upon representations by plaintiff that he would seek to enjoin operation of the business, defendant abandoned the enterprise. Plaintiff sued for the liquidated damages. It was held that the conduct of the plaintiff in threatening to obtain an injunction amounted to an election of the remedy of specific performance and precluded an action for damages for breach of contract. *Frumin v. Chazen*, 153 Tenn. (26 Thomp.) 1, 282 S. W. 199 (1926).

Where a partnership in the retail furniture business was sold under an unconditional agreement that the vendors should not reengage in that business in the same city for 3 years, the fact that the vendee transferred its assets to a newly formed corporation before the expiration of the period did not release the vendors from their obligation. The goodwill and the contract for its protection are assignable property rights, and the contract is not in restraint of trade. The true measure of damages for breach of the covenant not to compete is the injury the aggrieved party sustained as the natural and proximate result of the breach. If no damage is shown, only nominal damages are recoverable. *Bradford & Carson v. Montgomery Furniture Co.*, 115 Tenn. 610, 92 S. W. 1104 (1906).

A grocery-keeper sold his stock and agreed not to engage in that business in the same town for 10 months. The court upheld the contract. It allowed the full amount of damages (\$500) as was stipulated in the agreement, because upon the facts of the cause it did not appear unconscionable for plaintiff to recover this sum. *Muse v. Swayne*, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607 (1879).

In connection with the sale of a livery stable, a collateral parol agreement not to enter into competition in the same business and territory in which the defendant did business, so long as the defendant continued in business, was held valid. *Jackson v. Byrnes*, 103 Tenn. (19 Pick.) 698, 54 S. W. 984 (1900).

By contract the city of Paris leased and agreed eventually to sell its light and power plant, including the goodwill, to private individuals. The contract provided that the city could reenter the business of generating electric current and could grant a franchise to a third party to compete with the lessee, providing such grant did not prejudice any of the rights of lessee as prescribed in the terms of the contract. Such contract did not grant exclusive rights to lessee, and lessee's successor in interest could not enjoin the city from selling light and power through its own distribution system. *Ky.-Tenn. Light & Power Co. v. City of Paris*, 173 Tenn. 123, 114 S. W. 2d, 815 (1938).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

A practicing physician sold his medical practice to plaintiff and agreed to refrain from competing with him in the county. Defendant, resuming his practice in breach of the contract is liable for the actual amount of damages suffered by plaintiff. *Johnson v. Jones*, 1 Tenn. App. 24 (1925).

Restrictive Covenants Ancillary to Employment.

A dentist, who had practiced for 7 years, took into his employment a young dentist. There was a parol agreement, as part of the contract of employment, that defendant at the termination of such employment would not practice his profession in such town in competition with plaintiff. The contract, even though orally made, was reasonably restrictive. It is valid and enforceable. *Turner v. Abbott*, 116 Tenn. (8 Cates) 718, 94 S. W. 64 (1906).

A contract is valid whereby an employee of a rent-a-Ford company, who had access to lists of customers and an opportunity to learn business secrets, agreed not to become an employee of any competing company within a certain county for 5 years after leaving the employment. The contract may be enforced, though no specific injury is shown. *Matthews v. Barnes*, 155 Tenn. 110, 293 S. W. 993 (1927).

Restrictive Covenants Not Ancillary to the Sale of a Business Interest.

A contract provided that a mining company should furnish a merchant the trade of its employees, and in consideration therefor the mining company should receive 8 percent on sales to its employees. Either party could terminate the contract on 6 months' notice. The mining company opened its own store without giving such notice. The contract was not in restraint of trade and since it was breached, plaintiff is entitled to damages. *George & Chapman v. E. Tenn. Coal Co.*, 83 Tenn. (15 Lea) 454, 54 Am. Rep. 425 (1885).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Michie, 1938)
Cooperatives

Section 3816 provides that a cooperative marketing association and its members may make and execute marketing contracts, requiring the members to sell all or any specified part of their products to or through the association for any period of time, not over 10 years. Such marketing contracts between the association and its members shall not be considered in unlawful restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

The Tobacco Growers' Co-operative Association was organized under the Bingham Co-operative Marketing Act (Ky. Acts 1922, c. 1). It entered into contract with its members requiring all tobacco produced or acquired by the growers during certain years to be pooled and resold through the association at best prices obtainable. The contracts for exclusive dealing conformed with the statutory enactment, and do not violate either the Federal or State Anti-Trust Acts. *Dark Tobacco Growers' Co-op. Ass'n. v. Mason*, 223 Tenn. (23 Thomp.) 228, 263 S. W. 60 (1924); *Same v. Dunn*, 150 Tenn. (23 Thomp.) 614, 266 S. W. 308 (1924).

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STATE ANTITRUST LAWS

TEXAS



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. 1, sec. 26. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed nor shall the law of primogeniture or entailments ever be in force in this State.

STATUTORY PROVISIONS

Stat. (Vernon, 1936)

Conspiracies Against Trade

Art. 7426. "Trusts."—A "trust" is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for either, any or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

2. To fix, maintain, increase, or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce, or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled, or established.

5. To make, enter into, maintain, execute, or carry out any contract, obligation, or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport, or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix, or limit the output of any article or commodity which may be manufactured, mined, produced, or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce, or commodities partially or entirely within the State of Texas, or any portion thereof. (Acts 1903, p. 119.)¹

Art. 7427. "Monopoly" defined.—A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. *Id.*

¹ For further treatment of art. 7428 (7), see *Contracts not to Compete, infra*.

Art. 7428. Conspiracies against trade.—Either or any of the following acts shall constitute a conspiracy in restraint of trade.

1. Where any two or more persons, firms, corporations, or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity enter into an agreement or understanding to refuse to buy from or sell to any person, firm, corporation, or association of persons, any article of merchandise produce, or commodity.

2. Where any two or more persons, firms, corporations, or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation, or association of persons for buying from or selling to any other person, firm, corporation, or association of persons. *Id.*

Art. 7429. Acts illegal.—Any and all trusts, monopolies, and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal. (Acts 1903, p. 119.)

Art. 7430. Charters forfeited.—The charter of any corporation chartered under the laws of this State, adjudged guilty of violating any provision of this subdivision may be forfeited at the request of the Attorney General, if in the judgment of the court before whom the litigation is pending, the public interest requires it, provided, the forfeiture of the charter shall be in addition to all other penalties prescribed by law. (Acts 1903, p. 119; Acts 1923, p. 12.)

Art. 7431. Quo warranto proceedings.—For a violation of any provision of this subdivision or any antitrust laws of this State, by any corporation, it shall be the duty of the Attorney General, when in his judgment the public interest requires it, upon his motion and without leave or order of any judge or court, to institute suit, or quo warranto proceedings in Travis County, or at the county seat of any county in the State which the Attorney General may select, for the forfeiture of its charter rights and privileges, and the dissolution of its corporate existence, and for such purpose venue is hereby given to each district court in the State of Texas. (Acts 1903, p. 119; Acts 1909, p. 281; Acts 1923, p. 12.)

Art. 7432. Successors are prohibited from doing business.—When a corporation organized under the laws of this State shall have been convicted of a violation of any provision of this subdivision and its charter and franchise has been forfeited, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. (Acts 1903, p. 119.)

Art. 7433. Foreign corporations.—When any foreign corporation is adjudged guilty of violating any provision of this subdivision or any antitrust law of this State, the Attorney General may bring suit in the district court of Travis County for the purpose of enjoining and forever prohibiting such corporation from doing business in this State, and if in the judgment of the court the public interest requires it, the injunction shall be granted, provided the denial of the right to do business in this State to any foreign corporation adjudged guilty of violating the antitrust laws shall be in addition to all other penalties prescribed by law. (Acts 1903, p. 119; Acts 1923, p. 12.)

Art. 7434. Quo-warranto proceedings.—The laws governing quo-warranto, shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this title, *Id.*

Art. 7435. Rights of convicted foreign corporations.—When any foreign corporation has been convicted of a violation of any of the provisions of this subdivision and its right to do business in this State has been forfeited, as provided in the second preceding article, then, before such corporation or any other corporation to which such corporation may have transferred its properties and business or which has assumed its obligations, shall be permitted to incorporate or do business in Texas, it shall be required to go into the court where the original judgment of forfeiture was entered and show that it has fully obeyed the decree of court forfeiting its charter and has satisfied in full all fines and penalties assessed against it. It shall further show that it has so organized or reorganized its affairs and business that if permitted to do business in Texas, it can and will do so without violating any law of this State; and particularly that it has no connection with any person, firm, or corporation engaged in violating the laws against trusts and monopolies, and is not itself so engaged. No such action shall be instituted within five years from the date of such original conviction. Any corporation which shall be convicted a second time of a violation of any provision of this title shall be forever barred from instituting any such action hereunder. Whereupon and after a hearing had, after the notice to the Attorney General herein provided, the court may modify or reform such judgment so as to permit such corporation to incorporate, or secure a permit and do business in Texas, and such modified or reformed judgment shall be by the clerk of said court certified to the Secretary of State for action by him in conformity therewith. Nothing in this article shall in any manner affect any judgment hereafter rendered by any court against any corporation, its agent, or employes or successors.

Notice of filing of such proceeding and the taking of evidence shall be served upon the Attorney General whose duty it shall be to represent the State in such proceeding. The court may require the production of all books and records and may appoint a commission to take testimony, either within or without the State. The expense of the entire proceeding, including reasonable attorney's fees, the amount of which to be determined by the judge trying the case, and the same to be paid to the attorney representing the State, and same to be delivered by such attorney to the State Treasurer and by him deposited to the account of the general revenue fund of the State. The court, after modifying or reforming the judgment, as provided herein, shall retain jurisdiction of the case and at any time thereafter shall, upon showing that said corporation is violating the laws against trusts or monopolies, or has connection with any person, firm, or corporation engaged in violation of the laws against trusts or monopolies, set aside any order or judgment entered, in which event all proceedings based thereon, including all transfers of any and all properties shall be nullified, and it shall be the duty of the Attorney General, for good cause, to enter proceedings to set aside and nullify the modified judgment of the court and its proceedings, as herein provided. If the Court shall, after the hearing provided for, refuse to modify or reform such judgment, no permit shall be issued by the Secretary of State to such corporation or to any other corporation to which its properties or business have been transferred or which has assumed the payment of its obligation. (Acts 1903, p. 119; Acts 1917, p. 63; Acts 1919, p. 48.)

Art. 7436. Penalties; venue; fees.—Each firm, person, corporation, or association of persons, who shall in any manner violate any provision of this subdivision shall, for each day that such violation shall be committed or continued, forfeit, and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the State of Texas in the district court of any county in the State of Texas, and venue is hereby given to such district courts. When any such suit shall have been filed in any county and jurisdiction thereof acquired, it shall not be transferred to any other county, except upon change of venue allowed by the court. It shall be the duty of the Attorney General or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same. The fees of the district or county attorney for representing the State in all antitrust proceedings, or for the collection of penalties for the violation of the anti-trust laws of this State, shall be ten percent of the amount collected up to and including the sum of fifty thousand dollars, and five percent of all sums in excess of the first fifty thousand dollars, to be retained by him when collected, and all

such fees which he may collect shall be over and above the fees allowed under the general fee bill. The provisions of this subdivision as to fees allowed the prosecuting attorney shall not apply to any case in which judgment has heretofore been rendered in any court nor to any monies to be hereafter collected upon such judgment heretofore rendered in any court, whether such judgment or judgments are pending upon appeal or otherwise. The district or county attorney who joins in the institution or prosecution of any suit for the recovery of penalties for a violation of any of the anti-trust laws of this State, who shall, previous to the collection of such penalties, cease to hold office, shall be entitled to an equal division with his successor of the fee collected in said cause. In case of the employment of special counsel by any such district or county attorney, the contract so made shall be binding upon such prosecuting officer making such contract and thereafter retiring from office. In case any suit is compromised before any final judgment in the trial court is had, then the fees herein provided for shall be reduced one-half. (Acts 1903, p. 119; Acts 1909, p. 281.)

Art. 7437. All agreements in violation of, void.—Any contract or agreement in violation of any provision of this subdivision shall be absolutely void and not enforceable either in law or equity. (Acts 1903, p. 119.)

Art. 7438. Actions to have precedence.—All actions authorized and brought under this subdivision on motion of the Attorney for the State, shall have precedence of all other business, civil or criminal except criminal cases where defendants are in jail. *Id.*

Art. 7439. Evidence preliminary to prosecutions.—Upon the application of the Attorney General, or of any of his assistants, or of any district or county attorney, acting under the direction of the Attorney General made to any county judge or any justice of peace in this State, stating that he has reason to believe that a witness who is to be found in the county in which such county judge or justice of the peace is an officer, knows of a violation of any provision of the preceding subdivision, it shall be the duty of such county judge or justice to have summoned as in criminal cases and to have examined such witness in relation to violations of any provision of said subdivision. The said witness shall be duly sworn; and the county judge, or justice of the peace, shall cause the statements of the witness to be reduced to writing and signed and sworn to before him, and such sworn statement shall be delivered to the attorney upon whose application the witness was summoned. Should the witness summoned as aforesaid fail to appear or to make sworn statements of the facts within his knowledge or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court and

may be fined not exceeding one hundred dollars, and may be attached and imprisoned in jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. (Acts 1907, p. 221.)

Art. 7439a. Requiring attendance of out of county witnesses in certain suits.—For the purpose of enabling all parties to procure the personal attendance of witnesses in any suit which shall be instituted or is pending in any Court of competent jurisdiction in this State which involves a violation of laws enacted to conserve the natural resources of the State, or a violation of laws prohibiting trusts, monopolies, or combinations in restraint of trade, the clerk of said Court where such suit is pending, on the application of the Attorney General or any of his Assistants, or on the application of any county or district attorney acting under his direction, or on the application of any other party to said suit, shall issue a subpoena for any witness or witnesses who may be represented to reside within any county in the State of Texas, or be found therein at the time of the trial. Provided the clerk shall not issue subpoenas in excess of five (5) to compel the attendance of State witnesses or a like number to compel the attendance of defense witnesses without first obtaining a written order from the trial judge. Should any witness summoned as aforesaid fail to appear and testify in said case, he shall be guilty of contempt of Court, and may be fined not exceeding one hundred dollars (\$100.00) and may be attached and imprisoned in jail until he shall attend said Court in person and testify as to all the facts within his knowledge with reference to the matter inquired about; provided, however, that any witness who resides out of the county where said suit is pending shall not be required to attend said Court and testify in person until the party or parties requesting his testimony shall have tendered to him if requested by said witness, sufficient money to defray his actual traveling expenses, not exceeding four cents (4¢) per mile going to and returning from the Court by the nearest practical conveyance, and two dollars (\$2.00) per day for each day he may necessarily be absent from home as a witness in such cause. In case the State is the party requesting the personal attendance of such witnesses, such expenses shall be paid in the same manner as costs in felony cases. (Acts 1931, 42d leg., 1st C. S., p. 90, ch. 44, sec. 1.)

Art. 7440. Testimony; books and papers.—Whenever any suit shall be instituted, or is pending in any court of competent jurisdiction in this State by the Attorney General, or by any district or county attorney acting under his direction against any corporation, individual association of individuals, joint-stock association, or co-

partnership, under any law of this State against trusts, monopolies, or conspiracies in restraint of trade, or under any laws of this State regulating or controlling corporations, domestic or foreign, the Attorney General, district or county attorney, as the case may be, may, in addition to the means provided by law, examine and procure the testimony or evidence of witnesses and have books, papers, and documents produced as evidence in the manner herein provided. (Acts 1907, p. 16.)

Art. 7441. Evidence, how taken.—Whenever any action is commenced or is pending as contemplated in the preceding article, by the Attorney General, or by any district or county attorney acting under his direction, and said officer representing the State, either upon the trial of the case, or in preparation for the trial thereof, desires to take the testimony of any officer, director, agent, or employee of any foreign or domestic corporation or joint-stock association proceeded against, or in case of any copartnership, any member thereof, or in case of any individual or individuals, either of them, and the person or persons whose testimony is desired resides either within or without said State, the said officer shall file in said court where the action is brought, either in term time or in vacation, or with any special commissioner who may be appointed by the court to take testimony, as provided for in this law, a written statement setting forth the name and residence of each person whose testimony he desires to take, and in a general way shall designate any books, papers, or documents he desires produced, and the time when and the place where either within or without this State he desires such person to appear and testify or to produce books, papers, and documents, if any are desired. Thereupon the judge of said court, or the commissioner, before whom said testimony is being or shall be taken, shall immediately issue written notice, directed to the attorney or attorneys of record in said cause, or the agent, officer, or employee of any corporation or joint-stock association, or directed to the attorney or attorneys of record of any copartnership, individual or individuals, or to any member of such copartnership or to any individual or individuals who are defendant or defendants in said action, notifying said attorney or attorneys of record, or officer, agent, or employee, aforesaid, or member or members of any copartnership, or individual, that the testimony of each person named in said notice is desired, and requiring said attorney or attorneys of record, or such officer, agent, or employee aforesaid, or member of such copartnership, or any individual to whom said notice is delivered, or upon whom the same is served, to notify and have said witness or witnesses, whose testimony or evidence it is desired to take, at the time and place named in said notice,

before the court or special commissioner named, then and there to testify, and then and there to have and produce such books, papers, and documents as are called for, and for any of the purposes herein provided. The court or the commissioner may continue the taking of such evidence from day to day, or adjourn from day to day at the same place until the same has been concluded. Id.

Art. 7442. Judgment on failure to produce books, papers, etc.—Whenever any officer, director, agent, or employee of any foreign or domestic corporation, or joint stock association, authorized to do business in this State, or any member of any copartnership or any individual, against whom suit has been filed, or is pending, as provided for in this title, or the attorney or attorneys of record of any such corporation, joint stock association, copartnership, or individual shall be notified in accordance with the provisions of this title that any of the books, papers or documents belonging to such corporation, joint stock association, copartnership, or individual, are wanted before the court, or special commissioner as provided in this title, it shall be the duty of such defendant corporation, joint stock association, copartnership, or individual as the case may be, to produce and present, or cause to be produced and presented, as required in said notice, all such books, papers and documents belonging to any such defendant, or under such defendant's control, as may be specified in said notice, in court or before said special commissioner, at the time and place so specified. In the event of the failure or refusal of any such corporation, joint stock association, copartnership, or individual, to comply with any of the provisions of this article, it shall be the duty of the court, upon motion of the officer representing the State, to strike out all the pleadings, answers, motions, reply or demurrer theretofore or thereafter filed in such case by such defendant corporation, joint stock association, copartnership, or individual and render judgment by default against any such defendant. Id.

Art. 7443. Notice to attorneys on failure to produce.—Whenever any attorney or attorneys of record, or any agent, officer or employee of any corporation or joint stock association, proceeded against as herein provided, shall be notified that any officer, director, agent or employee of any such corporation or joint stock association is wanted before said court, or any special commissioner, as provided herein, to give his testimony or to produce any such books, papers or documents of said corporation or joint stock association, as the case may be, or if any attorney or attorneys of record of any copartnership, or individual shall be notified that any member or members of said copartnership or any individual who are defendants in any such action are desired as witnesses, or to produce books, papers or docu-

ments before any court, or before any special commissioner appointed to take testimony in said proceeding, it shall be the duty of such attorney or attorneys of record, or any such officer, director, agent or employee to immediately notify any such person of the time and place where he shall attend and give his testimony, or produce any such books, papers or documents, if any are desired. If any person whose testimony is desired, as herein provided, shall fail to appear, or appearing shall refuse to testify, or shall fail to produce whatever books, papers, or documents he or they may be ordered to produce, as before provided, then it shall be the duty of the court, upon motion of the Attorney General, district or county attorney, on proof of such refusal, failure or dereliction, to strike out the answer, motion, reply, demurrer, or other pleading theretofore or thereafter filed in such action, by said delinquent defendant, who has himself, or being a corporation or joint stock association, whose officer, agent, director, or employee, as herein provided, has refused or failed to attend and testify, or to produce all books, papers or documents demanded, which were in the custody or subject to the control of such witness or witnesses, or corporation or joint stock association. Said court shall, in the event of any such refusal or failure, proceed to render judgment by default against any such defendant: *Provided*, That if any such defendant shall file a written sworn denial, in said court, setting forth that such failure or refusal did not arise by reason of any fault or procurement of defendant, the court shall hear evidence upon that issue; and if the defendant shows to the satisfaction of the court that any witness who failed to attend did not do so at the instance or procurement of said defendant, or that the books, papers, or documents demanded were not in its possession or control and could not be produced, and that such defendant had complied with all the provisions of this title within such defendant's power to perform, then in that event the answer, motion, reply, demurrer or other pleadings shall not be stricken out or judgment by default taken because of the failure of the witness to attend, who could not be so procured, or because of the failure to produce the books, papers or documents not in the possession or under the control of such defendant; but the court shall have the power to enter such further orders in respect to the matter in controversy as it may deem necessary for the proper administration of justice. In any proceeding had before a special commissioner, as herein provided, the certificate of the special commissioner showing the failure or refusal of any such witness or witnesses to appear and testify, or to produce any books, papers or documents desired, shall be sufficient prima facie evidence of such failure, refusal or dereliction on the part of any such defendant, when same is filed in court. Any witness attending any proceeding herein provided for in compliance with any notice or

subpoena issued by authority of this law shall receive as compensation one dollar per day for each day of his attendance and four cents per mile traveled, computed upon the shortest practical route. Any claim for fees and mileage shall be filed with the court, or special commissioner, and sworn to by said witness, and shall be taxed up as costs and collected as other costs in civil cases. Id.

Art. 7444. Special commission to take testimony.—The court or presiding judge thereof, in which any proceeding as herein provided is pending, in term time or in vacation, upon application therefore made by the Attorney General, or district or county attorney acting under his direction, shall appoint some well-qualified disinterested person as special commissioners to take testimony in any such case, at any point within or without the State, as designated in such application; or where requested by either party to said cause of action, upon the issues joined in said cause. Such special commissioner shall have full power and authority to issue notices provided for in the third preceding article and to issue subpoenas for witnesses, compelling the attendance of such witnesses, the production of books, papers, or documents, to issue attachments, to punish for contempt to the same extent as provided by law for said court, to administer oaths to witnesses, to have all witnesses examined orally, which testimony shall be reduced to writing, and may be taken down by a competent stenographer and transcribed, and shall be signed and sworn to by said witness. The person appointed as special commissioner in any case shall qualify by taking the Constitutional oath of office, and shall, with all convenient speed, certify and return the testimony taken by him to the court appointing him. Said commissioner shall note all objections to the testimony and shall not exclude any testimony. All questions as to the materiality or admissibility of same shall be reserved for the court trying the case. Such testimony so taken may be read in evidence upon the trial of the suit in which same was taken, subject to any legal objections which might be made to same. The compensation of such commissioner shall be his actual expenses in traveling and such fees as are allowed a notary public in taking depositions, to be taxed up as costs and collected as in civil cases. Id.

Art. 7445. Notice to witnesses.—When any notice is issued and served, as provided for in this subdivision, ten full days exclusive of the day of service shall elapse before any witness so requested shall be compelled to appear and testify, or produce any books, papers, or documents called for. If the taking of testimony shall not be concluded on the date named in said notice, each witness shall remain in attendance from day to day until same is completed

or said witness is finally discharged by the court, or commissioner, as the case may be. Service of said notice and the return thereon may be made by any sheriff or constable of this State, or by any disinterested person competent to make oath of the fact, and shall be made by delivering to each person or attorney to be served a true copy of such notice. Return of such service shall be indorsed on or attached to the original notice; it shall state when the same was served and the manner of service and upon whom served, and shall be signed. If served by a person other than an officer, it shall be sworn to by the party making the service before some officer authorized by law to take affidavits. *Id.*

Art. 7446. Witnesses exempt from prosecution.—Any person who shall testify before any county judge or justice of the peace as provided for in this title, or any witness for the State who shall testify or produce any books, papers, or documents in any proceeding or examination under the provisions of this title, shall not be subject to indictment or prosecution for any transaction, matter, or thing, concerning which he truthfully testifies or produces evidence, documentary or otherwise. (Acts 1907, pp. 16, 221.)

Art. 7447. Provisions cumulative.—The provisions of this subdivision shall be cumulative of all laws of this State, and shall not be construed as repealing any other law relating to the taking of testimony or evidence; but shall be construed as providing an additional means of securing evidence for the enforcement of the laws, as herein provided. (Acts 1907, p. 16.)

Stat. (Vernon, 1936), Pen. Code
Conspiracies Against Trade—Penal Provisions

Art. 1632. Defining trusts.—A “trust” is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for any or all of the following purposes:

1. To create, or which may tend to create or carry out, restrictions in trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen compe-

tition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree, in any manner, to keep the price of such article or commodity, or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall, in any manner, affect or maintain the price of any commodity or article, or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance, or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce, or commodities partially or entirely within this State, or any portion thereof. [Acts 1903, p. 119.]

Art. 1633. "Monopoly."—A "monopoly" is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for

the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. *Id.*

Art. 1634. "Conspiracy in restraint of trade."—Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations, or associations of persons, who are engaged in buying or selling any article of merchandise, produce, or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons, any article of merchandise, produce, or commodity.

2. Where any two or more persons, firms, corporations, or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation, or association of persons for buying from or selling to any other person, firm, corporation, or association of persons. *Id.*

Art. 1635. Punishment.—Whoever violates any provision of this chapter shall be confined in the penitentiary not less than two nor more than ten years. (Acts 1907, p. 194.)

Art. 1636. Persons required to testify.—Upon the application of the Attorney General or of any of his assistants, or of any district or county attorney, acting under the direction of the Attorney General, made to any county judge, or any justice of the peace, in this State, stating that he has reason to believe that a witness, who is to be found in the county in which such judge or justice is an officer, knows of a violation of any provision of this chapter, it shall be the duty of such judge, or justice, before whom such application is made, to have summoned and examined such witness in relation to violations of any provisions of this chapter, said witness to be summoned as in criminal cases. The said witness shall be duly sworn; and the judge or justice shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; such sworn statement shall be delivered to the attorney upon whose application the witness was summoned. Should the witness so summoned fail to appear or to make statements of the facts within his knowledge under oath, or to sign the same after it has been reduced to writing, he

shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in jail until he makes a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person who shall testify before any judge or justice as provided for in this chapter, or who shall testify as a witness for the State in the course of any statutory proceeding to secure testimony for the enforcement of this law, or in the course of any judicial proceeding to enforce the provisions of this chapter, shall not be subject to indictment or prosecution for any transaction, matter or thing concerning which he shall so give evidence documentary or otherwise.

Art. 1637. Agreement to form trust, monopoly, etc.—If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly, or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined in the penitentiary not less than two or more than ten years. (Acts 1907, p. 457.)

Art. 1638. Operating in violation of this law.—If any person shall, as a member, agent, employee, officer, director, or stockholder of any business, firm, corporation, or association of persons, form in violation of the provisions of this chapter, or shall operate, in violation of such provisions, any such business, firm, corporation, or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation, or association, or shall do any other act which has the effect of violating or aiding in the violation of any provision of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way or give away within this State, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secret rebates on such purchase for the purpose of the aforesaid, he shall be confined in the penitentiary not less than two nor more than ten years. *Id.*

Art. 1639. Persons outside State liable.—If any person shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall

cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect within this State, or, if such trust, monopoly, or conspiracy in restraint of trade, having been formed outside of said State, any person shall give effect to such trust, monopoly, or conspiracy in this State, or he shall do anything to help or aid it doing business in this State, or otherwise violate the antitrust laws of this State, or if any person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation, or association of persons, formed or operated in violation of any provision of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, shall be confined in the penitentiary not less than two nor more than ten years. *Id.*

Art. 1640. Forming trusts, etc.—If any person, employe, agent, stockholder, or officer of any person, firm, association of persons, or corporation, now doing business in this State, have formed a trust, or monopoly, as defined in this chapter, or have formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perform any act of any character to carry out such trust, monopoly, or conspiracy in restraint of trade, such person, employe, agent, stockholder, or officer shall be confined in the penitentiary not less than two nor more than ten years. (Acts 1907, p. 458.)

Art. 1641. Venue.—Prosecutions under this chapter may be conducted in Travis County, or in any county wherein a trust, monopoly, or conspiracy in restraint of trade is being carried on. (Acts 1907, p. 458.)

Art. 1642. Agricultural products and livestock exempt.—No provision of this law shall apply to agricultural products or livestock while in the hands of the producer or raiser. It shall be lawful for any person engaged in any kind of work or labor, manual or mental, or both, to associate with other such persons to form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments. (Acts 1899, p. 262.)

