

STATE PRICE CONTROL LEGISLATION

WORKS PROGRESS ADMINISTRATION

COL. F. C. HARRINGTON, ADMINISTRATOR
CORRINGTON GILL, ASST. ADMINISTRATOR

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State
PRICE CONTROL
LEGISLATION

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PREPARED BY
THE MARKETING LAWS SURVEY

A. H. MARTIN, Jr., DIRECTOR
E. E. McCLEISH, ASST. DIRECTOR

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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 various compilations will be published in such form as it is hoped will be useful as reference books to Federal and State public agencies, the lawyer, the research 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.

State Price Control Legislation is volume 2 in the MARKETING LAWS SURVEY series of publications. Volume 1 presented *State Antitrust Laws*.

ACKNOWLEDGMENTS

Direct price control legislation has a history dating back to the late 1860's. This factual presentation of price-control measures comprising the compilation of State statutes and digest of pertinent court decisions represent, as did volume 1, the work of the **MARKETING LAWS SURVEY** staff of attorneys and research assistants employed in the headquarters of the Survey in Washington, D. C., and in the three regional offices in New York City, Chicago, and Los Angeles. These staffs followed a carefully developed outline of compilation prepared by the Survey. Materials collected in the regional offices were sent to Washington for final selection, review, and analysis, and there assembled and edited for publication.

The preparation, organization, and final review and analysis of this growing and complex body of legislation and its interpretation by the courts was under the general technical and legal direction of **IRWIN W. SILVERMAN**, Chief Attorney; **L. THOMPSON BENNETT, JR.**, Chief Administrative Attorney and **IRVIN LECHLITER**, 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, of the law schools of many universities and colleges, of legal publishing firms 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 the Survey, each of whom had a share in gathering and organizing this volume for publication.

A. H. MARTIN, Jr.,
Director.

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STATE PRICE CONTROL LAWS

(Scope Note)

INTRODUCTION

THE Sherman Antitrust Act of 1890¹ reflected American faith in the major postulates of a system of competitive individualism. Similar to some of the State antitrust laws which preceded and followed this federal law,² its proscriptions in general terms of contracts and combinations in restraint of trade and of monopolies and attempts to monopolize were regarded as measures for the preservation of a free competitive order. If that order was preserved against forces that would tend to destroy it, the legislative objective would be attained. The automatism of free competition would do the rest. In these laws, Government was not acting on prices as such but was rather seeking to suppress forces operative in the market place that were disturbing the operation of the competitive norm. The control of price under laws of this type was indirect.

Direct price control legislation first appeared in the "Granger Laws" of the late 1860's and early 1870's³ under which States sought to control railroad rates. From this beginning the movement spread into the Federal field in the Interstate Commerce Act of 1887. Early in this century, the movement took a new turn when direct price control was extended to cover gas and electricity, and today in varying extent it covers other enterprises in the public-utility field. State statutes in this category are not within the scope of this volume.

In the early part of this century there appeared a series of State laws directed against predatory price practices⁴ and locality