Art. 1643. Trade unions, etc. It shall be lawful for any members of such trades union or other organization or association, or any other person, to induce or attempt to induce, by peaceable and lawful means, any person to accept any particular employment, or quit any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit any pursuit, in which such person may then be engaged. No such member shall have the right to trespass upon the premises of another without the consent of the owner thereof. *Id.*

Art. 1644. Not to apply to combination, etc.—The foregoing article shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade. Nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employes. Nothing herein shall be construed to repeal, affect, or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools, and monopolies. *Id.*

Stat. (Vernon, 1936)

Art. 1302. Purposes.—The purposes for which private corporations may be formed are:

50. To subscribe for, purchase, invest in, hold, own, assign, pledge, and otherwise deal in and dispose of shares of capital stock, bonds, mortgages, debentures, notes and other securities, obligations, contracts, and evidences of indebtedness of foreign or domestic corporations not competing with each other in the same line of business; *provided the powers and authority herein conferred shall in no way affect any provision of the antitrust laws of this State.* (Acts 1921, p. 265.)

Art. 1372. Law violations.—Whenever any domestic or foreign corporation in this State shall violate any law of this State, including the law against trusts, monopolies, and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection. (Acts 1907, p. 175.)

Art. 1531. Affidavit.—Before a permit is issued to such corporation, its president, vice president, secretary, or treasurer, or two of the directors thereof, shall make and file in the office of the Secretary of State an affidavit stating that such corporation is not a trust or organization in restraint of trade in violation of the laws of this State, has not, within twelve months next preceding the making of such affidavit, become or been a party to any trust agreement of any kind which would constitute a violation of any antitrust law of Texas existing at the date of such affidavit, and has not within that time, entered into or been in any wise a party to, any combination in restraint of trade within the United States, and that no officer of

such corporation has, within the knowledge of affiant, within such time and on behalf of such corporation or for its benefit, made any such contract, or entered into or become a party to any such combination in restraint of trade. The jurat of the officer making such affidavit shall be attested by his official signature and seal of office. (Acts 1909, C. S., p. 267; id.)²

Judicial Decisions

Application of the Common Law.

The common law doctrine against monopolies and restraint of trade was incorporated in the first Texas Constitution of 1845 by provisions enacted to the effect that monopolies and grants in perpetuity shall never be permitted. There were no general antitrust cases prior to the enactment of the Antitrust Act in 1889, and since then most cases turned on provisions contained in the constitution and statutes. However, for application of common law doctrines see *Contracts not to Compete, infra*.

In a case, decided after the act of 1889, but involving an agreement made prior to the act, the plaintiff, a butcher, contended that a firm of cattle dealers had induced another firm to refrain from dealing with him, thereby forcing him to make purchases out of the city. The court held that at common law, a seller may refuse to sell to whomever he pleases, but may not combine and conspire with others to do so to the injury of another. Such combinations were actionable at common law. *DeLa v. Winfree*, 80 Tex. 400, 16 S. W. 111 (1891). See also *North Texas Gin. Co. v. Thomas*, 277 S. W. 438 (Civ. App. 1925).

Constitutionality of Statutes.

The first general Antitrust Act was passed in 1889 (L. 1889, c. 117, 141). Its validity was questioned in a suit to restrain a combination of fire-insurance companies from fixing insurance rates and agents' commissions, on the ground that the statute violated the "equal protection" clause of the fourteenth amendment to the Federal Constitution, since it exempted agricultural and livestock products while in the hands of the producer. The district court and court of civil appeals denied defendants' contentions, and held for the State. The decision, however, was reversed by the Supreme Court of Texas not on the above ground, but on the ground that the act was inapplicable

²Art. 1531 is a part of the Foreign Corporation Law, arts. 1529 to 1538.

to the business of insurance, and that, otherwise, the act was valid. *Queen Insurance Co. v. State*, 22 S. W. 1048; 24 S. W. 397 (Civ. App. 1893). See also *Anheuser-Busch Brewing Ass'n & Houck*, 27 S. W. 692 (Civ. App. 1894), aff'd., 88 Tex. 184, 30 S. W. 869 (1895), where the court held the act constitutional, despite the exemptions.

The act of 1889 was amended in 1895 (L. 1895, c. 83, p. 112), but the exemptions to agricultural and livestock products were retained. Its validity was again challenged on the same ground, but the contention was overruled. *Texas Brewing Co. v. Anderson*, 40 S. W. 737 (Civ. App. 1898).

The act of 1895 was also challenged on the ground that it violated the Bill of Rights of the State Constitution, which provided that "no citizen of this State be deprived of life, liberty, property, or immunities, or in any manner disfranchised, except by the due course of the law of the land." This contention was likewise overruled on authority of the *Anderson* case, *supra*. *Texas Brewing Co. v. Durum*, 46 S. W. 860 (Civ. App. 1898).

Both the 1889 and 1895 acts were then attacked as invalid, in a suit to cancel a corporation's permit to do business in the state, on the ground that defendants were deprived of their property and contract rights "without due process of law" in violation of the fourteenth amendment to the Federal Constitution, and also on the ground that the acts constituted class legislation. The acts, however, were upheld as a valid exercise of the State's police power. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936 (1898). The decision was affirmed by the Supreme Court of the United States, but on a different ground, holding that the constitutional questions were not before the court. (*Id.*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657 (1900).)

In 1902 the Supreme Court of the United States decided the case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540 (1902), involving the Antitrust Act of Illinois, which contained similar exemptions. In an action to collect the purchase price for pipes sold, the defendant argued that the plaintiff could not recover on the ground that it was a member of an illegal combination. The Supreme Court held the entire Illinois Antitrust Act unconstitutional, on the ground that the exemptions to agricultural and livestock products constituted class legislation, in violation of the "equal protection" clause of the Federal Constitution.

Following the *Connolly* decision, the State court of civil appeals, in a suit to recover penalties for violation of the antitrust laws, held the Antitrust Acts unconstitutional. *State v. Waters-Pierce Oil Co.* 67 S. W. 1057 (1902). But, in another case, the Supreme Court of

Texas held that in the light of the Connolly decision, *supra*, the State courts could hold only so much of the antitrust laws invalid, as came within purview of that decision, but that the laws were valid in so far as they authorized forfeiture of a charter of a domestic corporation or the revocation of a license of a foreign corporation for violation of the State laws. *State v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603, 67 S. W. 1049, 69 S. W. 58 (1902). In deciding the case, the Texas court relied on the opinion of the United States Supreme Court in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Supp. Ct. 518, 44 L. Ed. 657 (1900), where the court did not discuss the validity of the law, but held that the State had the power to institute proceedings for the forfeiture of charters or permits for violation of the antitrust provisions.

The Antitrust Act was again amended in 1899 (L. 1899, c. 146, p. 241) requiring each corporation to file an affidavit to the effect that it is not violating the State Antitrust Acts. Two days later, on May 27, the legislature enacted another law, Pen. Code, art. 1642 and 1643 (L. 1899, c. 153, p. 162), exempting labor organizations from prosecutions under the Antitrust Acts.

The Antitrust Act of 1899 was then attacked on the ground of articles 1642 and 1643, exempting labor unions and persons employed in agricultural products from prosecutions under the antitrust laws, as being in violation of the "equal protection" clause of the fourteenth amendment of the Federal Constitution. In a suit to forfeit the license of a foreign corporation, for combining with others to fix prices of cottonseed and oil, the court of civil appeals overruled these contentions and held the act valid. *National Cotton Oil Co. v. State*, 72 S. W. 615 (1903), *aff'd.* 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689 (1905).

The Supreme Court of Texas, immediately thereafter had occasion to decide the validity of the act of 1899. In a suit by the State to recover penalties for violation of the antitrust laws, the defendants argued that the 1899 act was invalid because it was cumulative and continued the provisions and penalties of the acts of 1889 and 1895, declared unconstitutional in the *Connolly* case, and because it contained provisions in articles 1642 and 1643, exempting labor unions and dealers in agricultural and livestock products. But, the court held that the act of 1899 did not have the effect of incorporating the invalid provisions of the prior statutes, and that the later law was severable, and therefore valid. *State v. Laredo Ice Co.*, 73 S. W. 951 (Civ. App. 1903).

The *National Cotton Oil* case came before the Supreme Court of the United States, and the Court, having before it the Laredo deci-

sion, took the position that it must follow the decision of the highest court of the State on interpretation of the State law. It held therefore that under the State court's interpretation, all combinations in restraint of trade are penalized including such violations by agricultural, livestock, or labor combinations, and as thus interpreted, the laws were not in violation of the "equal protection" clause of the fourteenth amendment to the Federal Constitution. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 70, 49 L. Ed. 689 (1905).

In 1903, a new Antitrust Act, articles 7426 et seq., was enacted. Its constitutionality was challenged on several grounds in another oil combination suit. Since the suit for penalties was brought both under the acts of 1899 and 1903, both acts were alleged to be unconstitutional, the 1899 act because of the trade-union exemption, and the 1903 law because its penal provisions were indefinite and uncertain in violation of the "due process" clause. The court of civil appeals overruled these objections, and upheld the provisions of both acts. *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 102, 106 S. W. 918 (1907), aff'd., 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417 (1909).

In 1924 the validity of the act of 1903 was again contested, but on entirely different grounds. This was a suit for the forfeiture of a Texas corporation's charter on the ground that it had transferred the majority of its stock to the Standard Oil Co. of New Jersey, a company adjudged guilty of violating the antitrust laws, and it was therefore contended could not do business in the state under article 7803. The court of civil appeals, however, held that the article was not self-executing, that if interpreted to be self-executing, it would constitute a violation of the "due process" clause. It was therefore necessary for the State to first obtain a judgment of a court decreeing the forfeiture of the New Jersey corporation's right to do business in Texas. *State v. Humble Oil & Refining Co.*, 263 S. W. 319 (1924). In 1937, the validity of the antitrust laws was again challenged in a suit against the Standard Oil Co. on the ground of exemptions contained in the Cooperative Marketing Act (arts. 5737-5764) and 1642 and 1643 of the Penal Code, rendered unconstitutional under the Connolly decision. The court, however, upheld the policy of the State as expressed in the Cooperative Act. The act provided for reasonable classifications and was therefore held to be valid. *State v. Standard Oil Co.*, 130 Texas 313, 107 S. W. (2d) 550 (1937).

In 1939 the constitutionality of articles 1632-1644 of the antitrust laws was challenged as violating the Fourteenth Amendment of the Federal Constitution since it exempted from its operation dealers in agricultural and livestock products. The court followed the reasoning expressed in the dissenting opinion of the *Connolly* case, *supra*,

and held that such exemption was not a denial of "equal protection." The court believed that the legislature could consider prevailing economic conditions and the difference between the classes in relation to the ultimate object of the statute which was to promote general prosperity and in the light of such considerations, such distinction between the classes was thought not unreasonable. *Ex parte Tigner*, 132 S. W. (2d), 885 (Civ. App. 1939).

Application of Statute.

Territoriality.

A foreign corporation is subject to the same laws as a domestic corporation. In a suit for the forfeiture of a foreign oil company's license for violations of the antitrust laws of 1889 and 1895, the court overruled the foreign corporation's contention that the transactions constituted interstate commerce, and therefore that the State law did not apply. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936 (1898), *aff'd.*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657 (1900).

A foreign corporation, which acquired the property of another foreign corporation whose right to do business in the State was forfeited for violation of the Antitrust Acts of 1889 and 1895 can be refused a permit to do business in the State. The court overruled the contention that the statute as interpreted had an extraterritorial effect, since it prohibits only acts performed in the State. A State has power to grant a permit to foreign corporations on such terms as it sees fit. *Pierce Oil Corp. v. Weinert*, 106 Tex. 435, 167 S. W. 808 (1914).

Even if the practices, on which suit for penalties for violation of article 7426 was based, were approved by the Federal Trade Commission, this could not affect the application of the State Antitrust Acts, a Federal agency being unable to regulate business wholly within a State. *State v. Standard Oil Co.*, 107 S. W. (2d) 550 (1937), *rev'g* 82 S. W. (2d) 402.

A State court, which had lawfully obtained jurisdiction to appoint a receiver for a foreign corporation, whose permit to do business in Texas was forfeited for violation of the antitrust laws, does not thereby deprive the corporation of the right to carry on interstate commerce. But, the State court, having obtained prior jurisdiction, a Federal court cannot thereafter appoint a receiver to take possession of the property. *Palmer v. Texas*, 158 F. 705 (1907), *modified and aff'd.* 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435 (1909).

In a suit for penalties for violation of the Antitrust Act, the defendants demurred on the ground that they had become parties to a code of practice, containing among others, the following rules, which had been approved by the Federal Trade Commission: (1) Restriction

or prohibition of free installation of filling-station equipment, and fixing prices for such equipment; (2) prohibition of lease and license plan, under which refiner leased filling station and sublet it to retailer at smaller rental; (3) prohibition of donations; (4) prohibitions of deviation from posted prices. The supreme court of the State held, however, that by such practices, the defendants had obtained a monopoly of the retail oil business in the State, and in such intrastate commerce, the Federal Trade Commission had no jurisdiction. *State v. Standard Oil Co.*, 107 S. W. (2d) 550 Civ. App. (1937).

Scope of Statute.

The provision in the Antitrust Acts, prohibiting combinations for the purpose of fixing the price of any commodity, includes shares of stock, since "commodity" is broader in meaning than "merchandise." In a suit on an agreement between oil promoters and a stockholder that the former would pay the latter 90 cents for his stock if he would refrain from selling his stock at 75 cents, so that the promoters would be able to sell theirs at \$1, the court overruled the plaintiff's contention that shares of stock were not within the meaning of "trade or commerce" in the Antitrust Act, and dismissed the suit. *Pound v. Lawrence*, 233 S. W. 359 (Civ. App. 1921); cf. *Edwards v. Roberts*, 222 S. W. 278 (Civ. App. 1920). See also *Hurt v. Cooper*, 113 S. W. (2d) 929 (Civ. App. 1938), involving the validity of the Chain Store Tax Act, where the court of civil appeals, in a dictum indicated that joint advertising by voluntary chains might be within the purview of article 7426, section 2 prohibiting price fixing.

Procedure of Enforcement.

Where illegality of the contract due to unlawful restraint of trade or creation of monopoly appears on the face of the instrument, the court will take judicial notice of such violation, even though the point was not raised by either side. *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871 (1896).

This is also the rule when the illegality is patent on the record. *Crandall v. Scott*, 161 S. W. 925 (Civ. App. 1913); *Heid Bros. v. Riesto*, 281 S. W. 638 (Civ. App. 1926). For policy of the appellate courts to consider antitrust questions, whether presented at trial or on appeals see *Pasteur Vaccine Co. v. Burkey*, 22 Civ. App. 232, 54 S. W. 804 (1899). But, where the facts are controversial, the question must be submitted to the jury. *Langford v. Power*, 196 S. W. 662 (Civ. App. 1917). See also *Waters-Pierce Oil Co. v. State*, 47 Civ. App. 299, 48 Tex. Cr. App. 147, 105 S. W. 851 (1907); dismissed, 212 U. S. 112, 29 Sup. Ct. 227, 53 L. Ed. 431 (1909); *East Line and Red River R. R. Co. v. State*, 75 Tex. 434, 12 S. W. 690 (1889).

Article 7439 (L. 1903, sec. 15), providing that persons summoned before justices of the peace may be compelled to testify in Antitrust Act violations, was held not to apply to proceedings before a grand jury, and therefore, there was no contempt for refusal to give testimony at such proceedings. *Ex parte Andrews*, 51 Tex. Cr. R. 79, 100 S. W. 376 (1907).

If a defendant is charged with being a party to a conspiracy, it is not enough to prove that he was an agent under Penal Code (1895), article 981. The indictment must charge that he had knowledge of the conspiracy. *Hathaway v. State*, 36 Tex. Cr. R. 261, 36 S. W. 465 (1896). Penal Code, articles 1638-1640, now in force, are broader in scope and do not expressly require that knowledge be proven.

Under common law a plaintiff had a right of action against defendants, who conspired together not to sell to plaintiff or to cut prices so as to drive plaintiff out of business, or who circulated false statements to ruin plaintiff's business. *Texas Public Utilities Corp. v. Edwards*, 99 S. W. (2d) 420 (Civ. App. 1936); *Brown v. American Freehold Land Mortgage Co.*, 97 Tex. 599, 80 S. W. 985 (1904). Under the antitrust Acts, however, a private party has no right of action for violation of the antitrust laws as such, but may bring an action for damages. *North Tex. Gin Co. v. Thomas*, 277 S. W. 438 (Civ. App. 1925). Neither can a stockholder, generally, sue on his own behalf for injury to the corporation under the antitrust laws, unless he can show that he has made an effort to obtain the consent of the corporation, or that his appeal to the directors would be in vain. *Stinnett v. Paramount Famous Lasky Corp.*, 37 S. W. (2d) 145 (Civ. App. 1931).

A suit to forfeit the rights of a foreign corporation to do business in the State is a civil suit, and it is, therefore, not necessary for the State to prove beyond reasonable doubt a violation of the antitrust laws. It is sufficient when the evidence tends to establish such violations. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936 (1898), *aff'd.* 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657 (1900).

Article 7433 (art. 7803) is not selfexecuting, and the State cannot bring suit to forfeit the charter of a Texas corporation on the sole ground that it had transferred the majority of its stock to the Standard Oil Co. of New Jersey, a company, adjudged guilty of violations of the antitrust laws. Before a company can be deprived of doing business in the State under article 7803, it is first necessary for the State to obtain a judgment decreeing the forfeiture of the foreign corporation's right to do business in the State. *State v. Humble Oil Co.*, 263 S. W. 319 (Civ. App. 1924); *cf. Pierce Oil Corp. v. Weinert*, 106

Tex. 435, 167 S. W. 808 (1914), where a foreign corporation purchased all the "out of State" property of another corporation, convicted of violating the antitrust laws, was held not precluded from doing business in the State, because the purchasing company did not acquire the "business" of the guilty corporation. The court held that the law has no extraterritorial effect, and applies only to acts done in the State.

Mandamus will not lie to compel the attorney general to institute proceedings for the forfeiture of a charter. It is the duty of the prosecuting officer to first examine the facts and then determine whether or not the antitrust laws were violated, and that the necessary evidence to prove such guilt can be obtained. *Lewright v. Bell*, 94 Tex. 556, 63 S. W. 623 (1901).

Remedies.

In a suit for penalties and for a restraining order under article 7433, providing that a foreign corporation "adjudged" guilty of antitrust violations shall be denied the privilege of doing business in State, the court held that it was not necessary for the State to file a separate and different suit, in which such corporation has been found guilty, before suit for penalties can be brought. *State v. Standard Oil Co.*, 107 S. W. (2d) 550 (Civ. App. 1937). See *Frels v. Consolidated Theatres*, 134 S. W. (2d) 369 (1939).

Writs of attachment and garnishment, provided for in articles 1372, 1373, and 1375-7, were held to be applicable only to domestic corporations, operating under State charters, or to foreign corporations, under licenses or permits, but cannot apply to a foreign corporation which had no permit to transact business in the State.

An action to recover penalties under article 7426 is not criminal within the meaning of Const. art. V, sec. 8, denying the State the right to appeal in criminal cases. *State v. Waters-Pierce Oil Co.*, 67 S. W. 1049 (Civ. App. 1902). For the same reason, an action for penalties or cancellation of permit is not barred by the statute of limitations, Penal Code, articles 180 and 181. *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 918 (1907); *aff'd*. 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417 (1909).

A verdict of \$1,623,900 constituting penalties for 1,033 days under the Antitrust Act of 1899 and for 1,488 days under the act of 1903 is not excessive, in violation of the due process clause of the fourteenth amendment. *Ibid*. The right to penalties does not survive the corporation. *Mason v. Adoue*, 30 Civ. App. 276, 70 S. W. 347 (1902).

Attorney fees.

The attorney for Travis County under section 7436 employed special counsel to assist him in a suit to recover penalties for violation of the antitrust laws by certain oil companies. The court held that

the county was not injured by the award of fees to the special counsel. The statute expressly authorizes the employment of special counsel for such prosecutions and is therefore liable for the payment of special fees. *Standard Oil Co. v. State*, 132 S. W. (2d), 612 (1939).

Defenses.

The fact that the plaintiff is a member of a trust is no defense on a contract, not growing out of the alleged illegal combination. In a suit for breach of contract to accept certain motion-picture films the court overruled the defense that plaintiff was a member of a motion-picture trust, since the debt sued for was entirely separable from the trust activities. *Metro-Goldwyn-Mayer Distributing Corp. v. Cocke*, 56 S. W. (2d) 489 (Civ. App. 1933).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Stat. (Vernon, 1936)

Cooperatives

Article 5762 provides that agricultural marketing associations organized under articles 5737 to 5764 shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

Stat. (Vernon, 1936), Pen. Code
Agricultural Products and Livestock

Article 1642 provides that agricultural products and livestock while in hands of the producer or raiser are exempt from Antitrust Laws.

Trade-Unions

Articles 1642 and 1643 provide that it shall be lawful to form trade-unions, and that the members thereof may induce, by peaceable and lawful means, any person to accept or quit any particular employment. See *General Antitrust Laws, supra*.

Judicial Decisions

Cooperatives.

The validity of article 5762, exempting cooperative marketing associations from the Antitrust Acts has been attacked as a violation of the "equal protection" clause of the fourteenth amendment to the Federal Constitution. The supreme court of Texas held that the

legislature may make reasonable classification of subjects and persons, and upheld the act. *State v. Standard Oil Co.*, 107 S. W. (2d) 550 (1937); revg. 82 S. W. (2d) 402; *Hollingsworth v. Texas Hay Assn.*, 246 S. W. 1068 (Civ. App. 1922); *Lennox v. Tex. Cotton Coop. Assn.*, 55 S. W. (2d) 543 (Commn. App. 1932).

An egg-producers' association, not incorporated under the Cooperative Marketing Act (art. 5762), was held in violation of the Antitrust Acts because of an agreement with its members that all eggs produced by the members be sold through the association. *Fisher v. El Paso Egg Producers Assn.*, 278 S. W. 262 (Civ. App. 1925).

Agricultural and Livestock Products.

For validity of Penal Code, article 1642, exempting agricultural and livestock products from application of the antitrust laws see *General Antitrust Laws, Constitutionality of Statutes, supra*.

Trade Unions.

The validity of Penal Code, article 1643, enacted in 1899 protecting workers in their right of organization was contested as a violation of the "equal protection" clause of the fourteenth amendment. The court held the statute did not operate as an exemption to the antitrust statutes, and upheld the act. *Waters-Pierce Oil Co. v. State*, 106 S. W. 918 (Civ. App. 1908), affd. 212 U. S. 86 (1909). See *General Antitrust Acts, Constitutionality of Statutes, supra*.

The constitutionality of Penal Code, article 1644, exempting certain labor-union activities from application of the Antitrust Acts was upheld in a suit to restrain a railroad from enforcing its contract with a union, which required the company to hire at least 85 percent union switchmen. The plaintiff contended such contract was in violation of the Antitrust Act, but the court declared the contract did not interfere with the interests of society or the liberty of the plaintiffs to pursue their trade, or in any way affected "the real needs of the people in their health, safety, comfort, or convenience." *Underwood v. Texas & Pac. Ry. Co.*, 178 S. W. 38 (Civ. App. 1915).

The application of article 5154, providing that articles 5152 and 5153 (Civil Statutes), giving labor the right to organize, shall not be deemed to diminish the effectiveness of the antitrust laws was tested in *Ex parte Stout*, 82 Tex. Cr. R. 183, 198 S. W. 967 (1917), involving a conviction of a member of the Cooks and Waiters Union, under a municipal ordinance, prohibiting picketing, for the purpose of persuading the public not to patronize the picketed establishment. It was contended the ordinance was in conflict with the above-mentioned articles, but the court held that since the ordinance did not prevent members of the union from persuading employees from working, there was no conflict with the State law.

The right to picket does not extend to the practice of boycotting employers whose employees were not on strike. In a suit by the employer to restrain the union members from picketing the premises in order to induce him to sign a union contract, the court held the action of the union in violation of the Antitrust Act. *Webb v. Cooks, Waiters, etc., Union*, 205 S. W. 465 (Civ. App. 1918). Picketing for the purpose of inducing a union contract is not lawful, even though there is evidence to show that the employer had conspired to destroy the labor union. *Cooks, Waiters, etc., Union v. Papageorge*, 230 S. W. 1086 (Civ. App. 1921).

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Railroads

Const. art. X, sec. 5 provides that no railroad or other corporation, or lessees, purchasers, or managers thereof shall consolidate the stock, property, or franchises of such corporation, with, or lease or purchase the works or franchises of, or in any way control any railroads owning or having under its control a parallel or competing line and prohibits common officers to such lines.

Const. art. X, sec. 6 provides that no railroad company organized under laws of State shall consolidate by private or judicial sale or otherwise with any railroad company organized under laws of any other State or of the United States.

STATUTORY PROVISIONS

Stat. (Vernon, 1936)

Railroads

Article 6406 provides that no railroad corporation, or the lessees, purchasers, or managers of any railroad corporation shall consolidate its stocks, property, works, or franchises, with, or lease, or purchase the stocks, property, works, or franchises of any railroad corporation owning or controlling a competing or parallel line; common officers or agents to such lines are prohibited. No railroad company organized under the laws of this State shall consolidate with any railroad company organized under laws of any other State, or the United States. Stat. (Vernon, 1936), Pen. Code, arts. 1649, 1650 provide against consolidation (as in the above articles) and further provide that any officer, agent, etc., who violates the provisions of the articles shall be fined not less than \$1,000 nor more than \$4,000 but exempts

one who has not by virtue of his position a voice in management or power to avoid violation of the law.

Interurban Railways

Article 6543 provides that no corporation operating interurban railways shall ever be permitted to acquire, own, control, or operate any parallel or competing interurban line, or to purchase, lease, acquire, own, or control, directly or indirectly, the shares or certificates of stock or bonds, franchise, or physical properties, or any part thereof, of any other corporation, if the same will violate any provision of the antitrust laws.

Milk

Article 165-2, section 11 provides that article 165-2, sections 1 to 10, providing for the setting up of codes of fair practice and the elimination of unfair competition or practices in the production and distribution of milk, shall not alter, repeal, change, modify, or in any way change the purpose of the antitrust laws of the State.

Petroleum Oil and Natural Gas

Article 6049d, section 13 provides that nothing in this article providing for the conservation of petroleum oil and natural gas shall modify the antitrust or monopoly statutes of the State.

Article 6049e, section 19 provides that nothing in this article relating to conservation of natural gas and oil shall alter, affect, or change the antitrust laws.

Article 1499 provides that no corporation engaged in the oil and gas producing business, prospecting for, and producing oil and gas, and owning land, leases, etc., for said purposes shall exercise these powers while owning or operating oil pipe lines in this State. Article 1500 provides that any corporation owning or operating oil pipe lines in State shall separately incorporate such lines whereupon it shall acquire power to engage in oil and gas producing business. Article 1504 provides that the above provisions do not authorize any transaction the effect of which would be to lessen competition or to violate any law prohibiting trusts and monopolies, and conspiracies in restraint of trade, or to violate any provision of antitrust laws of this State.

Public Utilities

Article 7428a, section 1 provides that monopolies are against public policy and it is unlawful for anyone doing business in the transportation and/or sale of natural gas, electric current, and power,

telephone services and/or similar public utilities to wilfully and intentionally do any act whatever to prevent or hinder any legitimate competition in such business. See *State Price Control Legislation: Antidiscrimination Legislation.*

Telegraph

Article 1418 provides that no corporation shall have power to contract with any owner of land to maintain a telegraph line over his land to exclusion of other companies.

Housing Authorities

Article 1524j provides that the act creating low-cost housing authorities, articles 1524c to 1524k, does not in any way nullify antitrust laws.

Labor Organizations

Article 5154 provides that articles 5152 and 5153 giving working persons the right to organize shall not apply to any combination of capital, or capital and persons formed for the purpose of limiting production or consumption of labor's products or for any other purpose in restraint of trade.

Insurance Companies

Article 5040 provides that insurance companies doing a similar line of business owned by substantially same controlling stockholder and which have never been companies actually competing with each other may consolidate but such consolidation shall not be effectuated in violation of antitrust and antimonopoly laws.

Stat. (Vernon, Supp., 1938)

Citrus Fruits

Article 5764a, section 19 provides that the Texas Citrus Marketing Act, sections 1 to 23, regulating citrus marketing agreements, shall not alter, repeal, change, or modify the antitrust laws, both civil and criminal, which shall prevail over any section of statute held to be in contravention of antitrust laws.

Article 1287-1, section 8a provides that the Agricultural Protective Act, sections 1 to 9, regulating sale of citrus fruit shall not alter the antitrust laws of the State.

Stat. (Vernon, Supp. 1939) Pen. Code

Liquor

Article 666-17 provides (1) that it shall be unlawful for any person holding a package store permit, or owning an interest in a package store, to have any interest, either directly or indirectly, in a wine and

beer retailer's license, or the business thereof; (2) that it shall be unlawful for any person to hold or have an interest in more than five package store permits or stores or the business thereof; (3) that it shall be unlawful for any person who owns or has an interest in a business of a distiller, brewer, rectifier, wholesaler, winery, wine bottler, or any agent, servant, or employee:

(a) To own or have an interest, directly or indirectly, in the business, premises, equipment, or fixtures of any retailer;

(b) To furnish, give, or lend any money, service, or other things of value, or to extend unusual credit terms to any retailer, or to any person for the use, benefit, or relief of such retailer, or to guarantee the fulfillment of any financial obligation of any retailer;

(c) To make or enter or offer to enter into an agreement, condition, or system, the effect of which will amount to the shipment and delivery of alcoholic beverages on consignment;

(d) To furnish, give, rent, lend, or sell any equipment, fixtures, or supplies to any retailer;

(e) To pay or to make any allowances to any retailer for a special advertising or distribution service, or to allow excessive discounts;

(f) To offer any prize, premium, gift, or other similar inducement to any retailer or consumer.

Article 666-41 provides that any person who violates any provisions of this act for which a specific penalty is not provided shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for not more than one year. Article 666-19 provides that if a person has been finally convicted in any court for the violation of any provision of this act or of any rule and regulation of the board, the board or administrator may cancel or suspend any permit which he may hold or in which he may have an interest and no appeal from such action shall be allowed. Thereafter, the board may in its own name institute action upon the bond supporting such permit for the benefit of the State. Upon proof of such conviction or cancellation of the permit, the court before whom such suit is brought shall render judgment in favor of the board for all fines, costs, and fifteen percent of the face value of the bond.

Article 667-5 provides that any person making application for a retail dealer's license shall state that said applicant has no financial interest in any establishment authorized to sell distilled spirits; that no other person engaged in the business of selling distilled spirits has any financial interest in the business to be conducted under the license now sought; and that he is not residentially domiciled with any person who has any financial interest in the establishment engaged in the

business of selling distilled spirits. Article 667-19 (1) (m and n) provide that the board or administrator shall have authority to cancel the license of any person authorized to sell beer upon finding that the licensee has violated the above prohibitions. However, no license authorizing the retail sale of beer in a hotel shall be cancelled for the causes specified above in (m and n) in those cases where there is a place of business authorized to sell distilled spirits in unbroken packages on premises of the hotel other than that part of such premises covered by the retail beer dealer's license.

Article 667-24(1) (a-g) provide that (1) it shall be unlawful for any manufacturer or distributor, directly or indirectly, or through a subsidiary or affiliate, any agent or any employee, or by any officer, director or firm member :

(a) To own any interest in the business of any retail dealer in beer, or any interest of any kind in the premises in which any such retail dealer conducts his or its business;

(b) To hold the ownership or any interest in any license to sell brewery products for consumption on the premises covered by such license, except the license of manufacturers to dispense their own products on the brewery premises;

(c) To furnish, give, or lend any money or other thing of value, except signs, or to extend unusual credit terms, to any person engaged in selling brewery products for consumption on or off the premises where sold, or to any person for the use, benefit, or relief of said person engaged in selling as above or to guarantee the repayment of any loan or the fulfillment of any financial obligation of any person engaged in selling beer at retail. The extension of credit for longer period of time than is generally extended to regular customers of a manufacturer or distributor covering the purchase of brewery products from such manufacturer or distributor shall be deemed unusual credit terms;

(d) To make any delivery of beer under any agreement, arrangement, condition, or system whereby the person receiving the same has the right at any time to relinquish possession to or return same to the shipper, or whereby the title to such beer remains in the shipper; or to make any delivery of beer under any agreement, arrangement, condition, or system whereby the person designated as the receiver merely acts as an intermediary for the shipper or seller and the actual receiver, including any delivery of beer to a factor or broker; or to employ any other method whereby any person is placed in actual or constructive possession of beer without acquiring title thereto, or whereby any person designated by the shipper or seller as the purchaser did not in fact purchase the same, or to make any other kind of transaction which in law may be construed as a consignment sale;

(e) To furnish, give, rent, lend, or sell any equipment, fixtures, or supplies to any person engaged in selling brewery products for consumption on the premises where sold. This subsection does not apply to such equipment, fixtures, or supplies furnished, given, loaned, rented, or sold prior to November 16, 1935, except that such transactions made prior to this date are not to be used as a consideration for an agreement thereafter made respecting the purchase of brewery products; provided that equipment, fixtures, or supplies furnished, given, rented, loaned, or sold to any person engaged in selling brewery products for consumption on the premises where sold, prior to November 16, 1935, when removed from the premises of such person or repossessed by any manufacturer or distributor of brewery products or by his agents or employees, shall not again be furnished, given, rented, loaned, or sold to any person engaged in the sale of brewery products for consumption on the premises where sold;

(f) To pay or to make any allowances to any buyer for a special advertising or distribution service, (1) unless in pursuance of a written contract defining the service to be rendered and the payment therefor; and (2) unless such service is rendered and the payment is reasonable and not excessive in amount; and (3) unless such contract is separate and distinct from any sales contract; and (4) unless such payment is equally available for the same service to all competitive buyers in the same class in the same trade area; or (5) where the result of any allowance, rebate, or payment results in the retailer giving to any manufacturer or distributor any advantage as to the sale of beer distributed by such manufacturer or distributor;

(g) To offer any prize, premium, gift, or other similar inducement, except advertising novelties of nominal value, to any dealer in or consumer of brewery products.

Article 667-26 provides that any person who violates any provisions of this article II shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$25 nor more than \$500 or by imprisonment in the county jail for not more than one year, or by both. However, in cases where the administrator or the Board, in writing, recommend acceptance of a plea of guilty, and such plea is accepted, the decree of the court and assessment of penalty shall not require cancellation of the license, but shall leave such question to the discretion of the board or administrator, having in mind the purpose of this act. Article 667-27 vests the attorney general and the district or county attorney with injunctive powers to restrain any existing or threatened violations. Upon any judgment of the court that violation of any restraining order or injunction issued hereunder has occurred, such judgment shall operate to cancel without further proceedings any license or permit held by such per-

son, nor shall a new license or permit be reissued within one year next preceding the filing of his application for a new license or permit. See *Tying Contracts and Exclusive Dealing Arrangements, infra*.

2. Public Contract Provisions

Stat. (Vernon, 1936) Supplies

Article 635 provides that a bidder on contracts for state supplies is required to file an affidavit stating that within 12 months past the bidder has not violated any law of State referring to trust and monopolies. See projected Vol. *Governmental Purchasing*.

Article 2367 provides that a bidder on contracts for county supplies shall attach to each bid an affidavit that bidder is not a member of any pool, trust, or combination and has not for the preceding 6 months been directly or indirectly concerned in any agreement to control prices of supplies bid on, or to influence any person to bid or not to bid thereon. See projected Vol. *Governmental Purchasing*.

Textbooks

Article 2853 provides that no book shall be purchased by Textbook Commission from any person, firm, or corporation who is a member of or connected with any trust; a sworn affidavit is required from all bidders on textbook contracts as to interest of person, firm, corporation, or individual stockholder thereof in any other textbook publishing house, and attested copies of all written agreements with others engaged in textbook publishing business must be filed with the Governor. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

SPECIAL ANTITRUST ACTS

Railroads.

A contract between a railroad and an express company giving the latter exclusive privilege over the railroad lines was held in violation of the Antitrust Acts of 1899 and 1903, even though the combination was formed prior to the enactment of the law. *State v. Mo. K. & T. Ry. Co.*, 99 Tex. 516, 91 S. W. 214 (1906). An agreement between a number of carriers and citizen's associations of a city for reduced special trip tickets was held not to be in violation of the act. *Lytle v. Galveston, H. & S. A. Ry. Co.*, 100 Tex. 292, 99 S. W. 396 (1907).

The constitutional prohibition (Const. art. X, secs. 5 and 6) against consolidations of parallel and competing railroad lines, does not apply to street railways. *Scott v. Farmers & Merchants National Bank*, 97 Tex. 31, 75 S. W. 7 (1903).

The plea of a railroad, in a personal injury suit, that it had sold its road and was not operating the line at the time of injury, is not available, if the railroad fails to prove that the transfer was lawful, and was not made to a parallel or competing line. *East Line & R. R. Ry. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834 (1887). See also *Atchison, T. & S. F. Ry. v. Weeks*, 248 Fed. 970 (1918); *Scott v. Mo. O. & G. Ry. Co.*, 151 S. W. 578 (1912).

Railroads, by reason of control, management, or of their relations with other lines may become competing within the constitutional prohibitions, even though the roads are not parallel and do not connect. *East Line & R. R. Ry. Co. v. State*, 75 Tex. 434, 12 S. W. 690 (1889).

A contract between officers of a number of railroads, combined in an association, empowering its manager to fix freight rates for the alleged purpose of avoiding extreme and sudden changes in the rate structures is a violation of Const. art. X, sec. 5. *Gulf C. & S. F. Ry. Co. v. State*, 72 Tex. 404, 10 S. W. 81 (1888). But an arrangement between a county, three steam railroads, and an electric interurban railroad, for joint truckage, depot, or terminal use, authorized by the State legislature, for the purpose of reconstructing a causeway, was held valid. *Galveston Causeway Construction Co. v. Galveston, H. & S. A. Ry. Co.*, 284 Fed. 137 (1922).

Insurance.

The original Antitrust Act of 1889 (L. 1889, c. 117) did not mention the business of insurance or of "aids to commerce," and the act, therefore, was held not applicable to the insurance business, in a

case by the State against a number of insurance companies conspiring to fix insurance rates. The court held that though insurance may be an "aid" to commerce, it did not constitute "commerce" as commonly understood, and furthermore that if the act were intended to apply to insurance, it was not sufficiently definite to support a criminal prosecution. *Queen Insurance Co. v. State*, 86 Tex. 250, 24 S. W. 397 (1893). Following this decision, the legislature amended the Antitrust Act so as to include "aids to commerce," but not specifically mentioning the business of insurance. The act of 1903 (art. 7426, sec. 2), however, specifically prohibits combinations to fix, maintain, or increase the cost of insurance. In a suit by plaintiff against a number of insurance companies for conspiring to refuse to sell him insurance, the court of civil appeals held this refusal did not constitute actionable damage, as the evidence failed to show that the defendants actively persuaded other companies not to write the insurance. *Griffin v. Pallatine Insurance Co.*, 202 S. W. 1014 (1918). On rehearing of the appeal (235 S. W. 637 (1921)), the case was remanded for a new trial on the ground that there was sufficient evidence on the question of conspiracy to go to the jury and that if such conspiracy was found to exist, it was unlawful under the Antitrust Act of 1903. (Id. 238 S. W. 637 (Civ. App. 1922).)

The act of 1917 (L. 1917, art. 4878, p. 136) authorizing the State insurance commissioner to fix rates for fire insurance does not empower the state to fix commissions to be paid by companies to their local agents. *Commercial Standard Ins. Co. v. Board of Insurance Commissioners*, 34 S. W. (2d) (Civ. App. 1931). An agreement between insurance companies fixing commissions to be paid their agents is an action in restraint of trade, and is an attempt at price fixing. *Potomac Fire Ins. Co. v. State*, 18 S. W. (2d) 929 (Civ. App. 1929).

The validity of the law regulating rates on automobile insurance (L. 1927, art. 4682b, p. 373) was upheld in a suit to set aside the rate-fixing order of the Board of Insurance Commissioners. The court held that the business of insurance was affected with a public interest. It, therefore, could be regulated by the State, and was not a violation of the Antitrust Act. *Board of Insurance Commissioners v. Sproles M. Freight Lines*, 94 S. W. (2d) (Civ. App. 1936). See also *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 346 Sup. Ct. 612, 58 L. Ed. 1011.

An insurance company selling its property to another in consideration that the latter underwrite the vendor company's policies does not, through such consolidation, violate the Antitrust Act. *Patton v. American Home Life Ins. Co.*, 233 S. W. 293 (Civ. App. 1921). See also *California State Life Ins. Co. v. Kring*, 208 S. W. 372 (Civ. App. 1919).

An insurance company cannot refuse payment of a policy on the ground that the insured, a manufacturer of bagging material, was a member of a trust which aimed to control the price of that commodity in the State of Texas. The court ruled that a dealer is not precluded from insuring his stock against loss by fire, even though engaged in practices to unlawfully fix prices of his product. *Springfield Fire & Marine Ins. Co. v. Cannon*, 46 S. W. 375 (Civ. App. 1898); *Patton v. American Home Life Ins. Co.*, *supra*.

Petroleum and Gas.

The validity of article 6049 (d), section 4, was raised in a suit to restrain the enforcement of an order of the railroad commission fixing and apportioning the amount of gas which may be produced from the plaintiff's wells. The plaintiff contended that the order would reduce the potential capacity of its wells from 2 to 4 percent while apportioning some 18 percent of the daily production allowances to wells without any market facilities; and that it was a violation of the "due process," "commerce," and "equal protection" clauses of the Federal Constitution. The court did not declare the statute unconstitutional, but interpreted it to mean that the commission can issue prorating orders only when waste is being or is about to be committed, and the order at issue, having been made without such finding of waste, was therefore void. *Canadian River Gas Co. v. Terrell*, 4 Fed. Supp. 222 (1933).

Public Contracts.

Several newspaper owners in a county, agreed to submit bids for publishing the delinquent tax list, at the same price. They also agreed that the successful bidder divide the proceeds of such bids with the others. This arrangement was held unlawful as against public policy and the antitrust laws. *City of Wichita Falls v. Skein*, 18 Civ. App. 632, 45 S. W. 1037 (1898).

An agreement by a vendee to purchase a number of cords of wood in consideration that the vendor refrain from bidding for a United States Government contract was held in violation of the antitrust laws, and the vendor was denied recovery for the breach. *Heid Bros. Inc. & Riesto*, 281 S. W. 638 (Civ. App., 1926).

In a suit by the plaintiff bank against the city that it be appointed depository of the city's funds, on the ground that it had offered the highest rate of interest, the court upheld the city. The city properly rejected the bids as evidence was produced showing collusion between the plaintiff and other banks. *City National Bank v. City of Corpus Christi*, 233 S. W. 375 (Civ. App., 1921); *Hall v. San Jacinto State Bank*, 255 S. W. 506 (Civ. App., 1923); cf. *Arroyo-Colo. Navigation District v. State National Bank of Brownsville*, 90 S. W. (2d) 881

(Civ. App., 1936); cf. *Flanders v. Wood*, 83 Tex. 277, 18 S. W. 572 (1892).

In a proceeding for the forfeiture of a gas company's charter on the ground that it conspired to unite all the electric, gas, and streetcar companies for the purpose of having only one company bid for the city's public lighting contract, and to fix prices, such an attempt was held to be in violation of the antitrust laws. *San Antonio Gas Co. v. State*, 27 Civ. App. 118, 54 S. W. 289 (1899). See also *Empire Gas & Fuel Co. Inc. v. Lone Star Gas Co. Inc.*, 289 Fed. 826 (1923); *Amarillo Oil Co. v. Ranch Creek Oil & Gas Co.*, 271 S. W. 145 (Civ. App., 1925); *Fairbanks Morse Co. v. Texas Electric Service Co.*, 63 Fed. (2d) 702 (1933), cert. den., 290 U. S. 655.

Two competitive bidders agreed on the price to be submitted for a gas plant and also agreed that the successful bidder divide its profits with the others. The agreement was held against public policy, and the Antitrust Acts. *Daily v. Hollis*, 27 Civ. App. 570, 66 S. W. 586 (1901). For common law application see *James v. Fulcrod*, 5 Tex. 258 (1851). See also *Uvalde Rock Asphalt Co. v. Chapin-Colglazier Const. Co.*, 299 S. W. 710 (Civ. App., 1927).

II. CONTRACTS NOT TO COMPETE

Stat. (Vernon, 1936)

Article 7426 provides that a "trust" is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for either, any or all of the following purposes: (7) To abstain from the purchase or sale of merchandise, produce, or commodities partially or entirely within the State of Texas, or any portion thereof. See *General Anti-trust Laws, supra*.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

Application of the Common Law.

Covenants not to compete are valid at common law, if the restraint is not unreasonable. *Wolff v. Hirschfeld*, 23 Civ. App. 670, 57 S. W. 572 (1900); *Comer v. Burton-Lingo Co.*, 24 Civ. App. 251, 58 S. W. 969 (1900); *Crump v. Ligon*, 37 Civ. App. 172, 84 S. W. 250 (1904); *Langever v. United Advertising Co.*, 258 S. W. 856 (Civ. App., 1924); *Bynum v. McFee*, 70 S. W. (2d) 499 (Civ. App., 1934). *Linen Service Corp. v. Myres*, 128 S. W. (2d) 850 (Civ. App. 1939).

Application of the Statutes.

An agreement by a vendor, who sold his stock, goods, and goodwill with a promise not to reenter the mercantile business in the town of Batesville for 1 year is not void as against policy, nor in violation of the antitrust law. *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079 (1897), rev'g 39 S. W. 186 (1897). (This is the leading case.)

The following contracts have been upheld as not being unreasonable: *Erwin v. Hayden*, 43 S. W. 610 (Civ. App., 1897) (sale of a grocery business, the seller agreeing not to engage in the same business in the town for 2 years); *Poon v. Miller*, 234 S. W. 573 (Civ. App., 1921) (sale of a fish market, with an agreement not to engage in the business in the county, while the buyer is still so engaged); *Schlag v. Johnson*, 208 S. W. 368 (Civ. App., 1919) (an agreement by a retiring partner of a plumbing and windmill business not to engage in competition with the old or a new partnership in the same town); *Goldberg v. Soltes*, 32 S. W. (2d) 246 (Civ. App., 1930) (an agreement by a partner of a jewelry, pawnshop, and mercantile business not to engage in a similar business in a certain street for 4 years and 2 months was

held valid as against a retiring partner who was selling goods and working in a store selling competitive products); *Smith-Calhoun Rubber Co. v. McGhee Rubber Co.*, 235 S. W. 321 (Civ. App., 1921) (a contract by a rubber company doing business at Dallas and Fort Worth, with an agreement not to compete in the Fort Worth territory, was enforced); *Richardson v. Webster-Richardson Co.*, 46 S. W. (2d) 384 (Civ. App., 1932) (an agreement by a publisher of established reputation that he will not publish any newspapers in Texas for 5 years, except on behalf of the purchaser).

A lumber partnership sold its business to another dealer with an agreement not to compete in the city of Cleburne for 10 years. The vendors were not held liable for their breach, since the evidence showed that the deal was made to obtain a monopoly of the lumber business. It, therefore, was held to be in violation of the antitrust Acts. *Comer v. Burton-Lingo Co.*, 24 Civ. App. 251, 58 S. W. 969 (1900); *Robinson v. Levermann*, 175 S. W. 160 (Civ. App., 1915); *Crandall v. Scott*, 161 S. W. 925 (Civ. App., 1913); cf. *Langever v. United Advertising Corp.* 258 S. W. 856 (Civ. App., 1924).

A furniture dealer purchased the business of a competitor, the vendor agreeing not to engage in the business so long as the vendee did business in the town. The agreement was held valid, although the vendee sold a share in the business to another competitor, and there was some evidence that monopolistic objects were attempted. The court upheld the covenant, as the object of restraint of trade was not definitely established. *Saye v. Garrard*, 204 S. W. 684 (Civ. App., 1918). See *Linen Service Corp. v. Myres*, *supra*.

An agreement not to compete was held binding on members of the vendor's new firm, when the vendor breached his covenant not to engage in the undertaking business in the city, while the vendee was in business. *Welsh v. Morris*, 16 S. W. 744 (Civ. App., 1891).

The fact that the vendee of a cotton-gin and grist-mill business formed a new corporation is no defense in a suit for a breach of the covenant by the vendor. *Malakoff Gin Co. v. Reddlesperger*, 133 S. W. 519 (Civ. App., 1911). The fact that the vendor had moved the plant to another county and had not brought suit to restrain the vendee for 3 years, was no defense. *Id.* An action for damages will lie against an employer of an expartner, who knew of the latter's agreement not to compete in a flour-meal business in a specified territory. *Raymond v. Yarrington*, 96 Tex. 443, 73 S. W. 800 (Civ. App., 1903); cf. *Yates v. Blythe*, 79 S. W. (2d) 913 (Civ. App., 1935).

A vendor of a lumber business, who agreed not to compete within a radius of 10 miles, but moved outside that territory and shipped lumber to customers within the restricted area, was held liable for

the breach. *Foxworth v. Galbraith Lumber Co.*, 46 S. W. (2d) 663 (Comm'n. App., 1932).

If actual damages are difficult to ascertain for breach of covenant not to compete, actual damages will be allowed. *Raymond v. Yarrington*, *supra*.

The fact that the vendee's receipts are the same as before the breach, does not necessarily mean that damages may not be proven. *Welsh v. Morris*, *supra*.

Where a contract, however, stipulates liquidated damages in case of breach, the vendee has an adequate remedy at law, and equity has no jurisdiction to issue an injunction. *Rucker v. Campbell*, 35 Civ. App. 178, 79 S. W. 627 (1904); *Bynum v. McFee*, 70 S. W. (2d) 499 (Civ. App., 1934); *Tobler v. Austin*, 22 Tex. Cr. App. 99, 53 S. W. 706 (1899); *Miller v. Chicago Portrait Co.*, 195 S. W. 619 (Civ. App., 1917).

Restrictive Covenants Ancillary to the Sale of a Professional Practice.

A contract by a physician who bought a medical practice for \$3,000, with the understanding that the retiring practitioner would sell his patronage and not practice within 10 miles of the town of Marion for 10 years was held valid. *Wolff v. Hirshfeld*, 23 Tex. Cr. App. 670, 57 S. W. 572 (1900).

A physician who agreed not to reenter the profession in the same town or within a radius of 20 miles was held to his contract, even though no time limitation was specified. The court concluded that the restriction was not unreasonable, and will be upheld during the life of the vendee. *Randolph v. Graham*, 254 S. W. 402 (Civ. App., 1923).

Restrictive Covenants Ancillary to Employment.

Employment contracts with reasonable restrictions to protect the employer's interests are valid. An employee, who sold his fire-insurance business under a contract to work for the vendee for 1 year, at a specified salary and not to engage in the business for 3 years in a certain city was restrained from breaching his covenant. *Fort v. Moore*, 33 S. W. (2d) 807 (Civ. App., 1931).

A covenant by a music teacher of a music institute, never to establish a school of any kind in the town of Hillsboro, was upheld. *Patterson v. Crabb*, 51 S. W. 870 (Civ. App., 1899).

Where the employee agrees to pay liquidated damages for the breach, the employer has an adequate remedy at law, and a restraining order will not issue. *Miller v. Chicago Portrait Co.*, *supra*; *Bynum v. McFee*, *supra*.

A contract by an employee not to engage in a competing laundry business or to divert the plaintiff's business to others for 2 years after leaving the employment was upheld when applied to a specific territory designated as the employee's route. *Jennings v. Shepherd Laundries*, 276 S. W. 726 (Civ. App., 1925). See *Blaser v. Linen Service Corp. of Texas*, 135 S. W. (2d) 509 (1940).

When an employee of an ice company agreed not to engage in the ice business for 3 years in his territory and 5 square miles adjacent thereto, the restriction as to the adjacent territory was not upheld. *City Ice Delivery v. Evans*, 275 S. W. 87 (Civ. App., 1925); *Bettinger v. North Fort Worth Ice Co.*, 278 S. W. 466 (Civ. App., 1925); *Gray v. Republic Ice Co.*, 72 S. W. (2d) 340 (Civ. App., 1934).

Where territorial limitations are not specified in a contract of employment, the employee after termination of employment will be restricted to a reasonable area, such as is required for the protection of the employer's business. *McAnally v. Person*, 57 S. W. (2d) 945 (Civ. App., 1933); *Southern Properties, Inc. v. Carpenter*, 21 S. W. (2d) 372 (Civ. App., 1929); *Martin v. Hawley*, 50 S. W. (2d) 1105 (Civ. App., 1932); *Burroughs Adding Machine Co. v. Chollar*, 79 S. W. (2d) 344 (Civ. App., 1935); cf., *Texas Ice & Cold Storage Co. v. McGoldrick*, 284 S. W. 615 (Civ. App., 1926).

A contract made by the principal stockholder of a corporation with an employee whose shares he purchased on the condition that he not compete in the laundry business for 6 months after the employment, was held enforceable for the benefit of the corporation. *Parisian Live Dyers & Cleaners v. Springfield*, 275 S. W. 1098 (Civ. App. 1925); *Jennings v. Shepherd Laundries Co.*, 276 S. W. 726 (Civ. App. 1925); *Oak Cliff Ice Delivery Co. v. Peterson*, 300 S. W. 107 (Civ. App. 1927); cf. *Martin v. Hawley*, 50 S. W. (2d) 1105 (Civ. App. 1932).

Restrictive Covenants Ancillary to the Lease of Property.

Covenants ancillary to the lease of property not to permit a competing business on certain neighboring land are not in violation of the Antitrust Act. An agreement not to allow a saloon in any building owned by the vendor on the same block for 5 years is valid. *Anderson v. Rowland*, 18 Civ. App. 460, 44 S. W. 911 (1898); *Wheatley v. Kollaer*, 63 Civ. App. 459, 133 S. W. 903 (1910).

Where the defendant leased a motion-picture theater built by the lessor, one who conspires with the lessor in breaching the latter's covenant not to erect a motion-picture theater on restricted land is equally liable with the lessor for the breach. *Clay v. Richardson*, 290 S. W. 235 (Civ. App. 1926).

The fact that the lessee-plaintiff was an unincorporated association, which could not own a leasehold, was held no defense by the lessor. *Edwards v. Old Settlers' Ass'n*, 166 S. W. 423 (Civ. App. 1914).

Where a lessor of a filling station promised not to enter into a business dealing with automobile accessories for 5 years in an unrestricted territory, the court interpreted the restriction to cover the county where the filling station was located. *Star Refining Co. v. Butcher*, 84 S. W. (2d) 303 (Civ. App. 1935).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Article 7426 (7) provides that a "trust" is a combination to abstain from engaging in business or from purchase or sale of merchandise in State. See *General Antitrust Laws, supra*.

Stat. (Vernon, 1936) Cooperatives

Article 5753 provides that agricultural cooperative marketing associations may make and execute marketing contracts, requiring members to sell for a period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities to or through the association or facilities created by the association. Marketing agreements between the association and its member shall not be considered illegal or in restraint of trade. Art. 5762. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Stat. (Vernon, Supp. 1938), Pen. Code Liquor

Article 666-27 (b) provides that it shall be unlawful for any brewer, distiller, winery, or manufacturer of any alcoholic beverage or manufacturer's agent, or any of the agents, servants, or employees thereof, to enter or offer to enter into any agreement, contract, arrangement, condition, or system, either orally or written, with any wholesaler or any other person in this State wherein or whereby any person is required, obligated, persuaded, influenced, or induced, or by the terms of which it is intended or calculated to require, obligate, persuade, influence, or induce any person to purchase,

produce, obtain, require, or secure any certain volume or quota of business, more or less, of any one or more types, kinds, brands, or varieties of alcoholic beverages, whether the same be within any period of time, or within any area, or upon the fulfillment of any condition, attainment, provision, demand, or promise or to require, obligate, persuade, influence, or induce any person or attempt to require, obligate, persuade, influence, or induce any such person to sell any alcoholic beverage in any manner calculated to induce a violation of the law. The board or administrator shall have the power and it shall be their duty to investigate such and if they find or have good reason to believe that the provisions set out in this subsection have been or are being violated it shall be their duty to give notice of hearing to the affected parties in the manner as provided for other hearings. Upon the finding of facts by the board or administrator that any such person has violated or is violating any provisions hereof, an order shall be entered by the board or administrator prohibiting any such person or his agents directly or indirectly to ship into this State any of his goods or merchandise for a period not to exceed one year. It shall further be unlawful for any person to import into this State any alcoholic beverage of such person during the period of suspension as ordered by the board or administrator. Any alcoholic beverage so unlawfully transported or imported into this State is hereby declared to be an illicit beverage. The board shall adopt all necessary rules to effectuate the purposes of this section.

Article 667-24 (1) provides that (1) it shall be unlawful for any manufacturer or distributor, directly or indirectly, or through a subsidiary or affiliate, any agent or any employee, or by any officer, director, or firm member:

(j) To require by agreement or otherwise, that any retailer engaged in the sale of brewery products shall purchase any of such products from such persons to the exclusion in whole or in part, of the products sold or offered for sale by any other person engaged in the manufacture or distribution of brewery products, or to require the retailer to take or dispose of a certain quota of any such product;

(k) To give or permit to be given money or anything of value in an effort to induce agents, employers, or representatives of customers or prospective customers to influence their employers or principals to purchase or contract to purchase brewery products from the maker of such gift, or to influence such employers or principals to refrain from dealing or contracting with competitors. See *Special Antitrust Laws: Liquor, supra*.

Judicial Decisions

Tying Contracts.

See *Exclusive Dealing Arrangements, Applicability to Leases and Patents*; *infra*, also *Clark v. Cyclone Woven Wire Fence Co.*, 22 Civ. App. 41, 54 S. W. 392 (1899), *infra*.

Exclusive Dealing Arrangements.

Application of the Common Law.

An ice manufacturer agreed to sell a quantity of ice to a brewer at a fixed price providing the brewer would not resell or retail the product. The agreement was held not to be against public policy at common law, since there was no evidence to show that the brewer ever did or intended to sell ice, and hence the public was not adversely affected. *Crystal Ice Mfg. Co. v. San Antonio Brewing Ass'n*, 8 Civ. App. 1, 27 S. W. 210 (1894).

A salt company agreed to ship two-thirds of its output over a certain railroad at as low a rate as any road may offer. The arrangement was held not invalid, and that a connecting carrier was in no position to refuse shipment, even if the rate was unlawful. *Int. & G. N. R. Co. v. Cain*, 35 Civ. App. 539, 80 S. W. 571 (1904).

A group of independent cottonseed mills agreed with another independent group for the former to sell the latter its entire output of cottonseed at certain stipulated prices. The former also agreed to refrain from engaging or dealing in cottonseed at some important cottonseed markets in Texas. In an action to recover the purchase price, the court held that the obvious object of the contract was to create a monopoly and fix the price of an essential and necessary product. Recovery of the stipulated price, therefore, was denied. *Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 19 S. W. 274 (1892).

Application of the Statutes.

Since the State Antitrust Act prohibits all combinations in restraint of trade, the "rule of reason" does not apply to exclusive dealing arrangements. *Crandall v. Scott*, 161 S. W. 925 (Civ. App. 1913).

A Texas beer distributor covenanted with a brewer of another State that he would sell only the beer of that brewer. The covenant was held illegal under article 7426 of the Antitrust Act of 1889. The court overruled the contention that the transaction constituted interstate commerce. Interstate commerce ceased when the article was delivered to the Texas buyer and at that point became subject to the state's police power. *Fuqua et al. v. Pabst Brewing Co.*, 90 Tex.

298, 38 S. W. 29 (1897). See also *J. R. Watkins Medical Co. v. Johnson*, 162 S. W. 394 (1914). Interstate commerce in such transactions ceases the moment that the goods pass into possession of the purchaser. *Caddell v. J. R. Watkins Medical Co.*, 227 S. W. 226 (Civ. App. 1921); *Whisenant v. Shores, Mueller Co.*, 194 S. W. 1175 (Civ. App., 1917); *S. S. White Dental Mfg. Co. v. Hertzberg*, 51 S. W. 355 (Civ. App., 1899); *State v. Racine Sattley Co.*, 63 Civ. App. 663, 134 S. W. 400 (1911); *Armstrong v. W. T. Raleigh Co.*, 178 S. W. 582 (Civ. App., 1915); *W. T. Raleigh Co. v. Marshall*, 248 S. W. 153 (Civ. App., 1922); *W. T. Raleigh Co. v. Land*, 297 S. W. 810 (Comm'n App., 1926); *Burpee Can Sealer Co. v. McDonnel*, 75 S. W. (2d) 459 (Civ. App., 1934).

Where exclusive dealing arrangements constitute interstate commerce, the State antitrust law does not apply: *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791 (1909) (where a New York company agreed to furnish a Texas dealer with souvenir albums, and not to sell such albums to any other dealer in Galveston for 1 year); *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 Civ. App. 553, 120 S. W. 532 (1909) (where an order for paint was given by a Texas dealer to an Ohio manufacturer's agent in Texas, forwarded to and accepted in Ohio); *Dr. Koch Vegetable Tea Co. v. Malone*, 163 S. W. 662 (Civ. App., 1914) (where a contract was consummated in Texas for sale and delivery of goods, f. o. b. Minnesota, with territorial and price restriction for resale); *Hughes Bros. Mfg. Co. v. Cairo T. & S. Bank*, 24 Fed. (2d) 199 (1928) (a sale with restrictive provisions was held not to have been rendered intrastate even after an agent and mechanic of the foreign manufacturer were sent into the State to repair the articles sold and to aid the Texas dealer); *Moroney Hardware Co. v. Goodwin Pottery Co.*, 120 S. W. 1088 (Civ. App., 1909) (a contract for the sale of pottery made in another State by a firm which was a member of an association controlling 80 percent of the pottery business in the country at prices determined by the association was held a transaction in interstate commerce).

Exclusive dealing arrangements are subject to the State antitrust law, if the goods have been delivered to the Texas purchaser free from any claim of title by the shipper and held for sale by the buyer as owner. Such goods are part of the common mass of property in the State and subject to State law. *Watkins Medical Co. v. Johnson*, 162 S. W. 394, 397 (Civ. App., 1914); *Cook v. Page*, 294 S. W. 934 (Civ. App., 1927); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29 (1897).

A provision in a restrictive dealing contract that the buyer pay with "acceptances" for each invoice, passes title and the transaction

is subject to State law. *Fuqua v. Pabst Brewing Co.*, *supra*. See also *National Automatic Machine Co. v. Smith*, 32 S. W. (2d) 678 (Civ. App., 1930).

If the relation between the parties to an exclusive dealing contract is that of principal and agent, title has not passed and the State Anti-trust Act does not apply. *Crowley Mercantile Co. v. Brenard Mfg. Co.*, 287 S. W. 127 (Civ. App., 1926); *Welch v. Phelps-Bigelow Windmill Co.*, 89 Tex. 653, 36 S. W. (1896); *McConnon & Co. v. Powell*, 248 S. W. 428 (Civ. App., 1923); cf. *Southwest General Electric Co. v. Munn Electric Co.*, 263 S. W. 954 (Civ. App., 1924).

A contract requiring an exclusive agent to send all orders to the manufacturers, who billed the purchaser directly, paying the agent commissions on each order was held one of agency. The contract, therefore, was valid, and the State law does not apply. *Double Seal Drug Co. v. Keith*, 107 S. W. (2d) 428 (Civ. App., 1937).

A contract between a foreign corporation and a Texas dealer for the sale of tires on "consignment" was held to be interstate commerce. *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.*, 159 S. W. 1012 (Civ. App., 1913); cf., *Falls Rubber Co. v. La Fon*, 113 Tex. 367, 256 S. W. 577 (1923) (where the court held that the mere designation of an "agent" is not controlling, the exact relation between the parties must be determined by the legal effect of the provisions of the contract itself). See also *Woods v. American Brewing Ass'n.*, 215 S. W. 448 (Comm'n. App., 1919); *Texas Brewing Co. v. Durrum*, 46 S. W. 880 (Civ. App., 1898); *White Dental Co. v. Hertzberg*, 51 S. W. 355 (Civ. App., 1899); *Henderson Tire & Rubber Co. v. Roberts*, 1 S. W. (2d) 510, *affd.* 12 S. W. (2d) 154 (Comm'n App., 1929).

Scope of Statutes.

Contracts for the sale of merchandise or commodities, whereby exclusive territories are designated, outside of which no sales may be made, or prohibiting the purchaser from handling similar or competitive products, are invalid under article 7426. *W. T. Rawleigh Co. v. Land*, 115 Tex. 319, 279 S. W. 810 (Comm'n. App., 1926); *W. T. Rawleigh Co. v. Baker*, 117 S. W. (2d) 1117 (Civ. App., 1938); *W. T. Rawleigh Co. v. Cook*, 107 S. W. (2d) 625 (Civ. App., 1937); *W. T. Rawleigh Co. v. Gober*, 8 S. W. (2d) 845 (Civ. App., 1928); *Chunn v. W. T. Rawleigh Co.*, 9 S. W. (2d) 268 (Civ. App., 1928); *W. T. Rawleigh Co. v. Bradberry*, 290 S. W. 870 (Civ. App., 1927); *W. T. Rawleigh Co. v. Hudson*, 290 S. W. 775 (Civ. App., 1926); *W. T. Rawleigh Co. v. Marshall*, 248 S. W. 153 (Civ. App., 1922); *W. T. Rawleigh Co. v. Smith*, 231 S. W. 799 (Civ. App., 1921); *Dodd v. W. T. Rawleigh Co.*, 203 S. W. 131 (Civ. App., 1918); *Newby v. W. T. Rawleigh Co.*, 194 S. W. 1173 (Civ. App., 1917); *W. T. Rawleigh Co.*

v. *Mayberry*, 193 S. W. 199 (Civ. App., 1917); *W. T. Rawleigh Co. v. Gunn*, 186 S. W. 385 (Civ. App., 1916); *W. T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S. W. 549 (Civ. App., 1916); *J. R. Watkins Medical Co. v. Johnson*, 162 S. W. 394 (Civ. App., 1914); *J. R. Watkins Co. v. Myers*, 255 S. W. 1004 (Civ. App., 1923); *Pasteur Vaccine Co. v. Burkey*, 22 Civ. App., 232, 54 S. W. 804 (1899); *S. S. White Dental Co. v. Hertzberg*, 51 S. W. 355 (Civ. App., 1899); *McConnon & Co. v. Klenk*, 11 S. W. (2d) 222 (Civ. App., 1928); *McConnon & Co. v. Ralston*, 275 S. W. 165 (Civ. App., 1925); cf., *McConnon v. Powell*, 248 S. W. 428 (Civ. App., 1923); *Whisenant v. Shores-Mueller Co.*, 194 S. W. 1175 (Civ. App., 1917); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29 (1896); *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27 (1896); cf. *Anheuser-Busch Brewing Ass'n. v. Houck*, 27 S. W. 692 (Civ. App., 1894); *Carroll v. Evansville Brewing Assn.* 179 S. W. 1099 (Civ. App., 1915); *Texas Brewing Co. v. Durrum*, 46 S. W. 880 (Civ. App., 1898); *Burpee Can Sealer Co. v. McDonnell Co.*, 75 S. W. (2d) 458 (Civ. App., 1934); *Nat. Automatic Mach. Co. v. Smith*, 32 S. W. (2d) 678 (Civ. App., 1930); *State v. Willys Overland*, 211 S. W. 609 (Civ. App., 1919); *Kissel Motor Co. v. Walker*, 270 Fed. 492 (1921); *Troy Buggy Works Co. v. Fife & Miller*, 74 S. W. 956 (Civ. App., 1903); *Mansur & Tebbets Implement Co. v. Price*, 55 S. W. 764 (Civ. App., 1900); *State v. Racine Sattley Co.*, 63 Civ. App., 663, 134 S. W. 400 (1911); *Waters-Pierce Oil Co. v. State*, 44 S. W. 936 (Civ. App., 1898); *Francis T. Simmons & Co. v. Terry*, 79 S. W. 1103 (Civ. App., 1904); *Manufacturers Finance Corp. v. Fort Worth Paper Co.*, 68 S. W. (2d) 307 (Civ. App., 1933); *Pictorial Review Co. v. Pate Bros.*, 185 S. W. 309 (Civ. App., 1916); *Segal v. McCall Co.*, 108 Tex. 55, 184 S. W. 188 (1916); *Fred Miller Brewing Co. v. Coonrod*, 230 S. W. 1099 (Civ. App., 1921); cf. *Fisher v. Frito Co.*, 81 S. W. (2d) (Civ. App., 1935).

A contract providing that the dealer must buy all the gasoline required for a certain filling station was upheld, since the restriction was limited to a specific purpose. *Cox v. Humble Oil & Ref. Co.*, 16 S. W. (2d) 285 (Comm'n. App., 1929). See also *Jones Inv. Co. v. Great Atlantic & Pac. Tea Co.*, 65 S. W. (2d) 495 (Comm'n. App., 1933); *Twaddell v. H. O. Wooten Grocer Co.*, 68 S. W. (2d) 285 (Civ. App., 1934); cf. *Wood v. Texas Ice Cold Storage Co.*, 171 S. W. 497 (Civ. App., 1914) and *Star Mill & Elevator Co. v. Fort Worth Grain & Elevator Co.*, 146 S. W. 604 (Civ. App., 1912) (where agreements to purchase commodities from certain persons only were held in violation of the Antitrust Act).

An arrangement whereby the territory of a dealer is indirectly restricted is in violation of the Antitrust Acts. A contract for the sale

of automobiles not expressly restricting the territory, but providing that the buyer be paid only one-half of the commission for sales made outside of certain limits, is unlawful. *State v. Willys-Overland, Inc.*, 211 S. W. 609 (Civ. App., 1919). See also *Caddell v. Watkins Medical Co.*, 227 S. W., 226 (Civ. App., 1921); *J. R. Watkins Co. v. Myers*, 255 S. W. 1002 (Civ. App., 1923).

Exclusive dealing contracts containing resale price fixing provisions are invalid under the Antitrust Acts. *W. T. Rawleigh Co. v. Baker*, 117 S. W. (2d) 1117 (Civ. App., 1938); *W. T. Rawleigh Co. v. Cook*, 107 S. W. (2d) 625 (Civ. App., 1937); *Chunn v. W. T. Rawleigh*, 9 S. W. (2d) 268 (Civ. App., 1928); *W. T. Rawleigh Co. v. Gober*, 3 S. W. (2d) 845 (Civ. App., 1928); *W. T. Rawleigh Co. v. Bradberry*, 290 S. W. 870 (Civ. App., 1927); *W. T. Rawleigh Co. v. Mayberry*, 193 S. W. 199 (Civ. App., 1917); *W. T. Rawleigh Co. v. Gunn*, 186 S. W. 385 (Civ. App., 1916); *W. T. Rawleigh Co. v. Fitzpatrick*, 184 S. W. 549 (Civ. App., 1916); *Whisenant v. Shores-Mueller Co.*, 194 S. W. 1175 (Civ. App., 1917); *Hubb-Diggs Co. v. Mitchell*, 231 S. W. 425 (Civ. App., 1921); 256 S. W. 702 (Civ. App., 1923).

A contract in which the resale price is not stipulated, but the buyer was "largely governed" by the seller's suggestions, is not in violation of the law. *W. T. Rawleigh Co. v. Fletcher*, 275 S. W. 210 (Civ. App., 1925). See also *Brenard Mfg. Co. v. Crawley Mercantile Co.*, 260 S. W. 246 (Civ. App., 1924), 287 S. W. 127 (Civ. App., 1926).

Contracts prohibiting a buyer from having any other business or employment or providing that he must devote his entire time to the goods sold are in violation of the Antitrust Act, and are illegal. *Dodd v. W. T. Rawleigh Co.*, 203 S. W. 131 (Civ. App., 1918); cf. *W. T. Rawleigh Co. v. Harper*, 17 S. W. (2d) 455 (Comm'n. App., 1929).

As to Leases.

A railroad company may grant an exclusive privilege to a transfer company to solicit business on its property. *Lewis v. Weatherford M. W. & N. W. Ry. Co.*, 36 Civ. App. 48, 81 S. W. 111 (1904). See also *Fort Worth & D. C. Ry. Co. v. State*, 99 Tex. 34, 87 S. W. 336 (1905); *Clisbee v. Chicago, R. I. & G. Ry. Co.*, 230 S. W. 235 (Civ. App., 1921).

An owner of a plantation may grant an exclusive privilege for the erection of a general store on its property. *Redland Fruit Co. v. Sargent*, 51 Civ. App. 619, 113 S. W. 330 (1908); cf. *Tex. & Pac. Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871 (1896).

A contract-agency agreement of a lessee oil refining company, which had a 3 years' lease of the premises, limiting the station operator in the kind and character of products to be sold on the property is valid. *Champlin Refining Co. v. Street*, 57 S. W. (2d) 903 (Civ. App., 1933);

Watson v. Magnolia Petroleum Co., 81 S. W. (2d) 138 (Civ. App., 1935); *State v. Gulf Refining Co.*, 279 S. W. 526 (Civ. App., 1926); *Montgomery v. Creager*, 22 S. W. (2d) 463 (Civ. App., 1929); *Celli & Del Papa v. Galveston Brewing Co.*, 227 S. W. 941 (Comm'n. App. 1921).

As to Services.

An agreement between a photographic concern and a grocery company to supply the latter's customers with calendars to which their photographs were attached, the same service not to be performed for any other grocer, is not in violation of the Antitrust Act. *Forrest Photographic Co. v. Hutchinson Grocery Co.*, 108 S. W. 768 (Civ. App., 1908).

Advertising cuts, furnished for the purpose of advertising a business, not to be furnished to anyone else in the city, is not unlawful. *Schow Bros. Inc. v. Adva-Talks* 232 S. W. 883 (Civ. App., 1921); *Bogota Mercantile Co. v. Outcault Advertising Co.*, 184 S. W. 333 (Civ. App., 1916).

As to Patents, Trade-Marks, and Copyrights.

Exclusive dealing arrangements, unlawful under the Antitrust Acts, do not apply to patented articles since the purpose of the patent law is to create a so-called monopoly. *Lock v. Citizens Natl. Bank*, 165 S. W. 536 (Civ. App., 1914). Where the patent owner has parted with title, however, the protection ceases and exclusive arrangements thereunder are invalid. *Rogers v. Westinghouse Electric Supply Co.*, 116 S. W. (2d) 886 (Civ. App., 1938). *Clark v. Cyclone Woven Wire Fence Co.*, 22 Civ. App. 41, 54 S. W. 392 (1899). The antitrust act does not apply to articles protected by trade-mark, since the owners having the exclusive right to manufacture and sell the article so protected may grant any privileges or impose such restrictions as he may see fit. *Coca Cola v. State*, 225 S. W. 791 (Civ. App., 1920); cf. *Jersey Creme Co. v. McDaniel*, 152 S. W. 1187 (Civ. App., 1913).

Articles protected by copyright are not subject to the state antitrust law and the defense that the plaintiff was a member of a motion-picture trust was overruled. *Metro-Goldwyn Mayer Distributing Corp. v. Cocke*, 56 S. W. (2d) 489 (Civ. App., 1933); *Glass v. Hoblitzelle*, 83 S. W. (2d) 796 (Civ. App., 1935). See also *Ligon v. Alexander Film Co.*, 55 S. W. (2d) 1030 (Comm'n. App., 1932), cert. den., 289 U. S. 760, 53 Sup. Ct. 793, 77 L. Ed. 1503.

As to Franchises.

A city is prohibited from granting an exclusive right to a water company to supply the city with water for 25 years under Const.

art. I sec. 26. *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143 (1887); *Altgelt v. City of San Antonio*, 81 Tex. 436, 17 S. W. 75 (1891); *Ennis Water-Works Co. v. City of Ennis*, 105 Tex. 63, 144 S. W. 930 (1912). See also *City of Tyler v. Jester Co.*, 74 S. W. 359 (Civ. App., 1903); *Hartford Fire Ins. Co. v. City of Houston*, 102 Tex. 317, 116 S. W. 43 (1909); *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053 (1896).

Monopolies created by the state in the interest of public health, safety and welfare are valid exercises of the State's police power. A city, therefore, may grant an exclusive contract for the removal of garbage. *Gardner v. Dallas*, 81 Fed. (2d) 425 (1936), cert. den., 298 U. S. 668; *City of Breckenridge v. McMullen*, 255 S. W. 1099 (Civ. App., 1923). A city may license and regulate slaughterhouses. *City of Wichita Falls v. Roberson*, 283 S. W. 870 (Civ. App., 1926). See also *Giel v. City of Dallas*, 209 S. W. 209 (Civ. App., 1919); *Auto Transit Co. v. Fort Worth*, 182 S. W. 685 (Civ. App., 1915); *City of Mount Vernon v. Montgomery*, 265 S. W. 188 (Civ. App., 1924); cf., *Ex parte Savage*, 63 Tex. Cr. R. 285, 141 S. W. 244 (1911); *Ex parte London*, 73 Tex. Cr. R. 208, 163 S. W. 968 (1914).

Procedure and Enforcement.

If the illegality of the exclusive arrangement under the antitrust act is apparent on the face of the contract, the appellate court may remand the case for trial on this point. *Texas and Pacific Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871 (1895); *Pasteur Vaccine Co. v. Burkey*, 22 Civ. App. 232, 54 S. W. 804 (1899); see also *Crandall v. Scott*, 161 S. W. 925 (Civ. App., 1913); *Stephenson v. St. L. S. W. Ry.*, 181 S. W. 568 (Civ. App., 1915).

Where a contract is valid on its face, evidence of illegal practices in restraint of trade is admissible to show violation of antitrust act. *Due v. W. T. Rawleigh Co.*, 58 S. W. (2d) 179 (Civ. App., 1933); *W. T. Rawleigh Co. v. Land*, 279 S. W. 810 (Comm'n. App., 1926); *W. T. Rawleigh Co. v. Smith*, 231 S. W. 799 (Civ. App., 1921); *Newby v. Rawleigh Co.*, 194 S. W. 1173 (Civ. App., 1917); *Whisenant v. Shores Mueller Co.*, 194 S. W. 1175 (Civ. App., 1917).

A suit on a note arising out of a contract in restraint of trade cannot be maintained. *Columbia Carriage Co. v. Hatch*, 19 Civ. App. 120, 47 S. W. 288 (1898); or by a principal against the guarantors for the payment of goods sold under an illegal exclusive arrangements contract. *W. T. Rawleigh Co. v. Land*, 279 S. W. 810 (Comm'n. App. 1926); *W. T. Rawleigh v. Gober*, 3 S. W. (2d) 844 (Civ. App., 1928); *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27 (1896); *Dickerson v. McConnon Co.*, 248 S. W. 1084 (Civ. App., 1923); *W. T.*

Rawleigh Co. v. Cook, 107 S. W. (2d) (Civ. App., 1937). See also *Hubb-Diggs Co. v. Mitchell*, 231 S. W. 425 (Civ. App., 1921); *New Century Mfg. Co. v. Scheurer*, 45 S. W. (2d) 560 (Comm'n. App., 1932); *W. T. Rawleigh Co. v. Baker*, 117 S. W. (2d) 1117 (Civ. App., 1938); *Manufacturers' Finance Corp. v. Fort Worth Paper Co.*, 68 S. W. (2d) 307 (Civ. App., 1933).

Severability.

Where a manufacturer and dealer made an exclusive agreement prohibiting dealer from handling any other product, the contention that the illegal provisions could be eliminated without affecting the validity of other provisions was overruled, since the provisions were held not severable. *Fred Miller Brewing Co. v. Coonrod*, 230 S. W. 1099 (Civ. App., 1921); cf., *Saner-Whiteman Lumber Co. v. Texas N. O. R. Co.*, 282 S. W. 267 (Civ. App., 1925); *Dodd v. W. T. Rawleigh Co.*, 203 S. W. 131 (Civ. App., 1918), in which recovery was allowed in a suit on two severable contracts, one legal and the other illegal. Mere reference in a valid contract to the invalid one will not render the former unenforceable. *City of Tyler v. Jester Co.*, 74 S. W. 359 (Civ. App., 1903), but where a subsequent valid contract was made in furtherance of a prior invalid one, it is not enforceable. *Henderson Tire & Rubber Co. v. Roberts*, 1 S. W. (2d) 510 (Civ. App., 1928), 12 S. W. (2d) 154 (Comm'n. App., 1929). See also *Street v. Houston Ice & Brewing Co.*, 55 S. W. 516 (Civ. App., 1900).

Money due on an account stated, which is incorporated in a new contract in violation of the Antitrust Acts, cannot be recovered, since all items of the illegal contract are unenforceable. *Watkins Medical Co. v. Johnson*, 162 S. W. 394 (Civ. App., 1914).

As to Executed Contracts.

A dealer gave a manufacturer a check in settlement of indebtedness under an illegal exclusive contract, in order to obtain possession of an insurance policy, deposited with the manufacturer as security. The dealer subsequently stopped payment on the check. In a suit to recover the amount due, the court overruled the defense of invalidity under the Antitrust Act, on the ground that this suit was brought on an action distinct from the original contract and could be enforced. *Fred Miller Brewing Co. v. Coonrod*, *supra*.

Exemptions to Prohibitions Against Exclusive Dealing Arrangements.

The legislature has power to declare that it is the public policy of the State to exempt cooperative marketing associations from the application of the Antitrust Acts or from Const. art. I, sec. 26. In a suit to enjoin a member from breaching his contract to deliver all his hay to the cooperative association, organized under Cooperative Market-

ing Act (art. 5762), the court overruled the contention that the Cooperative Marketing Act created a monopoly in violation of the state constitution (art. I, sec. 26) or the antitrust laws. The court also held that one who knowingly aids or abets a member to breach such contract may be enjoined. *Hollingsworth v. Texas Hay Assn.*, 246 S. W. 1068 (Civ. App., 1923); *Lennox v. Texas Cotton Cooperative Assn.*, 55 S. W. (2d) 543 (Comm'n. App., 1932). See also *General Antitrust Laws, Constitutionality of Statutes, supra*, and *Exceptions to General Antitrust Laws, supra*.

An association, which merely intended to incorporate under the Cooperative Marketing Act, but did not do so, was subject to the Antitrust Act, even though it was handling its egg products from its members, exclusively. *Fisher v. El Paso Egg Producers Association*, 278 S. W. 262 (Civ. App., 1925).

UTAH

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. XII. Sec. 20. Trusts and combinations prohibited.—Any combination by individuals, corporations, or associations, having for its object or effect the controlling of the price of any products of the soil, or of any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited, and hereby declared unlawful, and against public policy. The Legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, it may declare a forfeiture of their franchise.

STATUTORY PROVISIONS

Rev. Stat. Ann. (1933)

Sec. 73-1-1. Combinations to control prices forbidden.—Any combination by persons having for its object or effort the controlling of the prices of any professional services, any products of the soil, any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and declared unlawful. (C. L. 17, sec. 4475.)

Sec. 73-1-2. Members deemed guilty of conspiracy to defraud.—Any person or association of persons who shall create, enter into, or become a member of or a party to, any pool, trust, agreement, combination, confederation, or understanding with any other person or persons to regulate or fix the price of any article of merchandise or commodity; or who shall enter into, or become a member of or a party to, any pool, trust, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined,

produced, or sold in this state shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to punishment as hereinafter provided. (C. L. 17, sec. 4476.)

Sec. 73-1-3. Trusts—Combinations to control production—Monopolies—Restraint of trade—Forbidden.—It shall not be lawful for any corporation to issue or to own trust certificates; or for any corporation, or an agent, officer, employee, director, or stockholder of any corporation, to enter into any combination, contract, or agreement with any person or persons, the purpose or effect of which shall be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hands of a trustee with intent to limit or fix the price, or lessen the production and sale, of any article of commerce, or its use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article, or to monopolize any part of trade or commerce within this state. (C. L. 17, sec. 4477.)

Sec. 73-1-4. Penalty imposed on guilty corporations or associations.—If a corporation, a company, a firm, or association is found guilty of a violation of any provision of this chapter, it shall be punished by a fine in any sum not less than \$100 nor more than \$2,000 for the first offense; and for the second offense, not less than \$500 nor more than \$5,000; and for the third offense, not less than \$5,000 nor more than \$10,000; and for every subsequent offense shall be liable to a fine of \$15,000. (C. L. 17, sec. 4478.)

Sec. 73-1-5. Penalty imposed on guilty individuals.—Any president, manager, director, or other officer, agent, or receiver of any corporation, company, firm, or association, or any member of any company, firm, or association, or any individual found guilty of a violation of any provision of this chapter, shall be punished by a fine of not less than \$100 nor more than \$1,000, or by confinement in the county jail not more than one year, or by both in the discretion of the court before which such conviction may have been had. (C. L. 17, sec. 4479.)

Sec. 73-1-6. Forbidden contracts, void.—Any contract or agreement in violation of any provision of this chapter shall be absolutely void. (C. L. 17, sec. 4480.)

Sec. 73-1-7. Forfeiture of corporate franchises.—Any corporation organized or existing under the laws of this state that violates any provision of this chapter shall thereby forfeit its corporate rights and franchise, and its corporate existence shall thereupon cease and determine. (C. L. 17, sec. 4481.)

Sec. 73-1-8. Id.—Notice to corporation.—It shall be the duty of the secretary of state, upon satisfactory evidence that any corporation

or association of persons incorporated or operating under the laws of this state has entered into any trust, combination, or association, mentioned in the preceding provisions of this chapter, to give notice to such corporation that unless it withdraws from and severs all business connections with such trust, combination, or association, its corporate rights and franchise will be revoked at the expiration of thirty days from the date of such notice. (C. L. 17, sec. 4482.)

Sec. 73-1-9. Id.—Attorney general to bring action.—At the expiration of thirty days, if such withdrawal or severance is not theretofore made, the secretary of state shall cause a certified statement of the facts to be filed in the office of the attorney general, who shall commence, or direct any county attorney in the state to commence an action in any district court of the state of competent jurisdiction to forfeit and revoke the corporate rights and franchise of such corporation. On the final decision of the same, should the defendant be found guilty of a violation of any of the provisions of this chapter, the court shall render judgment that the charter, corporate rights, and franchise of such corporation be revoked, and the secretary of state shall thereupon make publication of such revocation in four newspapers of general circulation in the four largest cities of the state. (C. L. 17, sec. 4483.)

Sec. 73-1-10. Liability of guilty persons—Damages.—In case any person or persons shall do, cause to be done, or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, such person or persons shall be liable to the person or persons injured thereby for treble the amount of damages sustained in consequence of any such violation. (C. L. 17, sec. 4484.)

Discriminations

Sections 103-55-2 to 103-55-5 provide that it shall be unlawful for any person engaged in the production, manufacture, or distribution of any commodity in general use to discriminate as to price between different localities for the purpose of preventing competition. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Rev. Stat. Ann. (Supp., 1939)

Discriminations

Section 94A-2-3 provides that it shall be unlawful for any person engaged in commerce to discriminate in price between purchasers of commodities of like grade, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. See vol., *State Price Control Legislation: Antidiscrimination Legislation*.

Sales Below Cost

Section 94A-2-7 provides that it shall be unlawful for any person engaged in business in Utah to sell or offer for sale any commodity at less than cost for the purpose of destroying competition or misleading the public, or with the effect of tending to create a monopoly. See Vol. *State Price Control Legislation: Prohibition of Sales Below Cost*.

**Rev. Stats. Ann. (1933)
Conspiracy Statute**

Section 103-11-1 provides (in part) that it is unlawful to commit any act injurious to trade or commerce.

Judicial Decisions

Scope of Constitutional and Statutory Provisions.

Const. art. XII sec. 20, *supra*, has been held to apply only to combinations of individuals, corporations, etc., and does not apply to the State itself. *Riggins v. District Court of Salt Lake County*, 89 Utah 183, 51 Pac. (2d) 645 (1935).

A contract between an unlawful combination existing outside the State and a corporation domiciled within the State is not voidable. *Fox Film Corp. v. Ogden Theatre Co.*, 82 Utah 279, 17 Pac. (2d) 294 (1932). Rev. Stat. (1933), secs. 73-1-1 to 73-1-10, and Const. art. XII, sec. 20, are inapplicable to combinations in restraint of trade entered into outside the State. *Ibid.*

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

**Rev. Stat. Ann. (Supp., 1939)
Resale Price Maintenance**

Sections 95-3-1 to 95-3-10 validate contracts fixing the resale prices of commodities bearing the trade-marks or brand names of producers or distributors, but the statute is expressly inapplicable to horizontal agreements between producers, between distributors, between wholesalers, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Cooperatives

Section 2-0-19 provides that an agricultural cooperative association organized under sections 2-0-1 to 2-0-30 shall not be deemed to be a conspiracy or combination in restraint of trade or an illegal

monopoly. Such association may disseminate market information to its members and advise them as to prices, crops, market conditions, etc. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

Rev. Stat. Ann. (1933)
Cooperatives; Labor Organizations

Section 49-2-2 provides that the state antitrust laws shall not be construed to apply to labor, agricultural, or horticultural organizations, instituted for the purpose of mutual self help and operated on a nonprofit basis. See *Cooperatives* in projected study.

L. 1939, c. 10
Agricultural Fair Trade Act

Sections 1 to 22 provide for the elimination of unfair trade practices affecting agriculture, permit contracts to secure fair returns to producers of agricultural products, and defining unfair discriminatory and injurious practices. Section 8 (8) provides that no individual, corporation, partnership, or association complying with the terms of the act shall be deemed to be engaged in a conspiracy or combination in restraint of trade or illegal monopoly or formed for the purpose of lessening competition or fixing prices. See *State Price Control Legislation: Resale Price Maintenance, Prohibition of Sales Below Cost, and Antidiscrimination Laws*.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Railroads

Const. art. XII, sec. 13, provides that no railroad corporation shall consolidate its stock, property, or franchises with those of any other railroad corporation owning a competing line.

STATUTORY PROVISIONS

Rev. Stat. Ann. (1933)

Railroads,

Section 77-0-5 provides that every railroad corporation organized under the laws of Utah may merge or consolidate with any other railroad corporation if the lines to be merged or consolidated are not competing.

News Service

Sections 73-2-1 to 73-2-7 provide that the business of buying, gathering, or disseminating news for publication is affected with a

public interest. It shall be unlawful for any person, association, or corporation engaged in such business to discriminate between persons engaged in publishing newspapers. Any combination having for its object or effect the controlling of news gathered for distribution and publication shall be deemed a trust and is prohibited and declared unlawful. All associations or corporations engaged in such business shall without discrimination in price render equal and impartial service to all newspapers offering to pay a reasonable price therefor. All telephone and telegraph companies employed to transmit such news shall be deemed process agents for such companies, and an offer to pay a reasonable price to such telephone or telegraph companies shall be deemed an offer to such news gathering agency. All contracts in violation of this act are void and unenforceable. In any action brought under this act it shall be sufficient to prove that such trust or combination existed and that such person was a member of it or acted in connection with it. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

Rev. Stat. Ann. (Supp., 1939)
Motor Vehicles

Sections 57-6-16 to 57-6-29 are identical in text with the Colorado statute. See Colo. Stat. Ann. (Michie, Supp. 1938), c. 16, secs. 407 to 419, set forth in full at pages 72-76, *supra*.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Stat. Ann. (Supp., 1939) Cooperatives

Section 2-0-17 provides that an agricultural cooperative association may require members to execute contracts with it, binding them to sell all or part of their products to it or to buy all or part of their supplies from it. The duration of such contracts shall not exceed three years unless they contain provisions allowing members to withdraw from the association during a stated period each year after the third year. No contract between the association and a member thereof shall be deemed to be in restraint of trade or an illegal conspiracy. Sec. 2-0-19 (a). See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

VERMONT



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Rev. Pub. Laws (1933)

Sec. 5855. Court of chancery; powers.—The court of chancery of the county where the corporation has its principal office may, upon petition and after notice and hearing and upon such terms and conditions as it deems just, dissolve any corporation whenever it appears that its business transactions are repugnant to the laws of this state. It shall so dissolve any corporation which has created a monopoly or unreasonably restrained competition in trade.¹

Holding Companies

Section 5819 prohibits holding companies and provides that a violation of this provision shall be cause for the dissolution of the offending corporation.

Corporations

Section 5822 provides that when stock of another corporation is received by a corporation in return for the lease or sale of its corporate assets all of such stock must be disposed of within two years from the time it was acquired. Failure to make such disposition shall be cause for the dissolution of the offending corporation.

¹This section is a part of the General Corporation Law, secs. 5786 to 6012.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**Rev. Pub. Laws (1933)
Cooperatives**

Section 5942 provides that an agricultural marketing association organized under sections 5905 to 5946 shall not be deemed to be a conspiracy, combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****Rev. Pub. Laws (1933)
Corporations Under Jurisdiction of Public Service Commission**

Section 6004 provides that when stock of another corporation is received by a corporation under the jurisdiction of the Public Service Commission in return for the sale or lease of its corporate assets, all of such stock must be disposed of within 2 years from the time it was acquired. Failure to make such disposition shall be cause for the dissolution of the offending corporation.

Section 6012 provides that a consolidation or merger of corporations under the jurisdiction of the Public Service Commission shall not become effective without the approval of the commission after due notice and hearing, and the finding on its part that such consolidation or merger will not result in obstructing or preventing competition in the purchase or sale of any product, service, or commodity, in the sale, purchase, or manufacture of which such corporations are engaged.

Dairy Products—Discrimination

Sections 7722-7723 as amended by L. 1939, Temporary No. 110, prohibits discrimination between different localities, or between different persons in the same locality in the prices paid for milk, cream, or butterfat where this is done with the intention of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor. See Vol. *State Price Control*.

**L. 1st Ex. 1934, Act 1
Liquor**

Section 2, as amended by L. 1935, Act 193, provides that a manufacturer or rectifier shall not have any direct or indirect financial

interest in the business of any person holding any class of retailer's license, bottler's license, wholesale dealer's license or druggist's permit.

Section 23, as amended by L. 1935, Act 196, provides that it shall be unlawful for a person, unless specially authorized by the board, to hold more than one first- or second-class retailer license at the same time; or a second- and third-class retailer license contemporaneously; or a bottler's or wholesale dealer's license and a license of any other class at the same time; but a person may hold a bottler's and a wholesale dealer's license contemporaneously provided both license fees are paid.

Section 27, as amended by L. 1935, Act 196, provides that no manufacturer, rectifier, bottler or wholesale dealer shall have any direct or indirect financial interest in the business of any person holding a first-, second-, or third-class retailer license or druggist's permit; nor shall holders of first-, second-, or third-class retailer licenses have any similar interest in the businesses of any of the first mentioned group.

Section 71, as amended by L. 1935, H. B. 347, provides that whoever willfully violates a provision of this act for which other penalty is not prescribed, or any of the regulations adopted pursuant thereto, shall be imprisoned for not more than three months nor less than one month, or fined not more than \$200 nor less than \$50, or both. Section 72 provides that a sentence of imprisonment under this act, either cumulative or on failure to pay fine and costs, shall not exceed the term of three years.

2. Public Contract Provisions

No provisions.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Application of Common Law.

An agreement between a telephone company and its licensor whereby the former is bound not to provide service to any telegraph company without the express permission of the licensor is void as against public policy, and mandamus will lie to compel the telephone company to serve other telegraph companies where one is already being served. *Commercial Union Telegraph Co. v. The New England Telegraph Co.* 61 Vt. 241 (1888).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Application of Common Law.

A contract for the sale of a medical practice, providing that the seller will not compete with the buyer in a particular locality for a certain period of time is valid. *Butler v. Burleson*, 16 Vt. 176 (1844); *Blanchard v. Weeks*, 34 Vt. 589 (1861).

An agreement not to bid at a public auction for the sale of the right to support the paupers of Barre is against public policy and void. *Noyes v. Day*, 14 Vt. 384 (1842).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Pub. Laws (1933) Cooperatives

Section 5930 provides that a cooperative marketing association and its members may make marketing contracts requiring members to sell all or any specified part of their products exclusively to or through the association for any period of time. Such marketing agreements shall not be deemed to be in unlawful restraint of trade. See *Exception to General Antitrust Laws, supra*. See also Vol. *Cooperatives* in projected **MARKETING LAWS SURVEY** study.

Judicial Decisions

Application of Common Law.

An agreement between a buyer and a seller whereby the latter in consideration of the purchase agrees not to sell his product to a competitor of the buyer in some particular locality is only in partial restraint of trade and valid. *Clark v. Crosby*, 37 Vt. 188 (1864).

A statement contained in stock certificates issued by a cooperative association providing that their acceptance binds the stockholders to deliver produce only to it, is not ultra vires, in restraint of trade, or against public policy. *Bessette v. St. Albans Cooperative Creamery Co.*, 107 Vt. 103, 176 Atl. 307 (1934).

VIRGINIA



I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. sec. 165. General assembly shall enact laws preventing all trusts, combinations, and monopolies inimical to the public welfare.—The general assembly shall enact laws preventing all trusts, combinations, and monopolies, inimical to the public welfare.

STATUTORY PROVISIONS

Code Ann. (Michie and Sublett, 1936)

Sec. 4722 (5). Definition of “person,” “persons,” “trust or monopoly”; a trust or monopoly unlawful and void.—Whereas, section one hundred and sixty-five of the Constitution of Virginia provides that the general assembly shall enact laws preventing all trusts, combinations and monopolies inimical to the public welfare; therefore,

Be it enacted by the general assembly of Virginia, That the word “person” or persons,” as used in this act, includes corporations, partnerships and associations existing under or authorized by any State or territory of the United States or a foreign country.

A trust or monopoly is a combination of capital, skill or acts by two or more persons, firms, partnerships, coporations or associations of persons, for any or all of the following purposes:

- (a) To create or carry out restrictions in trade or business.
- (b) To limit or reduce the production or increase of merchandise or commodities.
- (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or commodities.
- (d) To fix a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, any article,

thing, or commodity of merchandise, produce, business or commerce intended for sale, barter, use, enjoyment or consumption in this State.

(e) To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description by which they bind or have bound themselves not to sell, dispose of or transport any article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust, or monopoly, as is defined here is unlawful, against public policy and void. (1919, p. 82.)

Sec. 4722 (6). Unlawful to issue or own trust certificates or to enter into a combination to limit or fix prices or lessen production or sale.—It shall be unlawful for a person, partnership, association, or corporation, or any agent, to issue or own trust certificates, or for a person, partnership, association or corporation, or any agent, officer or employee thereof, or a director or stockholder of a corporation, to enter into a combination, contract or agreement with any person or persons, corporation or corporations or a stockholder or director thereof, the purpose and effect of which is to place the management or control of such combination or combinations or the manufactured product thereof, in the hands of a trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of an article of commerce, use, enjoyment or consumption, or to prevent, restrict or diminish the manufacture or output of such article. A contract or agreement in violation of any provision of this act is void and not enforceable either at law or in equity. *Id.*

Sec. 4722 (7). Foreign corporation violating provisions of act prohibited from doing business in State.—A foreign corporation or foreign association exercising any of the powers, franchises or functions of a corporation in this State violating any provision of this act shall not have the right of and shall be prohibited from doing any business in this State. *Id.*

Sec. 4722 (8). Agreements in leases or sales which may substantially lessen competition or create a monopoly unlawful; what

discriminations permitted.—It shall be unlawful for any person engaged in business within this State, in the course of such business, to lease or make sale, or contract for sale, of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption or resale within this State, or to fix the price therefor, or discount from, or rebate upon such prices on the agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares or merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale of such goods, wares or merchandise may be to substantially lessen competition, or to create a monopoly in any lines of business, but nothing contained in this act shall apply to discrimination in prices between purchasers of commodities on account of differences in grade, quality, or quantity (provided such differences shall be reasonable) of the commodity sold, or only to make allowance for differences in the cost of transportation or to discriminate in price in the sale of different commodities made in good faith to meet competition; nor shall it prevent persons selling goods as merchandise from selecting their own customers in bona fide transactions and not in restraint of trade. *Id.*²

Sec. 4722 (9). Damages and costs recoverable by person injured by reason of anything forbidden in act; limitation upon compensation of counsel.—Any person who shall be injured in his business or property by reason of anything forbidden in this act may sue therefor and recover threefold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and said counsel shall in no case receive any other, further or additional compensation except that allowed by the court, and any contract to the contrary shall be null and void. *Id.*

See note to sec. 4722 (21).

Sec. 4722 (10). Final judgment or decree against defendant in prosecution or equitable proceeding by Commonwealth as evidence in suit by any other party; statute of limitations.—A final judgment or decree rendered in any criminal prosecution or proceeding in equity brought in behalf of the Commonwealth under this act to the effect that the defendant has violated the provisions of this act shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under this act, as to the matters respecting which said judgment or decree would be an estoppel as between the parties thereto; but this

² For further treatment of sec. 4722 (2) see Vol. *State Price Control Legislation: Antidiscrimination Legislation*. MARKETING LAWS SURVEY series.

section shall not apply to judgments or decrees entered before any testimony has been taken or to judgments or decrees rendered by consent in criminal proceedings. Whenever any suit or proceeding in equity or criminal prosecution is instituted by the Commonwealth to prevent, restrain or punish any of the violations of this act, the running of the statute of limitations in respect of any suit or action arising under this act and based in whole or in part on any matter complained of in said suit or proceeding, shall be suspended during the pendency thereof. *Id.*

Sec. 4722 (11). Penalties for violation of act.—Any person, firm, or any officer or director of any corporation, violating or conspiring to violate any of the provisions of this act shall be fined not exceeding one thousand dollars, or confined in jail not exceeding twelve months, or both. On the second or subsequent conviction, the offense may, in the discretion of the jury, be punishable by a fine of not less than one thousand nor more than five thousand dollars and by confinement in jail not less than six months and not exceeding twelve months, or by confinement in the penitentiary not less than one nor more than ten years. *Id.*

Sec. 4722 (12). Existence and operation of certain organizations not forbidden.—This act shall not be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purpose of mutual help, and not having capital stock or conducted for profit; nor to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall such organizations, or the members thereof, be held or construed to be illegal combinations, trusts, or monopolies under the provisions of this act. *Id.*

Sec. 4722 (13). Whenever the attorney for the commonwealth of any city or county in this State shall have reason to believe that the provisions of this act have been or are being violated he shall cause a warrant or warrants to be issued by a justice of the peace of his county or city, returnable to the circuit court of his county or corporation court of his city, after which the offender shall be proceeded against by indictment or, in lieu thereof, indictments may be preferred against such offender in the first instance, with the usual right to bail. *Id.*

Sec. 4722 (14). Whenever ten or more citizens of any county or city shall file a bill in chancery in the circuit court of any county or the corporation court of any city against any person, firm, or corporation, alleging violations of the provisions of this act and praying that said party or parties may be restrained and enjoined from continuing the acts complained of, such court shall have the jurisdic-

tion to hear and determine the issues involved, to issue injunctions pendente lite and permanent injunctions and to decree damages and costs of suit, including reasonable counsel fees to complainants' or defendants' counsel. *Id.*

Sec. 4722 (15). Whenever affidavits of fifty or more citizens of the commonwealth shall be submitted to the attorney general alleging a violation or violations of the provisions of this act upon the part of citizens of two or more counties, or whenever the governor shall request such action, it shall be the duty of the attorney general to file a bill for an injunction against the alleged violators thereof in the circuit court of the City of Richmond, which shall have jurisdiction to summon the defendants and try the issue involved as though such defendants were citizens of the City of Richmond, and may issue injunctions pendente lite or permanent injunctions for the purpose of enforcing the provisions of this act. *Id.*

Sec. 4722 (16). The grand juries of the several cities and counties shall have jurisdiction to indict violators of the provisions of this act, who shall be tried in the circuit courts of the counties and the corporation courts of the cities as in the case of appeals from the justices of the peace and police justices and in the case of second, or subsequent, offenses, the cases shall be tried as other felonies are tried in said courts. *Id.*

Sec. 4722 (17). In any indictment, information, or complaint for any offense named in this act, it shall be sufficient to state the purpose or effect of the trust, combination or monopoly and that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created. *Id.*

Sec. 4722 (18). In prosecutions under this act, it shall be sufficient to prove that a trust, combination or monopoly, as defined herein, exists, and that the defendant belonged to it, and acted for or in connection with it, without proving that all the members belonged to it or without proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. Evidence of the general reputation of the existence and character of the trust or combination alleged shall be admissible. In case any court of record, or in vacation, any judge of said court, in which is pending any civil, criminal or other action or proceeding brought or prosecuted by the attorney general or any commonwealth's attorney for the violation of any of the provisions of this act, no person so ordered shall be excused from attending, testifying or producing books, papers, schedules, contracts, agreements, or any other document in obedience to the subpoena, or under the order of

such court or any commissioner or referee appointed by said court to take testimony, or any notary public or other person or officer authorized by the laws of the State to take depositions, when the order made by such court, or judge hereof, includes a witness whose deposition is being taken before such notary public or other officer on the ground or for the reason that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty; but no individual shall be prosecuted or be subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, before any such court, person or officer; but no person shall be excused from testifying for the commonwealth or the plaintiff or complainant in any proceeding under this act as to any offense committed by another hereunder by reason of his testimony tending to incriminate himself but the testimony given by such person, on motion of either the commonwealth, the plaintiff, or complainants, shall in no criminal case be used against him, nor shall he be prosecuted criminally for any offense as to which he has so testified. *Id.*

Sec. 4722 (19). In any proceeding under this act before any court of competent jurisdiction, if it appears from competent evidence that violations of the provisions of this act were contemplated, but not actually committed, the said courts in which such proceedings aforesaid are pending, may require a bond or bonds of the defendant or defendants in the penalty of not more than one hundred thousand dollars, conditional upon the abstention from all violations of the provisions of this act for the period of one year. In case of the forfeiture of the said penalty of said bond or bonds, like proceedings shall be had thereon as in the case of the forfeiture of a recognizance. In the case of the disobedience to any injunction or decree, like proceedings shall be had as in the case of other contempts of court. *Id.*

Sec. 4722 (20). Unconstitutionality of any provision of act shall not invalidate remainder.—If any section or provision of this act or any part of any section shall be declared unconstitutional by the Supreme Court of Appeals of Virginia, or the Supreme Court of the United States, the part so declared unconstitutional shall cease to be operative, but the remainder of the act and every section or part thereof not so declared unconstitutional shall continue to be the law of this State. *Id.*

Sec. 4722 (21). Construction of act; to what trusts, combinations, and monopolies applicable.—The provisions of this act shall be liberally construed in order effectually to secure the enforcement of

the provisions hereof for the protection of the people of the Commonwealth, but the act shall apply only to those trusts, combinations and monopolies which are unreasonable or inimical to the public welfare, as hereinbefore defined, and are prohibited and penalized under the provisions of any law of the United States, or would be prohibited and penalized under the provisions of any law of the United States, if their activities extended to interstate as well as intrastate commerce. (Id., 1926, p. 314.)

Code Ann (Michie, Supp., 1938)
Discriminations

Section 1463 (3) provides that it shall be unlawful to sell merchandise at less than cost to divert trade or injure a competitor substantially lessening competition, restraining trade or creating a monopoly. See Vol. *State Price Control Legislation: Prohibition of Sales Below Cost*.

Judicial Decisions

Application of Common Law.

A demurrer to an indictment against insurance companies combined for the purpose of regulating, controlling, and fixing premium rates for fire insurance within a certain city, was upheld because such action, as in the case of uniform rates established for utility services, is not an offense at common law. That the combination is organized for the purpose of coercing the city authorities to repeal a license tax levied on insurance companies does not make the offense indictable as a common law conspiracy. The court declared that the insurance companies in fixing their rates of insurance may take into consideration as any other item of expense the license taxes they are required to pay. *Harris v. Commonwealth*, 113 Va. 746, 73 S. E. 561 (1912).

Application of Statutes.

Section 4722 (21) limits the operation and effect of the antitrust statutes to trusts which are or would be prohibited and penalized under the provisions of any law of the United States, if their activities extended to interstate commerce. Since insurance does not come within the meaning of "commerce" or "trade" under Federal law (*Paul v. Virginia*, 8 Wallace 168), it is not covered by the State acts. *Werth v. Fire Companies' Adjustment Bureau*, 160 Va. 845, 171 S. E. 255 (1933), cert. den., 290 U. S. 659, 54 Sup. Ct. 74, 78 L. Ed. 570 (1933).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**Code Ann. (Michie, Supp., 1938)
Resale Price Maintenance**

Sections 1463i to 1463p validate contracts fixing the resale price of branded commodities. The statute is expressly inapplicable to agreements between producers, between distributors, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

**Code Ann. (Michie and Sublett, 1936)
Cooperatives**

Section 1265 (26) provides that no agricultural cooperative marketing association organized under sections 1265 (1) to 1265 (32) shall be deemed to be a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. See *Tying Contracts and Exclusive Dealing Arrangements*. See also *Cooperatives* in projected study.

Milk Producers and Distributors

Section 1211kk provides that marketing agreements between producers' cooperative marketing associations and distributors and producer-distributors under sections 1211m to 1211mm, which provide for control of the milk industry through regulation of production and price fixing, shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily. See Vol. *State Price Control Legislation: Administrative Price Control*.

Labor; Agricultural and Horticultural Associations

Section 4722 (12) provides that the General Antitrust Law, sections 4722 (5) to 4722 (21) shall not apply to labor, agricultural, or horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit. See *General Antitrust Laws, supra*.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****Code Ann. (Michie and Sublett, 1936)
Railroads**

Section 3857 (e) provides that railroads may not lease, sell, consolidate, or merge with the property and franchises of railroads com-

petitive between points both of which are within this state, or lines between the same terminal points both of which are within this state.

Cold Storage

Section 1228m provides that persons or corporations engaged in the business of storing foods for the public in a public cold-storage warehouse, may not directly or indirectly own or deal in any food commodities stored in such warehouses except food commodities that are legally acquired for charges or advances made.

Liquor

Section 4675 (84) provides that no manufacturer, bottler, or wholesaler whether licensed in this State or not, nor any officer or director of same, shall have any financial interest, direct or indirect, in any retail licensee's business or premises; nor rent, lend, or give to any retail licensee or to the owner of the premises on which the business of any such retailer is conducted, any money, equipment, furniture, fixtures, or property with which the business of such retailer is or may be conducted. Any person violating the provisions of this section shall be guilty of a misdemeanor. Any retailer consenting to any violation of the above provisions shall likewise be guilty of a misdemeanor.

2. Public Contract Provisions

Code Ann. (Michie and Sublett, 1936)

Highway Contracts

Sections 2154 (46) and 2154 (47) provide that every member of any highway contractors' association who bids upon any work let by the State Highway Commission must file an affidavit that the bidder has not entered into any combination, arrangement, or agreement the effect of which is to prevent competition or increase the cost of construction or maintenance of roads or bridges. If it is found that any highway contractors' association has engaged in activities tending to prevent competition in the bidding on such contracts, or to increase the cost of such contracts to the state, the State Highway Commission may annul such contract, paying only the reasonable value of the work done or materials furnished. See projected Vol. *Governmental Purchasing*.

Counties

Section 2725d provides that all purchases by counties shall be based on competitive bids whenever feasible, and that if all bids received on a pending contract are for the same unit price or total amount,

the county purchasing agent shall have authority to reject all bids and to make the required purchases in the open market, provided the price paid shall not exceed the bid price. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

A grocer sold his business, fixtures, equipment, and goodwill with no express covenant not to compete. He subsequently opened a store in the same vicinity and solicited his old customers. Even though not expressly provided for, the court will enforce the contract of sale and protect the vendee's interest. The vendor was held liable for damages suffered by the vendee. *Wood v. Pender-Dowey Grocery Co.*, 151 Va. 706, 144 S. E. 635 (1928).

A dairy company sold its business, the principal stockholders agreeing not to reengage in said business for a period of 10 years in the city of Washington or within a radius of 50 miles. During the pendency of a suit to enforce this agreement, the covenantee sold the business to a third party, which vendee was not made a party to the suit. The court held that the covenantee, having sold the business, did not have such an interest as would warrant relief, and the action was dismissed. *Burchell v. Capital City Dairy Co.*, 158 Va. 6, 163 S. E. 81 (1932).

Where one who was actively engaged in the management of a hardware business and owned one third interest in it and sold such interest, covenanting not to "go in the business" for a period of 5 years within 5 miles of a town, it was held that his acceptance of a mere clerk's job in a competing business was not a breach of the agreement, and he could not be restrained. *Stoneman v. Wilson*, 169 Va. 239, 192 S. E. 816 (1937).

Restrictive Covenants Not Ancillary to the Sale of a Business.

An employee of a corporation engaged in the business of disposing of carcasses of animals agreed with a stockholder of the corporation (the extent of the stockholder's interest is undisclosed by the evidence)

not to reengage in said business in the city of Norfolk nor within a radius of 40 miles for a period of 7 years. The consideration for the agreement was a parcel of real estate. In denying an injunction to restrain the breach of this contract by the employee, the court held that the contract was an unreasonable restraint of trade, since it went beyond what was necessary to protect the "slender" interest of the plaintiff, and it so lessened competition as to interfere with the public interest. *Klaff v. Pratt*, 117 Va. 739, 86 S. E. 74 (1915).

A contract for subscription of stock of a corporation organized to deal in used cars containing an agreement that the stockholder is not to compete with the corporation in certain cities is in violation of section 4722 (5) (6) as an agreement in restraint of trade and competition. *Norfolk Motor Exchange v. Grubb*, 152 Va. 471, 147 S. E. 214 (1929).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Michie and Sublett, 1936)
Cooperatives

Sections 1265 (17) and 1265 (26) provide that an agricultural cooperative marketing association organized under sections 1265 (1) to 1265 (32) may enter into contracts with its members requiring them to sell, for any period not over ten years, all or any specified part of their commodities, or specified commodities, exclusively to or through the association. Such contracts shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives in projected study*.

Section 4722 (8) provides that it shall be unlawful to lease or sell any goods on the understanding that the lessee or purchaser shall not use or deal in the goods of a competitor of the lessor or seller where the effect of such agreement may be to substantially lessen competition, or to create a monopoly in any lines of business. Such provision, however, shall not prevent sellers from selecting their own customers in bona fide transactions and not in restraint of trade. See *General Antitrust Laws, supra*.

Judicial Decisions

Exclusive Dealing Arrangements.

A contract whereby a filling station operator agreed to purchase all of his gas and oil from a wholesaler was held not to violate section

4722 (8) since it did not result in a "substantial" lessening of competition or create a monopoly. *Wiseman v. Dennis*, 156 Va. 431, 157 S. E. 716 (1931).

The operator of a tannery granted a right-of-way to a railroad which agreed not to ship chestnut oak bark over the railroad-stud line except to the tannery. The railroad refused to deliver bark as agreed upon and when sued on the contract contended that it was illegal and void in restraint of trade. The court held the contract valid. It was a limitation reasonably necessary to protect the interest of the tannery, and at the same time does not interfere or prevent the railroad from carrying on its regular and normal course of business. *Merriman v. Cover, Drayton & Leonard*, 104 Va. 428, 51 S. E. 817 (1905).

WASHINGTON

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. XII. Sec. 22. Monopolies and trusts.—Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership, or association of persons in this State shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise.

STATUTORY PROVISIONS

Rev. Stat. Ann. (Remington, Supp., 1939)
Corporations

Section 3803-65 provides that nothing in the general Corporation Act, sections 3803-1 to 3836-34, shall be interpreted to authorize a corporation to do any act in violation of the common law or statutes of this State or of the United States with respect to monopolies and illegal restraint of trade.

Discriminations

Section 5854-2 provides that it shall be unlawful for any person selling products to discriminate as to price between different localities with the intent to destroy the competition of dealer. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*. **MARKETING LAWS SURVEY Series.**

Rev. Stats. Ann. (Remington, 1932)
Conspiracy Statute

Section 2382 provides (in part) that it is illegal for two or more persons to conspire to prevent another from entering a lawful trade or calling by force, threats, or intimidation, or by interfering or threatening to interfere with the property of another, or to conspire to commit any act injurious to trade or commerce.

Section 2384 provides that every corporation which shall violate any provision of Sec. 2382 shall forfeit any right and franchise to do business in Washington.

Judicial Decisions

Application of the Common Law.

The common-law doctrine against restraints of trade was adopted by the courts of Washington during its early days as a Territory. In a case involving an agreement by the parties not to run steamboats in the territory of the other, the court held this was an attempt by each party to secure a monopoly in their respective territories, and that such a monopoly would not be upheld. *Oregon Steam Navigation Co. v. Calvin*, 1 Wash. T. 283 (1870).

Application of Constitutional Provisions.

In General.

Where three corporations were engaged in the abstract business, and one of them acquired the business of the second and also leased the abstract plant of the third, the contract was held not within purview of art. XII, sec. 22, of the constitution. The court stated that as the records were free to all, there could be no monopoly and no injury to the public. *Lumberman's Trust Co. v. Title Insurance, etc., Co., of Tacoma*, 248 Fed. 212 (C. C. A. 9th, 1918) (1918).

In a case involving a combination of nine door-manufacturing corporations controlling 85 percent of all fir doors exported from the States of Washington and Oregon, the court held that manufacturing of doors was not interstate commerce and that the combination came within purview of the constitutional prohibition. The combination contended that they were exempted from the State's monopoly laws under the Webb-Pomerene Act (40 Stat. 516, 15 U. S. C. A., secs. 61 to 65). But the court held that the common law and the constitutional prohibition against monopolies applied to the manufacture of the commodities and not to the commerce in the commodities involved. *American Export Door Corporation v. Gauger Co.*, 154 Wash. 514, 283 Pac. 462 (1929). However, an agreement between 108 manufacturers and dealers of red cedar shingles all of whom manu-

factured their products in the State of Washington was held to be a combination in interstate commerce. *Gibbs v. McNeely*, 118 Fed. 120 (C. C. A. 9th, 1902) (1902), reversing 107 Fed. 210 (1901). The fact that the parties to the combination were all residents of the State of Washington was held immaterial.

As to Monopolies Created by the State.

Const. art. XII, sec. 22 is not applicable to the State's operation, nor does it prohibit the State itself from creating and maintaining a monopoly. The constitutional provision was intended to apply only to private combinations of persons or associations engaged in fixing prices and limiting production against public welfare (dicta). The Washington Agricultural Adjustment Act, which made marketing agreements under the Agricultural Adjustment Act the standard of fair competition for intrastate transactions, was declared invalid not under art. XII, sec. 22, but on the ground of an unconstitutional delegation of legislative power. *Chas. Uhden, Inc. v. Greenough*, 181 Wash. 412, 43 Pac. (2d) 983 (1935).

In a suit to restrain the defendant from constructing a boom on a river near plaintiff's location, the defendant argued that if it were restrained, the plaintiff would obtain a practical monopoly of booms on the river in violation of the constitution. The court stated that if the extent of the river was such as to reasonably permit only one boom there was no violation of the constitution; the public interest being protected in that the State fixed the minimum and maximum charges. *Nicomien Boom Co. v. North Shore, etc. Co.*, 40 Wash. 315, 82 Pac. 412 (1905). Cert. den. 205 U. S. 548 (27 Sup. Ct. 790, 51 L. Ed. 924) (1907), 212 U. S. 406, 29 Sup. Ct. 355, 53 L. Ed. 574 (1908). See also *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845 (1904) aff'd (per curiam) 195 U. S. 624, 25 Sup. Ct. 789, 49 L. Ed. 350 (1904). An act (Rem. 1935 Supp., secs. 5671-1 to 11, Laws, 1935, c. 1) granted to all persons who held licenses in 1932 and 1933 for life, the right to fish for salmon with gill nets prohibiting such right to all other persons. It was contended in a suit challenging the constitutionality of the act, that this violated Const. art. XII. The court upheld this contention (dicta), but decided the case on other constitutional questions. *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 Pac. (2d) 1101 (1936).

As to Public Service Corporations.

Several cases involving exclusive franchises for public service corporations have been challenged in the courts on the ground that Const. art. XII was violated. Since the combination under the exclusive franchise was, however, under the regulation of a public authority, the public interest was protected, and the constitutional prohibition was held not to have been contravened.

A contract between two competing bus companies to the effect that one of them was to assign its rights to its certificate of convenience and necessity, subject to the approval of the public service commission, was held valid and not prohibited by art. XII, sec. 22, of the State constitution. *Inter-City Co. v. Bothell Bus Co.*, 139 Wash. 674, 247 Pac. 1040 (1926). Cf. *Manson v. Hunt*, 82 Wash. 291, 144 Pac. 45 (1914) involving a contract between two competing steamship companies, whereby one of them agreed to withdraw its boats for three years for a consideration of \$1,500. This was held to be in violation of Const. art. XII, sec. 22. See *Contracts not to Compete, infra*. See also *State ex rel. Department of Public Works v. Inland Forwarding Corporation*, 164 Wash. 412, 2 Pac. (2d) 888 (1931).

Authorization permitting the acquisition of existing railway systems contained in a franchise granted by ordinance to a street railway line is not in violation of Const. art. XII, sec. 22 of the State constitution as the provisions of this section were not intended as a limitation on the legislative power to authorize consolidation of utilities when deemed necessary for the public interest. *Wood v. City of Seattle*, 23 Wash. 1, 62 Pac. 135 (1900).

Refusal by a railway to construct a spur connection to a warehouse was not in violation of Const. art. XII, sec. 22, of the State constitution. The plaintiff cannot compel construction of such facilities as have been furnished to other warehousemen, since the services rendered to him by the railroad are reasonably adequate; the public carriers being required to furnish only such facilities as are reasonably necessary. No evidence of a monopoly or combination between the other warehousemen and railroad company in restraint of trade having been presented, the petition to compel construction of such spur was therefore denied. *Northwestern Warehouse Co. et al. v. Oregon Ry. Nav. Co.*, 32 Wash. 218, 73 Pac. 388 (1903).

An existing ferry company operating under a certificate granted to it under Rem. Rev. Stat. secs. 10361-1 and 10361-2, obtained a restraining order against threatened competition by another ferry company. The court held that the grant of an exclusive franchise does not violate article XII of the State constitution as competition in public services may in most instances harass rather than promote public welfare. The State is authorized to grant such rights, privileges, and franchises as will best protect the public interest. *Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Assn., et al.*, 176 Wash. 486, 30 Pac. 2d, 233 (1934).

Application of Statutes.

An information charging that defendants, intending to prevent competition, agreed not to compete with one another nor sell milk below certain stipulated prices clearly charges a crime of conspiracy

to accomplish an unlawful purpose. *State v. Erickson*, 54 Wash. 472, 103 Pac. 796 (1909). See also *State v. Scollard*, 126 Wash. 335, 218 Pac. 224 (1923).

The defendant agency consisting of a substantial number of ice manufacturers refused to deal with plaintiff, except on certain conditions. Plaintiff dealer unable to get his regular supply of ice elsewhere brought action for damages. The court held that the agency may deal as any other person with whomsoever it chooses. Manufacturers choosing to reserve their wholesale business to a mutually exclusive agency are not engaged in such activity as violates any law or contravenes public policy. There was no evidence of a combination to restrain trade nor of an attempt to create a monopoly. The court did not pass on the price-fixing aspect of the agreement as that question was not before the court. *Powell v. Graham*, 183 Wash. 452, 48 Pac. 2d, 952 (1935).

The court will not entertain a suit for the forfeiture of a charter or issue an order for other relief against an allegedly unlawful corporation unless judgment on the merits has been entered. *State ex rel. Hamilton v. Standard Oil Co. of California*, 176 Wash. 231, 28 Pac. (2d) 790 (1934). On the merits of the case the court held that the combination of dealers were privileged to buy and sell to whomever they pleased, that the fixing of reasonable prices between manufacturers and dealers was not unlawful and that certain competitors chose to follow another's competitor's prices "does not establish suppression of competition or show sinister domination." The case was dismissed on ground that the evidence did not sustain the alleged charges. *Id.*, 190 Wash. 496, 68 Pac. 2d, 103 (1937).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Rev. Stat. Ann. (Remington, Supp., 1938) Resale Price Maintenance

Sections 5854-1 to 5854-16 provide that contracts fixing the resale price of trade-marked commodities in open competition with similar commodities are valid. The act is expressly inapplicable to agreements, between producers, between wholesalers, or between retailers. Sec. 5854-14. See Vol. *State Price Control Legislation: Resale Price Maintenance*. MARKETING LAWS SURVEY series.

Rev. Stats. Ann. (Remington, 1932) Labor

Section 7614 provides that no person shall be prosecuted for entering into or carrying on any lawful arrangement, agreement, or combination between themselves made with a view of lessening the number of

hours of labor or increasing wages or bettering the conditions of working men and women, or for any lawful act done in pursuance thereof.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

CONSTITUTIONAL PROVISIONS

Common Carriers

Const. art. XII, sec. 14, prohibits combinations between common carriers and owners of vessels that make port in this State whereby the earnings of the one doing the carrying are to be shared by the one not doing the carrying.

Const. art. XII, sec. 16, provides that no railroad corporation shall consolidate with any other railroad corporation owning a competing line.

STATUTORY PROVISIONS

Rev. Stat. Ann. (Remington, 1932)

Railroads

Section 10463 provides that a railroad may consolidate its stock, property, or franchises with any other railroad corporation other than one owning a competing line. This section further prohibits the purchase, either directly or indirectly, of any stock or interest in a railroad corporation owning or operating a competing line. Section 10464 legalizes all former consolidations of railroad corporations except those where the railroads involved were competing lines.

Rev. Stat. Ann. (Remington, Supp., 1939)

Copyrights

Sections 3802- to 3802-12 provide that combinations of copyright holders to (1) fix prices on their copyrighted works, (2) collect fees, (3) issue blanket licenses for the right to commercially use copyrighted works are prohibited. Such persons may combine if they issue licenses on rates assessed on a per piece system of usage provided that rates charged are not in excess of those charged in other States. A complete list of copyrighted works of a combination must be filed with Secretary of State and is to be available to the public. This list must be filed by foreign and nonresident copyright holders if their copyrighted works are used in this State. Individual owners are exempted from this requirement. The transmission and production of copyrighted works are affected with the public interest and

hence illegal price fixing and monopolistic practices are to be prevented and the Federal laws are to be supplemented to that end. The act further provides for injunctions against violations. If the injunction is disobeyed a receiver is to be appointed and if the defendant attempts to withdraw the copyrighted works from the State the court shall appoint a State antimonopoly board which shall fix the license rates for a year. Unless the copyright holder agrees to refrain from the monopolistic practices within this time the copyrights shall escheat to the State. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

**Rev. Stat. Ann. (Remington 1932)
Nonprofit Corporations**

Section 3898 provides that nonprofit corporations organized under sections 3888 to 3900 that shall engage in any business for gain or which shall enter into any agreement or combination in restraint of trade, or to fix the price of any commodity, or to limit or regulate the production or distribution of any commodity, or which shall attempt to restrain trade, or fix the price of any commodity, or limit or regulate the production or distribution of any commodity shall forfeit its rights to exist as a corporation and shall be dissolved. See Vol. *Cooperatives* in projected study.

Dairy Products

Section 6242 provides that combinations to fix the price at which dairy products shall be bought or sold are prohibited. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

Insurance

Section 7076 prohibits insurance companies from entering into any combination or agreement with another insurance company for the purpose of controlling insurance rates, discriminating against any other company, or lessening free competition in the business.

Commission Merchants

Section 8299 (f) provides that the director of agriculture may decline to grant, or may revoke or suspend a license already granted to a commission merchant, after a hearing duly held as herein provided, where he is satisfied that the applicant or licensee has (5) participated in an illegal combination or combinations to fix prices. Section 8292-12 provides that the provisions of the act are not applicable to cooperative marketing associations.

Rev. Stat. Ann. (Remington, Supp. 1939)

Liquor

Section 7306-90 provides that no manufacturer or wholesaler or person financially interested directly or indirectly in such business, whether resident or nonresident, shall have any financial interest, direct or indirect, in any licensed retail business; nor own any of the property upon which such retail business is conducted; nor advance moneys or the equivalent under any arrangement whatsoever; nor shall any retail licensee under any arrangement whatsoever conduct his business upon property in which any manufacturer or wholesaler has any interest nor receive any such advances of money. No manufacturer or wholesaler shall be eligible to receive or hold a retail license or sell at retail. Financial interest, direct or indirect, as used in this section, shall include any interest, whether by stock ownership, mortgage, lien, or through interlocking directors, or otherwise.

Section 7306-91 provides that every person who violates any provision of this act or the regulations shall be guilty of a violation of this act, whether otherwise declared or not. Section 7306-93 provides that every person guilty of a violation of this act for which no penalty has been specifically provided shall be liable, on conviction, for a first offense to a penalty of not more than \$300 or to imprisonment for not more than two months, with or without hard labor, or both; for a second offense, to imprisonment for not more than six months, with or without hard labor; and for a third or subsequent offense to imprisonment for not more than one year, with or without hard labor. If the offender convicted is a corporation, it shall for a first offense be liable to a penalty of not more than \$2,000, and for a second or subsequent offense to a penalty of not more than \$3,000, or to forfeiture of its corporate license, or both.

2. Public Contract Provisions

Rev. Stat. Ann. (Remington, 1932)

General

Section 2333-1 provides that when any competitive bids for work or improvements have been solicited by the State or any of its subdivisions it shall be unlawful for any person to offer or give anything of value to another person for the purpose of inducing such other person either to refrain from submitting any bids or to enter into any agreement or arrangement whereby full and unrestricted competition for the securing of such public work will be suppressed. The statute further provides that it shall be unlawful for any person to solicit or accept money or any other thing of value upon a promise

that he will refrain from bidding upon such public work or that he will submit a bid in such sum as to eliminate full and unrestricted competition. Collusion in competitive bidding is unlawful. Sec. 2333-2. It is no defense to a prosecution under this act that any agreement to eliminate unrestricted competitive bids was made outside of the State if the work for which bids are called is to be done in the State. Sec. 2333-4. See projected Vol. *Governmental Purchasing*.

Rev. Stat. Ann. (Remington, Supp., 1939)
Road Equipment

Section 6450-47 provides that in purchases of road equipment exceeding \$500, on evidence of collusion between bidders, county commissioners may reject all bids. See projected **MARKETING LAWS SURVEY** volume *Governmental Purchasing*.

Printing

Section 10335 provides that all government printing work is to be done in the State except where bids are excessive and not reasonably competitive. No claims for printing done outside the State shall be allowed unless it shall be alleged and proved that such work could not be done in the State at reasonable and competitive rates. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

Judicial Decisions

Railroads.

In a petition for condemnation of a right-of-way by a carrier, it was argued that the petitioner railroad had violated art. XII, sec. 16 of the State constitution in that it had unlawfully consolidated with two other competing and parallel railroads. The court held, however, that according to the evidence the constituent corporations remained the same, each transacted its own business, made its own rates and transported freight and passengers over its own lines as before the consolidation. Each corporation remained separate and distinct from the other. The mere fact that each had subscribed stock in the consolidated corporation, was not a merger within the constitutional prohibition. *State ex rel. Cascade Railroad Co. v. Superior Court*, 51 Wash. 346, 98 Pac. 739 (1909).

The legality of a consolidation and merger of utilities in violation of Const. art. XII, sec. 16 cannot be raised by a private litigant. Such question should be left to appropriate action by the State. *Day v. Tacoma Ry. & Power Co.*, 80 Wash. 161, 141 Pac. 347 (1914). See also *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135 (1900).

Commission Merchants.

The validity of Rem. Rev. Stat. sec. 8301 (repealed by L. 1937, c. 67, sec. 12), a comprehensive statute for the regulation of commission merchants, was challenged on the ground that cooperative marketing associations were exempted. The court held that the exemption provided for in the act was based on a reasonable and valid classification, and that its provisions were not in violation of either the State or Federal Constitutions. *Northern Cedar Co. v. French*, 131 Wash. 394, 230.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to Sale of a Business.

A contract by a vendor of a meat market not to engage in the same business in the same locality for 2 years was upheld. The court not only enjoined the defendant but his wife as well. The court would not permit the defendant to circumvent his covenant by conveying all of his property to his wife, thereby permitting her to establish a similar business at the same place in competition with the vendee. Injunction and damages were granted. *Loutzenhiser v. Peck*, 89 Wash. 435, 154 Pac. 814 (1916). See also *Nelson v. Brassington*, 64 Wash. 180, 116 Pac. 629 (1911).

A contract by a manufacturer of laundry trays and other cement products not to reenter the same business in Washington or Oregon for 5 years was held valid. The court held that the restriction here was reasonably necessary for the protection of the vendee as the market for its product extended beyond the State line. Reasonableness as to time and place, said the court, depends on the nature of the business and circumstances of sale in each case. *Washington Char-crete Co. v. Campbell et al.*, 72 Wash. 566, 131 Pac. 208 (1913).

A covenant not to engage in the business of abstracting of titles in the county for 5 years was held enforceable. *Lumbermans' Trust Co. v. Title Insurance etc. Co. of Tacoma*, 248 Fed. 212 (C. C. A. 9th 1918).

Defendant had sold his stock in a corporation to plaintiff and orally agreed not to engage in a competing mercantile business in Spokane. He subsequently established a competing business directly opposite the plaintiff's shop. The court held that a written contract need not be proven and that the sale of a business, at a fair market value, was sufficient consideration for an agreement not to compete. *Johnson v. Schultz*, 137 Wash. 584, 243 Pac. 644 (1926). See also *Barash v. Robinson*, 142 Wash. 118, 252 Pac. 680 (1927).

Restrictive Covenants Ancillary to Employment.

A covenant by an employee of a certified public accountant not to solicit or perform accounting or auditing for clients of the employer with whom he came in contact during the course of employment for a period of 3 years after termination of employment was held valid. *Racine v. Bender*, 141 Wash. 606, 252 Pac. 115 (1927).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Stat. Ann. (Remington, Supp., 1939) Cooperatives

Section 2892 provides that a cooperative agricultural association organized under sections 2878 to 2909 may enter into contracts with its members requiring the members to sell all or part of their agricultural products of specified commodities exclusively to or through the association or any facilities to be created by the association, for any period not over 10 years. See *Cooperatives* in projected study.

Rev. Stat. Ann. (Remington, Supp., 1939) Insurance

Section 7131-16 provides that no domestic mutual insurance company shall enter into a management contract the effect of which would be to surrender the control and management of the company: *Provided, however*, That exclusive, general, or local agency contracts may be entered into with the approval of the insurance commissioner.

Judicial Decisions

Contracts between an association and its members requiring the latter to ship and sell all of their produce through the association are not invalid when there is no attempt to limit production or control

prices. Such agreements are not against public policy, and do not conflict with any of the provisions of the State or Federal Constitutions. The classification is not an arbitrary one. It is fair and reasonable. *Washington Cranberry Growers Association v. Moore*, 117 Wash. 430, 201 Pac. 773 (1921) aff'd. 204 Pac. 811 (1922).

A cooperative marketing association organized under the Cooperative Marketing Act sought to restrain a milk producer from violating his contract to deliver all of his milk and cream to the association for a period of 10 years. Such contracts are expressly authorized under section 15 of the Cooperative Marketing Act, as amended (Rem. Rev. Stat. sec. 2892) The contracts are valid and the statute under which they were consummated is not in violation of art. XII, sec. 22, nor do they violate the equal-protection and due-process clauses of the Federal Constitution. *Olympia Milk Producers Association v. Herman et ux.*, 176 Wash. 338, 29 Pac. (2d) (1934).

A grower upon entering into a marketing contract with the association to deliver and sell all of his produce through the organization waived a provision of the bylaws requiring a specific number of growers to enter into similar agreements before any of them became effective. The grower cannot subsequently repudiate his contract and interpose the provisions of the bylaws as a defense to a suit for specific performance of the contract. *Wenatchee Dist. Cooperative Association v. Thompson et al.*, 143 Wash. 657, 255 Pac. 918 (1927).

A provision in an exclusive marketing contract between a member and the association providing for liquidated damages in case of a breach of the contract was held not to preclude the association from seeking redress by injunction. *Pierce County Dairymen's Association v. Templin*, 124 Wash. 567, 215 Pac. 352 (1923), See also *Washington Cranberry Growers Association v. Moore*, 117 Wash. 430, 201 Pac. 773, aff'd on reh'g, 204 Pac. 811 (1922).

For other cases dealing with exclusive arrangements between marketing cooperatives and their members see *Washington Co-op. Egg & Poultry Ass'n. v. Taylor*, 122 Wash. 466, 210 Pac. 806 (1922); *Northwest Hay Association v. Hanson*, 135 Wash. 47, 236 Pac. 561 (1925); *Gughielmelli v. Walla Walla Gardener's Ass'n.*, 157 Wash. 109, 288 Pac. 251 (1930).

WEST VIRGINIA



1. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

No provisions.

Judicial Decisions

Application of Common Law.

In General.

The "true test" of the illegality of a contract or combination in restraint of trade is its tendency to injure the public and to control prices, limit production, or suppress competition. *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642, 47 S. E. 247 (1904). *Pocohantas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 56 S. E. 264 (1906). Such a "tendency" is sufficient to render a contract or combination illegal without a showing of evil intent, or actual injury, or attainment of monopoly. *Ibid.*

Under this test it has been held that a combination of three coal companies to form a corporation and enter into contracts giving it the exclusive right to sell the total output of each company at uniform prices, is illegal. *Slaughter v. Thacker Coal & Coke Co.*, *supra*. A similar combination of 20 coke producers to sell their total production through a corporation, organized for the purpose, at the best price the market would afford, each producer to be paid the average price of all coke sold, was held illegal. *Pocohantas Coke Co. v. Powhatan Coal & Coke Co.*, *supra*.

As to Public Utilities.

Although in general partial restraints of trade have been upheld when reasonable, a public utility cannot validly be restrained by private contract to any extent whatever. *West Virginia Transportation Co. v. Ohio River Pipe Line Co., et al.*, 22 W. Va. 600 (1883); *Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.*, 58 W. Va. 22, 50 S. E. 876 (1905). Thus a contract by a property owner, granting an oil-transportation company an exclusive right-of-way across his property for oil pipe lines, was held void. *Wheeling West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, *supra*. Similarly, an agreement between two gas companies within a city, dividing the territory between them and fixing prices, was held invalid. *Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.*, *supra*. However, a municipality may establish a monopoly. Thus a municipal franchise conferring upon a gas company the privilege of using the streets for conveying gas for heating, on condition that the company shall not sell gas for lighting in competition with the city does not constitute an illegal restraint. *City of Wheeling v. Natural Gas Co. of West Virginia*, 74 W. Va. 372, 82 S. E. 345 (1914).

It has been held, moreover, that a railroad company may grant a local transfer company the exclusive privilege of occupying a portion of its property adjacent to the station for the purpose of soliciting patronage, since a railroad is entitled to exercise a choice in granting the use of its private property. *Rose v. Public Service Commission*, 75 W. Va. 1, 83 S. E. 85 (1914). See also *Contracts not to Compete, infra*.

As to Competitive Bidding.

An agreement between two persons to purchase property jointly at a public auction and to divide it later has been held valid, as the combination was merely for the purpose of enabling them to bid for the property, and not for the purpose of suppressing bidding and purchasing the property at an inadequate price. *Henderson v. Henrie*, 61 W. Va. 183, 56 S. E. 369 (1907). However, an agreement between two persons, in the habit of buying property at delinquent tax sales, to become partners in all lands that might thereafter be bought by either at such sales, was held invalid, since the two had been competitive bidders previously and the partnership was entered into to prevent competition in bidding. *Coal & Coke Ry. Co. v. Marple*, 70 W. Va. 136, 73 S. E. 261 (1911).

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS**Code Ann. (Michie and Sublett, 1937)
Resale Price Maintenance**

Sections 4678 (1) to 4678 (8) validate contracts fixing the resale price of branded commodities in open competition with similar commodities. The statute is expressly inapplicable to horizontal agreements between producers, between distributors, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*. **MARKETING LAWS SURVEY** series.

Cooperatives

Section 1955 provides that an agricultural cooperative association organized under sections 1928 to 1957 shall not be deemed a combination in restraint of trade or an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected study.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts****CONSTITUTIONAL PROVISIONS****Railroads**

Const. art. XI, sec. 11 provides that no railroad corporation shall consolidate with any other railroad owning a parallel or competing line or obtain the possession or control of such line by lease or other contract without permission of the legislature.¹

STATUTORY PROVISIONS**Code Ann. (Michie and Sublett, 1937)****Banks**

Sections 3220 and 3221 provide that it shall be unlawful for any person to purchase or hold stock in any banking institution for the purpose of selling, negotiating, or trading participation in the ownership thereof either for the purpose of perfecting control of one or more such banking institutions or to induce others to become participating owners therein.

Necessities

Section 6112 provides that it shall be unlawful for any person buying or selling any foodstuffs, fuel, or other necessities of life

¹ Such permission has been expressly granted to railroads by the Legislature. Code Ann. (1937) sec. 3107.

to store such articles for the purpose of cornering the market, affecting the market price, or limiting the supply thereof to the public, whether temporarily or otherwise. Any person violating this provision shall be guilty of a misdemeanor, punishable by fine or imprisonment.

Agricultural Products

Section 1916 provides that the commissioner of agriculture shall have authority to initiate proceedings to enjoin restraint of trade in, and unlawful combinations to fix the prices of, agricultural products.

Liquor

Section 999 (40) provides that no person shall be licensed in more than one capacity under the terms of this act; that there shall be no connection whatsoever between any retailer or distributor or brewer; and that no person shall be interested directly or indirectly through the ownership of corporate stock, membership in a partnership, or in any other way in the business of a retailer, if such person is at the same time interested in the business of a brewer or distributor. However, a brewer whose place of business is located within the State may bottle and distribute his own product from the place of manufacture, but must have a distributor's license for distribution from a place other than the place of manufacture. Also, a brewer or distributor may sell to a consumer, for personal use and not for resale, draught beer in quantities of one-eighth, one-fourth, and one-half barrels in the original container. Nothing herein contained shall prevent a brewer who bottles beer manufactured by another from obtaining a license as, and engaging in the business of, a distributor, but each bottle shall plainly indicate the name of the actual manufacturer.

Section 999 (43) (e) provides that it shall be unlawful for any brewer or distributor to give, furnish, rent, or sell any equipment, fixtures, signs, or supplies directly or indirectly or through a subsidiary or affiliate to any retail licensee, or to offer any prize, premium, gift, or other similar inducement, except advertising matter of nominal value, to either trade or consumer buyers.

Section 999 (43) provides that any person who violates any provision of this Act or who commits any of the acts herein declared to be unlawful, shall be guilty of a misdemeanor, and shall be punished for each offense by a fine of not less than \$25 nor more than \$500, or imprisonment in the county jail for not less than thirty days or more than six months, or by both in the discretion of the court.

2. Public Contract Provisions

Code Ann. (Michie and Sublett, 1937)
General

Section 2625 (22) provides that if all bids on a pending public contract for the purchase of commodities or services are at the same price, the director of purchases shall have authority to reject all bids and to purchase such commodities on the open market if the price paid on the open market does not exceed the bid prices. See projected Vol. *Governmental Purchasing*.

Construction Contracts

Section 1474 (4) provides that State highway or bridge construction contracts shall not be let to anyone connected with an unlawful combination in restraint of trade or to anyone who has an understanding to limit competition in bidding on the construction or furnishing of materials therefor. Such combinations are forbidden and any person entering into any such combination shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$1,000. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions**Restrictive Covenants Ancillary to the Sale of a Business.**

A contract not to compete entered into pursuant to the sale of a business is valid even if the restraint is not expressly limited as to time and space, since the contract will be construed as covering only such reasonable time and space as are necessary to protect the purchaser. The implication is that the agreement is to last during the life of the seller and to cover such territory as liberally protects the patronage transferred by the contract. *Boggs v. Friend*, 77 W. Va. 531, 87 S. E. 873 (1916).

Restrictive Covenants Ancillary to Employment.

It has been held that a contract by an employee not to engage in a similar business after termination of his employment is valid if it affords only a reasonable protection to his employer's interests. *O. Hommel Co. v. Fink*, 115 W. Va. 686, 177 S. E. 619 (1934).

Restrictive Covenants Not Ancillary to the Sale of a Business.

A contract between two corporations furnishing a city with gas, whereby they divide the territory between them, fix prices, and prohibit changes in price except by mutual consent, and whereby one company agrees to use only gas produced by the other and not to produce in the area where the other was producing, has been held invalid. *Charlestown Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.*, 58 W. Va. 22, 50 S. E. 876 (1905).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Code Ann. (Michie and Sublett, 1937)
Cooperatives

Sections 1943 and 1955 provide that a cooperative agricultural association organized under Sections 1927 to 1957 may enter into contracts with its members requiring them to sell, for any period not over 20 years, all or part of their agricultural products or specified commodities exclusively to or through the association or by means of facilities to be created by the association. Such contracts shall not be considered in restraint of trade or part of a conspiracy to accomplish an illegal purpose. See *Exceptions to General Anti-trust Laws, supra*. See also *Cooperatives* in projected study.

WISCONSIN

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

No provisions.

STATUTORY PROVISIONS

Rev. Stat. (1939)

Sec. 133.01. Unlawful contracts; conspiracies.—(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement, or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced, or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee, or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool, or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association, or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than one hundred dollars nor more than five thousand dollars. Any such person, corporation, copartnership, trustee, or association shall also be liable to any person transacting or doing

business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section.

(2) It shall be the duty of the attorney general to enforce the provisions of this act and to bring an action for the recovery of the forfeiture herein provided for, whenever complaint shall be made to him and evidence produced which shall satisfy him that there has been any violation thereof. The several district attorneys shall, upon the advice of the attorney general, who may appear as counsel in any such case, institute such actions or proceedings as he shall deem necessary to recover any forfeiture incurred on account of the violation of any of the provisions of this act.

Sec. 133.02. Injunction; pleading; practice.—The several circuit courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof. The several district attorneys shall, upon the advice of the attorney general, who may appear as counsel in any such case, institute such actions or proceedings as he shall deem necessary to prevent or restrain a violation of the provisions of the preceding section, which shall be begun by way of information or complaint as in ordinary actions, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing, shall be enjoined or otherwise prohibited. When the parties informed against or complained of shall have been served with a copy of the information or complaint and cited to answer the same the court shall proceed, as soon as may be in accordance with its rules, to the hearing and determination of the case; and pending the filing of the answer to such information or complaint may, at any time, upon proper notice, make such temporary restraining order or prohibition as shall be just. Whenever it shall appear to the court that the ends of justice require that other persons should be made parties to the action or proceeding the court may cause them to be brought in in such manner as it shall direct.

Sec. 133.03. Examination of adverse party; records; contempt.—(1) The examination of any party, or if a corporation be a party, of the president, secretary, other principal officer or the general managing agent thereof, or of the person who was such president, secretary, officer or agent at the time or the occurrence of the facts made the subject of the examination, or of any person acting for another or for a corporation or partnership, other than as a witness on a trial, may be taken by deposition at the instance of the attorney general in any such action or proceeding at any time intermediate the commencement thereof and final judgment. Such deposition shall be taken within the state before a judge at chambers or a court com-

missioner on a previous notice to such party and any other adverse party or the attorney thereof of at least five days, and may be taken without the state in the manner provided in these statutes for taking other depositions.

(2) The attendance of the party to be examined may be compelled by subpoena, without prepayment of witness' fees, and the examination shall be subject to the same rules as govern that of other witnesses; but he shall not be compelled to disclose anything not relevant to the controversy. If the examination shall be taken before issue joined, the notice of taking it shall be accompanied by the affidavit of the attorney general, district attorney or some party stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points upon which such discovery is desired; such examination shall be confined to the discovery of the facts relevant to the points so stated, unless the court or the presiding judge thereof, on motion and one day's notice, shall, before the examination is begun, by order further limit the scope thereof. Such examination shall not preclude the right to another examination after issue is joined upon all the questions in the cause, and the party examining shall in all cases be allowed to examine upon oral interrogatories.

(3) The examination shall not be compelled in any other county in this state than that of the party's residence except in the county of Dane: *Provided*, That whenever the defendant is a nonresident of the state his deposition may be taken as in other cases. In any such examination the judge or commissioner before whom the same is had shall have authority to compel the party examined to answer all questions relevant to the issues and shall, on application by the attorney general or district attorney, compel the production by such party of all books, papers, and records relevant and pertinent to the issues. If any defendant or his agent who is lawfully required to appear and testify on such examination or to produce such books, papers, or records shall, either within or without the state, neglect or refuse to do so he may be punished as for contempt, and the pleading of any such defendant may, in the discretion of the court, be stricken out and judgment rendered against him according to the prayer of the complaint.

Sec. 133.04. Partnerships included.—The word "person" wherever used in the three next preceding sections shall be deemed to include, besides individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States, any of the territories of this or any other state or of any foreign country: *Provided*, That nothing therein shall be construed

to affect labor unions or any other association of laborers organized for the purpose of promoting the welfare of its members, nor associations or organizations intended to legitimately promote the interests of trade, commerce or manufacturing in this state: *Provided further*, That nothing therein shall be construed to affect associations, corporate or otherwise, of farmers, gardeners or dairymen, including live stock farmers and fruit growers engaged in making collective sales or marketing for its members or shareholders of farm, orchard or dairy products produced by its members or shareholders.

Sec. 133.05. Certain organizations not forbidden.—Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. The labor of a human being is not a commodity or article of commerce.

Sec. 133.06. Inquisitorial proceeding.—(1) Whenever the attorney general shall file with any circuit court commissioner of this state a written statement or declaration that he has reason to believe and does believe that a contract, agreement, combination, trust or conspiracy in restraint of trade as defined by section 133.01 or 133.21, exists or that a violation of said or either of said sections has occurred in this state, or in any locality thereof, it shall be the duty of said circuit court commissioner to issue his subpoena for such persons as may be requested by the attorney general, requiring them to appear before him at a time and place to be fixed in said subpoena. Said subpoena may also require the production of all papers, books, files, or records in the possession of the person so subpoenaed. It shall not be necessary to pay the person so subpoenaed any mileage or witness fees in advance but claims for such mileage and fees duly verified and approved by the attorney general shall be audited and paid out of the state treasury and charged to the appropriation provided by subsection (2) of section 20.08, and shall be at the same rates as provided for witnesses for the circuit court.

(2) It shall be the duty of any person so subpoenaed to appear as commanded by such subpoena, and upon his failure so to do or to produce any papers, books, files or records in his possession, the commissioner so subpoenaing may punish such person as for contempt. It shall be the duty of any person so subpoenaed to answer under oath all inquiries that may be put to him by the attorney general, his

deputy, any of his assistants, or any district attorney or special counsel for the state acting under his direction, touching or relating to the existence of any contract, agreement, combination, trust or conspiracy in restraint of trade, as defined by section 133.01 or 133.21, and upon his failure to make full and complete answers and disclosures to all such questions as may be put to him, the court commissioner before whom such proceedings are pending is empowered to punish such witness as for contempt.

(3) Such testimony shall be taken by a stenographic reporter, transcribed into longhand, read over to or by the deponent and (unless such signing be waived by the state) be signed by him before the officer before whom the same was taken, and shall be kept and preserved by the attorney general as a part of the records of his office.

(4) The court commissioner shall be entitled to the usual fees for issuance of subpoenas and administering of oaths, and ten dollars per day for the time consumed in holding the inquiry. The stenographic reporter shall be entitled to ten cents per folio for taking and transcribing the testimony. All such fees and all other costs and expense incident to such inquiry shall be paid out of the appropriation provided by subsection (2) of section 20.08.

Sec. 133.07. Working people may organize; injunction not to restrain certain acts.—(1) Working people may organize themselves into or carry on labor unions and other associations or organizations for the purpose of aiding their members to become more skilful and efficient workers, the promotion of their general intelligence, the elevation of their character; the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit.

(2) No restraining order or injunction shall be granted by any court of this state, in any case between an employer and employes, or between employers and employes, or between employes, or between persons employed and persons seeking employment, involving or growing out of any dispute whatsoever concerning employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant, or by his agent or attorney. No such restraining order or injunction shall be granted

except by the circuit court or by a court of concurrent jurisdiction in equity, and then only upon such reasonable notice of application therefor as a presiding judge of such court may direct by order to show cause, but in no case less than forty-eight hours, which shall be served upon such party or parties sought to be restrained or enjoined as shall be specified in such order to show cause.

(3) No such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any laws of this state.

(4) Whenever in any matter relating to the violation of any such restraining order or injunction an issue of fact shall arise, such issue, whether presented in a civil or a criminal proceeding, shall be tried by a jury, in the same manner as provided for the trial of other cases. All contempt proceedings, whether civil or criminal, brought for the alleged violation of any such restraining order or injunction, are, and hereby are declared to be independent, original, special proceedings, and shall require a unanimous finding of the jury. The requirement for trial by jury shall not apply to direct contempts committed in the immediate presence of the court. (1931, c. 56.)

Sec. 133.08. Collective bargaining.—Sections 133.01, 133.04, 133.21, and 226.07 shall be so construed as to permit collective bargaining by associations of producers of agricultural products and by associations of employes when such bargaining is actually and expressly done for the individual benefit of the separate members of each such association making such collective bargain.

Sec. 133.17. Unfair discrimination in trade; unlawful selling.—

(1) Any person, firm, or corporation, foreign or domestic, doing business in this state and engaged in the production, manufacture, or distribution of any commodity in general use, that shall intention-

ally, for the purpose of injuring or destroying the competition of any regular, established dealer in such commodity or to prevent competition of any person who, in good faith, intends or attempts to become such dealer, discriminate between different sections, communities, or cities of this state, or between persons, firms, associations, or corporations in any locality of this state, by selling such commodity at a lower rate or price in one section, community, or city, or any portion thereof, or to any person, firm, association, or corporation in any locality of this state, than the rate or price at which said person, firm, or corporation, foreign or domestic, sells such commodity in another section, community, or city, or to another person, firm, association, or corporation in any locality of this state, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

(2) Any person, firm, company, association, or corporation, and any officer, agent, or receiver of any firm, company, association, or corporation, or any member of the same, or any individual violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred dollars, nor more than five thousand dollars for each offense, or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment.

Sec. 133.18. Same; unlawful buying.—(1) Any person, firm, company, association, or corporation, foreign or domestic, doing business in this state and engaged in the business of collecting or buying any product, commodity, or property of any kind, that shall intentionally, for the purpose of injuring or destroying the business or trade of a competitor in any locality of this state, or to prevent competition by any person who in good faith intends or attempts to engage in such business, discriminate between the different sections, communities, or cities of this state, or between persons, firms, associations, or corporations in any locality in this state, by buying any product, commodity, or property of any kind, and paying therefor a higher rate or price in one section, community, or city or to any person, firm, association, or corporation in any locality of this state, than is paid for the same kind of product, commodity, or property by said person, firm, company, association, or corporation, foreign or domestic, in another section, community or city, or to another person, firm, association, or corporation in any locality of this state, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

(2) Any person, firm, company, association, or corporation, and any officer, agent, or receiver of any firm, company, association, or

corporation, or any member of the same, or any individual violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred dollars nor more than five thousand dollars for each offense, or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment.

Sec. 133.19. Prosecutions.—The attorney general shall institute, manage, control, and direct, by himself, his deputy or any of his assistants, in the proper county, all prosecutions for violations of sections 133.17 to 133.185 and for such purpose shall have and exercise all powers conferred upon district attorneys in such cases. It shall be the duty of the district attorney in the county in which any such prosecution may be instituted or pending to cooperate with and assist the attorney general in such prosecution. (1935, c. 52, 486.)

Sec. 133.20. Revoke charter.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by the provisions of sections 133.17 to 133.185, he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony and require the production of books or other documents, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and if in such action the court shall find that such corporation is guilty of unfair discrimination, as defined by the provisions of said sections 133.17 to 133.185, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state. (1935, c. 52, 486.)

Sec. 133.21. Domestic corporations; cancellation of charters for restraining trade; affidavit.—Any corporation organized under the laws of this state which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its charter or authority to do business in this state canceled and an-

nulled. Every corporation shall upon filing its annual report with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in this section.

Sec. 133.22. Duty of attorney general.—Whenever the attorney general shall be notified or have reason to believe that any such corporation has violated any provision of section 133.21 it shall be his duty forthwith to address to any such corporation or to any director or officer thereof such inquiries as he may deem necessary for the purpose of determining whether or not such corporation has violated any provision of said section, and it shall be the duty of such corporation, director or officer so addressed to promptly and fully answer in writing, under oath, such inquiries; and in case such corporation, director or officer thereof fail or neglect to do so within sixty days from the receipt of such inquiries, unless such time is extended in writing by the attorney general, it shall be his duty to proceed against such corporation as provided in the next section.

Sec. 133.23. Ouster.—Upon complaint being made to the attorney general and evidence produced to him which shall satisfy him that any such corporation has violated any of the conditions specified in sections 133.21 and 133.22, he shall forthwith bring an action in the name of the state in any circuit court of this state to have the charter of such corporation forfeited, canceled, and annulled, and upon due proof being made thereof to the satisfaction of the court, judgment shall be entered therefor. All contracts or agreements made by any person, firm, corporation, or association while a member of any combination, conspiracy, trust or pool prohibited by sections 133.01, 133.21, and 226.07 of the statutes, or any of them, and which contract or agreement is founded upon, or is the result of, or grows out of, or is connected with, any violation of said sections, or any of them, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom shall be had by or for any such person, firm, corporation or association. Any payments made upon, under or pursuant to such contract or agreement to or for the benefit of such person, firm, corporation or association, may be recovered in an action by the party making any such payment, his heirs, personal representatives or assigns; provided, however, that suit for such recovery shall be brought within six years after the making of said contract or agreement.

Sec. 133.24. No privilege from self-accusation.—No person shall be excused from answering any of the inquiries herein provided for, nor from attending and testifying, nor from producing any books, papers, contracts, agreements or documents in obedience to a subpoena issued by any lawful authority in any case or proceeding based upon or growing out of any alleged violation of any of the provisions of

section 133.21, or of any law of this state in regard to trusts, monopolies, or illegal combinations on the ground of or for the reason that the answer, testimony, evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may answer, testify or produce evidence, documentary or otherwise, in obedience to any request under these provisions or any subpoena, or either of them, in any case or proceeding, except that the charter of any corporation may be vacated and its corporate existence annulled as hereinbefore provided, and except further, that no person testifying in any case or proceeding aforesaid shall be exempt from punishment for perjury committed in so testifying.

Section 133.25 constitutes the "Fair Trade Act." See *Exceptions to General Antitrust Laws, infra*.

Sec. 133.26. Certain contracts declared illegal.—Any contract, express or implied, entered into in violation of any of the provisions of sections 133.17, 133.18, or 133.185, is an illegal contract and no recovery shall be had thereon. (1935, c. 52, 486.)

Sec. 133.27. Legislative intent declared.—The intent of sections 133.17 to 133.185, and section 133.25 is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented. Said sections shall be liberally construed so that their beneficent purposes may be subserved. (1935, c. 52, 486.)

Sec. 348.401. Antitrust laws, violations.—Any person or persons who, individually or as an officer, director, or agent of any corporation, shall violate or advise, abet, or aid in a violation of any provision of section 133.01 or section 133.21, shall be punished by imprisonment in the state prison not to exceed five years, or by imprisonment in the county jail not to exceed one year, or by fine not exceeding five thousand dollars, or by both such imprisonment and fine.

Foreign Corporations

Sec. 226.07. Combinations and trusts.—Any foreign corporation which shall enter into any combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity

thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its license or authority to do business in this state canceled and annulled. (1931, c. 97, sec. 11.)

Sec. 226.08. (Repealed by 1931, c. 97, sec. 12.)

Sec. 226.09. Ouster.—Upon complaint and evidence which shall satisfy the attorney general that any foreign corporation has violated section 226.07, he shall forthwith bring an action in the name of the state in any circuit court to have the license of such corporation to do business in this state annulled and to oust it from this state. The provisions of section 133.24 shall extend to all proceedings under this section. (1931, c. 97, sec. 13.)¹

Conspiracy Statute

Section 343.681 provides that a combination by two or more persons for the purpose of wilfully injuring another in his reputation, trade, business, or profession by any means whatever is illegal and is punishable by imprisonment in county jail not more than one year or by fine not exceeding \$500.

Judicial Decisions

Application of Common Law.

A combination between a retail coal dealer and certain wholesalers to force out of business all retailers not parties thereto is in violation of the common law. *Hawarden v. Youghiogheny and L. Coal Co.*, 111 Wisconsin 545, 87 N. W. 472 (1901).

At common law public utilities have no right to a monopoly. Accordingly, a company organized as a private corporation with no attempt to comply with the provisions of the Public Utility Act regulating utilities is, nevertheless, subject to control by the railroad commission. *Commonwealth Telephone Co. v. Carley*, 192 Wis. 464, 213 N. W. 469 (1927).

Application of Statutes.

In General.

Section 133.01 is similar to the Federal antitrust statutes, and in construing it, the State courts have followed the interpretations rendered by the Supreme Court of the United States. *Pulp Wood Co.*

¹ Secs. 226.07 and 226.09 are a part of the Foreign Corporation Law, secs. 226.01 to 226.14.

v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N. W. 1058 (1914). Id. 168 Wis. 400, 170 N. W. 230 (1919), certiorari denied, 249 U. S. 610, 39 Sup. Ct. 291, 63 L. Ed. 800.

A plan adopted by an association of tobacco dealers providing for price fixing and a scheme of selling to members or persons on a certain jobbers' list only, is in violation of the antitrust laws (*dicta*). The complaint containing no averments that defendants are continuing the alleged unlawful combination, or that they threaten to continue it in the future, states no cause of action for injunctive or equitable relief. *State v. P. Lorillard Co.*, 181 Wis. 347, 193 N. W. 613 (1923).

Coercion by closing or materially narrowing trade outlets to competitors is not an essential element in an unlawful restraint of trade. Nor is it necessary that the restraint be general in scope of territory. It may be unlawful, even though confined within the limits of the city of Milwaukee. *State v. Lewis & Leidersdorf Co.*, 201 Wis. 543, 230 N. W. 692 (1930).

A contract of purchase of one rural telephone line by a competing company containing provisions against future duplication of services thereby resulting in cheaper rates is not against public policy nor in violation of the Antitrust Act. *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 140 N. W. 38 (1913).

A monopoly created by the issuance of patent rights is not a violation of the antitrust law. A contract appointing defendant special agent for plaintiff's patented patterns providing that defendant sell plaintiff's products exclusively at labelled prices is not in restraint of trade. *Butterick Publishing Co. v. Rose*, 141 Wis. 533, 124 N. W. 647 (1910); *Rose v. Gordon*, 158 Wis. 414, 149 N. W. 158 (1914). Cf. *Rubber Tire Wheel Company v. Milwaukee Rubber Works Company*, 142 Fed. 531 (1906) (patent rights may be abused by arbitrary and unreasonable price fixing).

Bylaws of an association of masons and builders requiring that members pay 6 percent of the contract price as dues, all bids be submitted first for approval by the association, and that the lowest bidder add 6 percent to his bid before placing it with the owner are all contrary to public policy and void. *Milwaukee Masons & Builders Association v. Niezerowski*, 95 Wis. 129, 70 N. W. 166 (1897).

A combination of liverymen refusing to do business with prospective customers who did not guarantee to deal exclusively with the combination was held void. *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003.

A manufacturer under the antitrust laws is not prohibited from dealing with such persons as he chooses. He may refuse to deal with those who will not conform to listed resale prices, unless by so doing the

practice tends to create and establish a monopoly. *Singer Sewing Machine Company v. Lang*, 186 Wis. 530, 203 N. W. 399 (1925).

Procedural and Remedial Provisions.

A corporation charged with maintaining a monopoly cannot defeat an action to recover damages by invoking the constitutional privilege of immunity. Immunity is a personal right, and the corporation cannot prevent the inspection of its books on such a theory. *Nekoosa-Edwards Paper Company v. News Publishing Company*, 174 Wis. 107, 182 N. W. 919 (1921).

The charter and license of a domestic and a foreign corporation shall be revoked and cancelled, if combined for monopolistic practices to restrain trade. *State v. P. Lorillard Company, supra*.

A purchaser of goods is not relieved from payment therefor by the mere fact that a corporation is an unlawful combination formed in violation of the antitrust laws. *Pulp Wood Company v. Green Bay Paper & Fiber Company, supra*.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

Rev. Stat. (1939)

Resale Price Maintenance

Section 133.25 provides that contracts fixing the resale price of branded commodities in open competition with similar commodities are valid. The act is expressly inapplicable to agreements between producers, between distributors, or between retailers. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Labor, Agricultural, or Horticultural Organizations

Section 133.05 provides that labor, agricultural, or horticultural organizations shall not be considered illegal combinations or conspiracies in restraint of trade under the antitrust laws. See *General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

Section 133.04 provides that sections 133.01 to 133.04 of the antitrust law shall not be construed to affect associations of farmers, gardeners, or dairymen, including livestock farmers and fruit growers engaged in making collective sale or marketing for its members or shareholders of farm, orchard, or dairy products produced by its members or shareholders. See *General Antitrust Laws, supra*.

Labor Unions

Section 133.07 provides that working people may organize themselves into labor unions. See *General Antitrust Laws, supra*.

C. SPECIAL ANTITRUST LAWS**1. Special Industry Antitrust Acts**

Rev. Stat. (1939)

Railroads

Section 190.06 provides that no railroad corporation shall consolidate with or in any way own or control any other corporation which owns or controls a parallel and competing railroad.

Hydraulic and Hydroelectric Power

Section 31.22 provides that if any dam maintained under a permit is used as part of an unlawful combination, or is controlled by any combination in the form of an unlawful trust, or forms the subject of a conspiracy to limit the output of hydraulic or hydroelectric power derived therefrom, or to restrain unlawfully trade in the distribution of such power, the state may take possession by receivership proceedings.

Swiss Cheese Dealers

Section 100.05 provides that swiss cheese dealers shall have their license to purchase swiss cheese revoked if found to be engaged in any practice or agreement in restraint of trade.

Fire Insurance

Section 203.23 provides that no fire, fire and marine, or marine and inland insurance company shall enter into any agreement, combination, or compact for the purpose of establishing and maintaining rates; except such agreements as are authorized by statute, or such as may be filed with and approved by the commissioner of insurance.

Warehouses

Section 126.37 provides that it shall be unlawful for any public warehouseman to enter into any contract, understanding, or combination with a railroad or other person or corporation by which the property of any person is to be delivered to any public warehouse for storage, or other purpose contrary to the direction of the owner.

Liquor

Section 176.17 (1)-(6) provides: (1) No manufacturer, rectifier, or wholesaler shall hold the ownership, directly or indirectly, of any interest in any license to sell products of the industry for consumption on the premises covered by such license;

(2) No manufacturer, rectifier, or wholesaler shall furnish, give, or lend any money or thing of value, directly or indirectly or through

a subsidiary or affiliate, or by any officer, director, or firm member of the industry, to any person engaged in selling products of the industry for consumption on the premises where sold, or to any person for the use, benefit, or relief of said person engaged in selling as above; or to guarantee the repayment of any loan or the fulfillment of any financial obligation of any person engaged in selling as above. Nothing herein contained shall affect the extension of usual and ordinary commercial credits for the products of the industry sold and delivered. No person licensed to sell intoxicating liquors for consumption on the premises where sold shall receive, or be the beneficiary of, any of the benefits hereby prohibited;

(3) No manufacturer, rectifier, or wholesaler shall furnish, give, rent, lend, or sell any equipment, fixtures, or supplies, directly or indirectly, or through a subsidiary or affiliate, or by any officer, director, or firm member of the industry, to any person engaged in selling products of the industry for consumption on the premises where sold. No person licensed to sell products of the industry shall receive, or be the beneficiary of, any of the benefits hereby prohibited;

(4) No manufacturer, rectifier, or wholesaler shall furnish, give, lend, or rent any interior decorations other than signs, or furnish, give, lend, or rent any sign or signs, for inside or outside use, costing collectively more than twenty-five dollars in any one calendar year, to any person licensed to sell intoxicating liquors for consumption on the premises where sold, either directly or indirectly, or through a subsidiary or affiliate, or by any officer, director, or firm member of any such manufacturer, rectifier or wholesaler. No person licensed to sell products of the industry shall receive, or be the beneficiary of, any of the benefits hereby prohibited;

(5) No manufacturer, rectifier, or wholesaler shall hold any interest in any premises hereafter acquired in which intoxicating liquors are sold at retail for consumption on the premises where sold;

(6) The violation of any provision of this section by any manufacturer, rectifier, wholesaler, retailer, or other licensee shall be sufficient cause for the revocation of the license of the manufacturer, rectifier, or wholesaler if such license shall be required, or of the licensee receiving the benefit from the prohibited act.

Section 176.41 provides that any person who shall violate any of the provisions of this chapter for which a specific penalty is not herein provided shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than \$500, or by imprisonment in the county jail or house of correction for not more than ninety days, or by both, and any license issued to him

shall be subject to revocation by the court in its discretion. In the event that any such person shall be convicted of a second offense, such offender, in addition to the penalties herein provided, shall forthwith forfeit the right to purchase any stamps from the State treasurer, and any license which may have been issued to him by any city, village, or town shall without notice be forthwith forfeited.

Malt Beverages

Section 66.05 (10c) (1) provides that no brewer, bottler, wholesaler, or corporation a majority of whose stock is owned by any of the above, shall supply, furnish, lease, give, pay for, or take any chattel mortgage on any furniture, fixtures, fittings or equipment used in or about any place which shall require a class B license for the retail sale of fermented malt beverages to be consumed on or off the premises where sold; nor shall they lease any real estate acquired after the effective date of this subsection to any person for the purpose of conducting therein any business requiring such a class B license: *Provided, however,* That this prohibition as to leasing of real estate shall not apply to a hotel, or to a restaurant in a part of or located in or upon the premises of any mercantile establishment, or to a bona fide club, society, or lodge that shall have been in existence for not less than six months prior to the date of granting such license; nor shall they advance, pay, or furnish money or any license fees or taxes which may be required to be paid by any retailer or be otherwise financially interested, directly or indirectly, in any class B license. However, an exception to the above restrictions allows a brewer to furnish, maintain, and operate in and upon the brewery premises a place for the sale of fermented malt beverages for which a class B license is required. Any licensee who shall be a party to any violation of this subdivision or shall receive the benefits thereof shall be equally guilty of a violation of the provisions thereof.

Section 66.05 (10) (m) (1) provides that any person who violates the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$500, or by imprisonment in the county jail for a term of not more than 90 days, or by both, and such license shall be subject to revocation. Upon conviction for a second offense, in addition to the penalties hereinbefore provided, such person shall forfeit any license issued to him without further notice, and no license shall thereafter be granted to such person for a period of one year from the date of such forfeiture.

2. Public Contract Provisions

Rev. Stat. (1939) Printing

Section 35.47 provides that the Director of Purchases may reject all bids for certain state printing whenever he is satisfied that any of the bids have been presented pursuant to an agreement, understanding, or combination to prevent free competition. See projected Vol. *Governmental Purchasing*.

Textbooks

Section 40.28 provides that a person offering textbooks for sale to schools must file a bond to guarantee, among other things, that he will not enter an agreement, contract, understanding, or combination to control prices or restrict competition in sale of school books. See projected Vol. *Governmental Purchasing*.

Patented Articles

Section 62.15 provides that public works of a city may be done by use of a patented article, materials, or process when the city shall have obtained from the owner of the patent, before advertising for bids, an agreement to furnish to any contractor desiring to bid upon such work as a whole, the right to use the patented article, materials, and processes, and also to furnish to any contractor the patented article itself upon payment of what the authorities letting the contract for such public work shall determine to be a reasonable price. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

Rev. Stat. (1939)

Sec. 218.01. Motor vehicle dealers; salesmen; sales finance companies, licenses; fees; regulations; coercion; subsidies; penalties.—(1) DEFINITIONS. In this section, unless the context otherwise requires, the following words and terms shall have the following meanings:

(a) "Motor vehicle dealer" means any person, firm, or corporation, not excluded by paragraph (b) of this subsection who:

1. For commission, money, or other thing of value, sells, exchanges, buys, or rents or offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,

2. Who is engaged wholly or in part in the business of selling motor vehicles whether or not such motor vehicles are owned by such person, firm, or corporation.

(b) The term "motor vehicle dealer" does not include:

1. Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court; or

2. Public officers while performing their official duties; or

3. Employes of persons, corporations, or associations enumerated in subdivisions 1 and 2 of this paragraph, when engaged in the specific performance of their duties as such employes.

(c) "Motor vehicle salesman" means any person who is employed as a salesman by a motor vehicle dealer to sell motor vehicles.

(d) "Sales finance company" means and includes any person, firm or corporation engaging in this state in the business, in whole or in part, of acquiring by purchase or by loan on the security thereof, or otherwise, retail instalment contracts from retail sellers in this state, including any motor vehicle dealer who shall carry or retain for more than thirty days any retail instalment contracts acquired by him in his retail sales of motor vehicles.

(e) "Retail instalment contract" or "instalment contract" means and includes every contract to sell one or more motor vehicles at retail, in which the price thereof is payable in one or more instalments over a period of time and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under a form of contract designated either as a conditional sale, chattel mortgage or otherwise.

(f) "Retail seller" means a person, firm or corporation selling or agreeing to sell one or more motor vehicles under a retail instalment contract to a buyer for the latter's personal use or consumption thereof.

(g) "Retail buyer" means a person, firm or corporation buying or agreeing to buy one or more motor vehicles from a retail seller under a retail instalment contract.

(h) "Cash price" means the retail seller's price in dollars for the sale of the goods, and the transfer of unqualified title thereto, upon payment of such price in cash or the equivalent thereof.

(i) "Finance charge" means that part of the total price in the retail instalment contract of sale in excess of the cash price, and includes, unless otherwise specified, the insurance premium, if any.

(j) The term "commission" means the state banking commission and including any member or members thereof or any duly authorized deputy named or appointed by such commission to perform any function in the administration or enforcement of this section.

(k) "Motor vehicle" means any motor driven vehicle required to be registered under section 85.01.

(l) "Manufacturer" means any person resident or nonresident in this state who manufactures or assembles motor vehicles in this state.

(m) "Distributor" or "wholesaler" means a person, resident or nonresident in this state, who in whole or part, sell or distributes motor vehicles to motor vehicle dealers in this state, or who maintains distributor representatives in this state.

(n) "Factory branch" means a branch office maintained in this state, by a person who manufactures or assembles motor vehicles, for the sale of motor vehicles to distributors, or for the sale of motor vehicles to motor vehicle dealers or for directing or supervising in whole or part, its representatives in this state.

(o) "Distributor branch" means a branch office similarly maintained by a distributor or wholesaler for the same purposes.

(p) "Factory representative" means a representative employed by a person who manufactures or assembles motor vehicles or by a factory branch, for the purpose of making or promoting the sale of its motor vehicles, or for supervising or contacting its dealers or prospective dealers.

(q) "Distributor representative" means a representative similarly employed by a distributor, distributor branch or wholesaler.

(r) "Person" means a person, firm, corporation or association.

Subsection (2) [Licensing] provides for the licensing of all motor vehicle dealers, salesmen, or sales finance companies, and sets forth the requirements for and procedure in granting such licenses.

(3) Licenses, how denied, suspended, or revoked.—(a) A license may be denied, suspended or revoked on the following grounds:

4. Wilful failure to comply with any provision of this section or any rule or regulation promulgated by the commission under this section.

14. Having violated any law relating to the sale, distribution or financing of motor vehicles.

15. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has induced or coerced or attempted to induce or coerce any automobile dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities which shall not have been ordered by said dealer.

16. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has attempted to induce or coerce, or has induced or coerced, any auto-

mobile dealer to enter into any agreement with such manufacturer, factory branch or representative thereof, or to do any other act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch or representative thereof and said dealer.

17. Being a manufacturer, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has unfairly, without due regard to the equities of said dealer and without just provocation, canceled the franchise of any motor vehicle dealer.

Subsections (3) (a) 1 to 3, 5 to 13, and (b) to (g) provide the other grounds for suspension or revocation of licenses, and the procedural requirements which must be complied with before such revocation.

Subsection (4) provides for the appointment of local advisory committees.

Subsection (5) [Rules and regulations.] (a) The banking commission shall promote the interests of the retail buyers of motor vehicles. It shall have power to define unfair practices in the motor vehicle industry and trade between licensees or between any licensees and retail buyers of motor vehicles.

(b) The commission shall have the power in hearings and trials arising under this section to determine the place, in the state of Wisconsin, where they shall be held; to subpoena witnesses; to take depositions of witnesses residing without the state, in the manner provided for in civil actions in courts of record; to pay such witnesses the fees and mileage for their attendance as is provided for witnesses in civil actions in courts of record; and to administer oaths. Whenever a hearing or trial shall be held by a member of the commission or by an examiner, he shall report his findings in writing to the entire commission, which shall thereupon make its rulings and orders.

(c) The commission may make such rules and regulations as it shall deem necessary or proper for the effective administration and enforcement of this section, the same to be effective when published at least once in the official state paper, but no licensee shall be subject to examination or audit by the commission except as provided in paragraph (d) of subsection (3) of this section.

Subsection (6) provides the formal requirements which retail instalment sales contracts must meet.

Subsection (7) [Prohibited acts.] (a) No manufacturer of motor vehicles, no wholesaler or distributor of motor vehicles, and no officer, agent, or representative of either shall induce or coerce, or attempt to induce or coerce, any retail motor vehicle dealer or prospective

retail motor vehicle dealer in this state to sell, assign, or transfer any retail instalment sales contract, obtained by such dealer in connection with the sale by him in this state of motor vehicles manufactured or sold by such manufacturer, wholesaler or distributor, to a specified sales finance company or class of such companies, or to any other specified person, by any of the acts or means hereinafter set forth:

1. By any statement, suggestion, promise, or threat that such manufacturer, wholesaler or distributor will in any manner benefit or injure such dealer, whether such statement, suggestion, threat or promise is express or implied, or made directly or indirectly.

2. By any act that will benefit or injure such dealer.

3. By any contract, or any express or implied offer of contract, made directly or indirectly to such dealer, for handling such motor vehicles, on the condition that such dealer sell, assign or transfer his retail instalment contract thereon, in this state, to a specified sales finance company or class of such companies, or to any other specified person.

4. By any express or implied statement or representation, made directly or indirectly, that such dealer is under any obligation whatsoever to sell, assign or transfer any of his retail sales contracts, in this state, on motor vehicles manufactured or sold by such manufacturer, wholesaler or distributor to such sales finance company, or class of companies, or other specified person, because of any relationship or affiliation between such manufacturer, wholesaler or distributor and such finance company or companies or such specified person or persons.

(b) Any such statements, threats, promises, acts, contracts or offers of contracts, set forth in paragraph (a) of this subsection are declared unfair trade practices and unfair competition and against the policy of this state, are unlawful and are prohibited.

(c) No sales finance company, and no officer, agent, or representative thereof, shall induce or coerce or attempt to induce or coerce any retail motor vehicle dealer to transfer to such sales finance company any of the retail instalment sales contracts in this state of such dealer on any motor vehicle by any of the following acts or means, namely:

1. By any statement or representation, express or implied, made directly or indirectly, that the manufacturer, wholesaler or distributor of such motor vehicles will grant such dealer a franchise to handle such motor vehicles if such dealer shall sell, assign or transfer all or part of such retail sales contracts to such sales finance company.

2. By any statement or representation, express or implied, made directly or indirectly, that the manufacturer, wholesaler or dis-

tributor of such motor vehicles will in any manner benefit or injure such dealer if such dealer shall or shall not sell, assign or transfer all or part of such retail sales contracts to such sales finance company.

3. By an express or implied statement or representation made directly or indirectly, that there is an express or implied obligation on the part of such dealer to sell, assign, or transfer all or part of such retail sales contracts on such motor vehicles to such sales finance company because of any relationship or affiliation between such sales finance company and the manufacturer, wholesaler or distributor of such motor vehicles.

(d) Any such statement or representations set forth in paragraph (c) of this subsection are declared to be unfair trade practices and unfair competition and against the policy of this state, are unlawful and are prohibited.

(e) Any retail motor vehicle dealer who, pursuant to any inducement, statement, promise or threat hereinbefore declared unlawful, shall sell, assign, or transfer any or all of his retail instalment contracts shall not be guilty of any unlawful act and may be compelled to testify to each such act.

(f) No manufacturer shall directly or indirectly pay or give, or contract to pay or give, anything of service or value to any sales finance company licensee in this state, and no such licensee in this state shall accept or receive or contract or agree to accept or receive directly or indirectly any payment or service of value from any manufacturer, if the effect of the payment or giving of any such thing or service or value by the manufacturer, or the acceptance or receipt thereof by the sales finance company licensee, may be to lessen or eliminate competition or tend to grant an unfair trade advantage or create a monopoly in the licensee who accepts or receives the payment, thing, or service of value or contracts or agrees to accept or receive the same.

(g) No used motor vehicle shall be offered for sale by any motor vehicle dealer or motor vehicle salesman unless the speedometer reading thereon shall be turned back to zero.

(h) It shall be unlawful for any motor vehicle dealer or motor vehicle salesman to refuse to furnish, upon request of a prospective purchaser, the name of the previous owner of any used car offered for sale.

Subsection (8) [Penalties] Any person, firm, or corporation violating any of the provisions of this section shall be deemed guilty of misdemeanor and upon conviction thereof shall be punished as follows:

1. For violation of any provision of subsection (7) of this section, by a fine of not exceeding ten thousand dollars or by imprisonment

in the county jail for not to exceed one year, or by both such fine and imprisonment.

2. For violation of subsection (2) of this section, by a fine not exceeding five hundred dollars or by imprisonment in the county jail for a period not to exceed ninety days, or by both such fine and imprisonment.

Subsection (9). **Severability.**—If any provision of this section or the application thereof to any person or circumstance is held unconstitutional, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby. (1935, c. 474; 1937, c. 377, 378, 417.)

Judicial Decisions

Exceptions to General Antitrust Laws.

Labor Agreements.

In the absence of allegation that employees of the company are organized as an illegal combination, the court held that the union is a lawful organization specifically exempted from the provisions of the antitrust laws. *A. J. Monday Co. v. Automobile Workers Local No. 25*, 171 Wis. 532, 177 N. W. 867 (1920).

Special Industry Antitrust Act.

Railroads.

A statute similar to sections 190-06 (Rev. Stat. 1878, sec. 1833), prohibiting consolidation of parallel and competing railroad lines is not applicable where a merger results in one continuous main line or in feeder lines and branches. *State v. McFetridge*, 56 Wis. 256, 14 N. W. 185 (1882).

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

Restrictive Covenants Ancillary to the Sale of a Business.

The sale of goodwill is not of itself sufficient to preclude seller from reengaging in business. There must in addition be an agreement not to compete based upon valuable consideration. *Washburne v. Dorsch*, 32 N. W. 551, 68 Wis. 436 (1887). Parol evidence is admissible to show that goodwill was purchased and that the seller agreed not to compete. *Lazar v. Berg*, 179 Wis. 610, 191 N. W. 966 (1923). An agreement by a seller not to engage in the same business in town and its vicinity unless in partnership with the buyer or by repurchasing the business is valid. *Madson v. Johnson*, 164 Wis. 612, 160 N. W. 1085 (1917). Where vendor covenants that he, his heirs, his executor, or his assigns, will not engage directly or indirectly as long as the buyer, his heirs, his executors, or his assigns shall engage in such business in the village is not an unreasonable restraint. *Cottingham v. Swan*, 128 Wis. 321, 107 N. W. 336 (1906). A covenant to the vendee not to engage terminates with abandonment or transfer of the business by the vendee. *Danke Co. v. Marten*, 207 Wis. 290, 241 N. W. 359 (1932).

Contracts reasonably restrictive as to time and place are valid. *Durbrow Commission Co. v. Donner*, 201 Wis. 175, 229 N. W. 635 (1930) (poultry business for 2 years in Milwaukee County—valid); *Kradwell v. Thiesen*, 131 Wis. 97, 111 N. W. 233 (1907) (drug business for 5 years in city of Racine—valid).

A reasonable area may be as broad as the territorial limits of the business require. *General Bronze Corp. v. Schmeling*, 208 Wis. 565, 243 N. W. 469 (1932).

A seller reengaging in business outside of the limit fixed in the sales agreement may do business with those coming to him from the restricted territory. *Midland Lumber & Coal Co. v. Roessler*, 203 Wis. 129, 233 N. W. 614 (1930).

A covenant not to engage in the junk business within a radius of 100 miles is a reasonable restriction and necessary for the protection of its goodwill. *Betten Co. Inc. v. Brauman*, 218 Wis. 203, 260 N. W. 456 (1935).

An injunction was granted to restrain the vendor of a business from entering the employ of a competitor after covenanting not to compete

in the vicinity for 5 years. *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540 (1906).

A contract not to compete in the same city for 5 years and to pay \$10 per day as liquidated damages for every day's violation is valid. *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654 (1897).

A contract not to compete unlimited in time and place is contrary to public policy and void. *Tecktonius v. Scott*, 110 Wis. 441, 86 N. W. 672 (1901).

Restrictive Covenants Ancillary to Employment.

A driver's contract not to deliver ice in competition with the employer after termination of employment in a territory larger than his former route and large enough for some 45 other drivers is unreasonable. *Wisconsin Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N. W. 819 (1933).

A covenant that employee will not solicit trade from employer's customers for 2 years after employment is reasonable. *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N. W. 412 (1911). See also *Jewel Tea Co. v. Novak*, 146 Wis. 224, 131 N. W. 415 (1911).

Although contracts reasonably restricted as to time and place are valid, a covenant by a solicitor that he will not for 2 years after termination of employment solicit business of his employer in the city of Milwaukee and certain specified suburbs was held invalid. *Milwaukee Linen Supply Co. v. Ring*, 210 Wis. 467, 246 N. W. 567 (1923).

In absence of any contract or circumstances by way of estoppel, a manufacturer cannot exclude a former employee from the competitive field. *A. W. Thompson Co. v. Thompson*, 224 Wis. 519, 272 N. W. 343 (1937).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Stat. (1939) Cooperatives

Section 185.08 (2) provides that contracts between an agricultural cooperative association and its members whereby such members agree to sell all or part of their products to or through, or to buy all or part of goods from or through the association or any facilities created by the association, shall be valid; provided that the term of such contracts does not exceed five years; however, contracts may be made self-renewing for periods not exceeding five years. See *Cooperatives* in projected study.

Judicial Decisions

Exclusive Dealing Arrangements.

A contract of an agent agreeing not to sell or handle any other product but that of his principal during the term of the contract is not in restraint of trade. *Butterick Publishing Co. v. Rose*, 141 Wis. 533, 124 N. W. 647 (1910).

Breach of an oral promise made by seller's agent not to deal with anyone but the buyer in a particular locality will not justify the buyer in rescinding a contract for the purchase of goods made through such agent. *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992 (1894).

A clause in a month-to-month lease requiring lessor to take electric power exclusively from a certain company is valid. *People's Land & Manufacturing Co. v. Beyer*, 161 Wis. 349, 154 N. W. 382 (1915).

In *Buxbaum v. G. H. P. Cigar Co.*, 188 Wis. 389, 206 N. W. 59 (1925), evidence of future profits was admissible to support a verdict for damages where an exclusive dealing arrangement to sell cigars was breached by the manufacturer.

An agreement in a lease for 3 years prohibiting the sale of beer on the premises except that manufactured by the lessor is valid since limited to time, space, and extent of trade. *Rose v. Gordon*, 158 Wis. 414, 149 N. W. 158 (1914). See also *Ruhland v. King*, 154 Wis. 545, 143 N. W. 681 (1913); *Berlin Machine Works v. Perry*, 71 Wis. 495, 38 N. W. 82 (1888).

The court restrained persons from maliciously interfering with contracts entered into by and between a cooperative and its members. The court upheld the Cooperative Marketing Act and the contracts and agreements consummated thereunder since the marketing schemes provided for are direct, of benefit to the producer and consumer, and not in violation of the fourteenth amendment to the Federal Constitution. *Northern Wis. Cooperative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N. W. 936 (1923).

WYOMING

I. TRUSTS, COMBINATIONS, AND MONOPOLIES

A. GENERAL ANTITRUST LAWS

CONSTITUTIONAL PROVISIONS

Const. art. I. Sec. 30. Monopolies and perpetuities prohibited.—Perpetuities and monopolies are contrary to the genesis of a free State, and shall not be allowed. Corporations being creatures of the State, endowed for the public good with a portion of its sovereign powers, must be subject to its control.

Const. art. X. Sec. 8. Trusts prohibited.—There shall be no consolidation or combination of corporations of any kind whatever to prevent competition, to control or influence production or prices thereof, or in any manner to interfere with the public good and general welfare.

Const. Art. III, Sec. 8. The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * any special or exclusive privilege, immunity, or franchise whatever, or amending existing charter for such purpose; * * *. In all other cases where a general law can be made applicable no special law shall be enacted.

STATUTORY PROVISIONS

Rev. Stat. Ann. (Courtright, 1931)

Sec. 117-201. Unfair competition prohibited.—Any person, firm, or corporation, foreign or domestic, doing business in the State of Wyoming and engaged in the production, manufacture, sale, or distribution of any commodity in general use, that shall make, enter into, form, or be a party to, any plan, agreement, consolidation, or combination of any kind whatsoever to prevent competition, or to control or influence production or prices thereof, or that shall, intentionally, for the purpose of destroying competition, or gaining unjust and unreasonable profits, discriminate between different sec-

tions, communities, or cities of this State, by selling such commodity at a lower rate in one section, community, or city, or any portion thereof, than is charged for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution and the freight rates therefrom, or shall charge a greater rate within this State for any commodity or manufacture, made or produced within this State, than such commodity, or manufacture is sold for in any other State, the freight rates being equal or less from the point of production or distribution, shall be deemed guilty of unfair discrimination; provided, however, that this article shall not apply to any case where by reason of different railroad rates or other natural things in favor of any manufacturer or dealer, of goods of this or another State, such manufacturer or dealer sells at a different price than he does to another, in order to meet the competitive dealer; *Provided, further*, That this article shall not apply to any case where any manufacturer of, or dealer in, goods manufactured or produced in this State sells products in one place cheaper than in another to meet upon the same or more favorable basis any competition from foreign States, or this State: *Provided, further*, That this article shall not prevent the sale of goods at proper commercial discounts customary in the sale of such particular goods. (L. '23, c. 86, sec. 1, amending C. S. '20, sec. 4372.)

Sec. 117-202. Attorney general and prosecuting attorney must inquire.—If complaint shall be made to the attorney general of the State of Wyoming, or the county and prosecuting attorney of any county thereof, that any corporation, chartered in this State or any foreign corporation, doing business in this State by virtue of compliance with the laws thereof, or any person or firm of persons doing business in this State, is guilty of unfair discrimination, within the terms of this article, it shall be the duty of the attorney general, and the county and prosecuting attorneys of this State to institute an inquiry as to such discrimination, giving to the party complained against notice and reasonable opportunity to be heard, and if in the judgment of such prosecuting officers, or either of them, any corporation, foreign or domestic, or any person or firm of persons, shall have been guilty of unfair discrimination within the terms of this article, it shall be their duty to institute quo warranto proceedings, to forfeit the charter of said domestic corporation, or, if a foreign corporation, to procure an order of court to cause the permit of said corporation to do business in this State, immediately forfeited. (L. '11, c. 62, sec. 2; C. S. '20, sec. 4373.)

Sec. 117-203. Corporation may be ousted.—If after the revocation of such charter, in the case of domestic corporation, or of its permit, if it be a foreign corporation, any corporation shall continue or attempt to do business in the State of Wyoming, it shall be the duty of the attorney general, by a proper suit, in the name of the State of Wyoming to oust such corporation from all business of every kind, and character in said State of Wyoming. (L. '11, c. 62, sec. 3; C. S. '20, sec. 4374.)

Sec. 117-204. Penalty.—Any person, firm, or corporation violating any of the provisions of this article shall be fined in any sum not more than five thousand dollars (\$5,000.00), or by imprisonment in the county jail not exceeding one year, or both such fine and imprisonment. (L. '23, c. 86, sec. 2, amending C. S. '20, sec. 4375.)

Sec. 117-205. Remedies—Cumulative.—Nothing in this article shall be construed as repealing any other legislation, or portion thereof, but the remedies herein provided shall be cumulative to all other remedies, provided by law. (L. '11, c. 62, sec. 5; C. S. '20, sec. 4376.)¹

L. 1937, c. 73
Discriminations

Section 1 provides that it shall be unlawful for any person selling products to discriminate as to price between different localities with the intent of destroying competition. See vol. *State Price Control Legislation: Antidiscrimination Legislation*.

B. EXCEPTIONS TO GENERAL ANTITRUST LAWS

L. 1937, c. 58
Resale Price Maintenance

Sections 1 to 12 provide that contracts fixing the resale price of branded commodities in open competition with similar commodities are valid, but the statute is expressly inapplicable to agreements between producers, between distributors, or between retailers. Sec. 7. See Vol. *State Price Control Legislation: Resale Price Maintenance*.

Rev. Stat. Ann. (Courtright, 1931)
Cooperatives

Section 28-723 provides that an agricultural cooperative association organized under sections 28-701 to 28-725 shall not be deemed a

¹ For further treatment of secs. 117-201 to 117-205, see Vol. *State Price Control Legislation: Antidiscrimination Legislation*. MARKETING LAWS SURVEY series.

combination in restraint of trade, or an illegal monopoly. See *Tying Contracts and Exclusive Dealing Arrangements, infra*. See also *Cooperatives* in projected **MARKETING LAWS SURVEY** study.

C. SPECIAL ANTITRUST LAWS

1. Special Industry Antitrust Acts

Rev. Stat. Ann. (Courtright, Supp., 1934)
Petroleum and byproducts—Discrimination

Sections 117-302 to 117-306 provide that it shall be unlawful for any person engaged in selling of petroleum and petroleum products to discriminate as to price between different localities. See Vol. *State Price Control Legislation: Antidiscrimination Legislation*.

L. 1935, c. 87
Liquor

Section 20 provides that no manufacturer, rectifier, or wholesaler of alcoholic or malt beverages shall hold any interest, stock, or ownership, directly or indirectly, in any license to sell at retail the products of the industry.

Section 21 provides that no manufacturer, rectifier, or wholesaler shall furnish, give, or lend any money or other thing of value, directly or indirectly, through a subsidiary or affiliate or by any officer, director, or firm member of the industry, to any licensee engaged in selling at retail the products of the industry, or to any such licensee for the use, benefit, or relief of said person engaged in selling as above; or to guarantee the repayment of any loan or the fulfillment of any financial obligation. Any retail dealer who becomes indebted to any of the above for a sum in excess of \$500 and fails to discharge said obligation within sixty days, and any retailer who sells on credit, shall upon proof thereof to the licensing authority have his license revoked. No person licensed to sell such beverages at retail shall receive or be the beneficiary of any of the benefits above prohibited.

Section 22 provides that no manufacturer, rectifier, or wholesaler shall furnish, give, rent, lend, or sell any equipment, fixtures, or supplies directly or indirectly, or through a subsidiary or affiliate or by any officer, director, or firm member of the industry, to any licensee engaged in selling at retail the products of the industry. No person licensed to sell products of the industry shall receive or be the beneficiary of any of the benefits hereby prohibited.

Section 23 provides that no manufacturer, rectifier, or wholesaler shall furnish, give, rent, lend, or sell any interior decorations other

than signs, or furnish, give, lend, or rent any sign or signs for inside or outside use, costing collectively more than \$25 in any one calendar year, to any person licensed to sell alcoholic or malt liquors at retail, either directly or indirectly or through a subsidiary or affiliate, or by any officer, director, or firm member of any manufacturer, rectifier, or wholesaler. No person licensed to sell products of the industry shall receive, or be the beneficiary of, any of the benefits hereby prohibited.

Section 24 provides that no manufacturer, rectifier, or wholesaler shall hold any interest in any premises hereafter acquired in which alcoholic or malt liquors are sold under a retail license.

Section 25 provides that the violation of any provision of this act by any manufacturer, rectifier, wholesaler, retailer, or other licensee shall be sufficient cause for the revocation of the license of such violators as well as of the licensee receiving the benefit from such prohibited acts.

Section 36 provides that any person who shall violate any provision of this act, not carrying with it a specific penalty, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than \$100, to which may be added imprisonment in the county jail for a period not exceeding three months.

2. Public Contract Provisions

Rev. Stat. Ann. (Courtright, Supp., 1934)
Supplies

Section 103-311 (5) provides that the Board of State Supplies may issue rules and regulations to stimulate competition in bids for supplies and materials. See projected Vol. *Governmental Purchasing*.

3. Anticoercive Financing Statutes

No provisions.

II. CONTRACTS NOT TO COMPETE

No statutory provisions.

Judicial Decisions

A verbal agreement by a dance-hall proprietor to pay a monthly consideration to another so long as he should secure the discontinuance of dancing at a competing hall, for a period not to exceed 3 years, is not illegal as in restraint of trade and competition. *Stewart v. McKeon*, 36 Wyo. 106, 252 Pac. 1024 (1927).

III. TYING CONTRACTS AND EXCLUSIVE DEALING ARRANGEMENTS

Rev. Stat. Ann. (Courtright, 1931)
Cooperatives

Section 28-721 provides that a cooperative agricultural association and its members may make contracts requiring the members to sell all or part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association for a period not exceeding 10 years. Section 28-723 further provides that such marketing contracts shall not be considered illegal or in restraint of trade. See *Exceptions to General Antitrust Laws, supra*. See also *Cooperatives* in projected study.

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[Cases cited throughout volume are arranged in alphabetical order. The roman numerals before each State name refer to subdivisions of text. For instance, IA-General Antitrust Laws; IB-Exceptions to General Antitrust Laws; IC-Special Antitrust Laws; II refers to Contracts Not To Compete; and III to Tying Contracts]

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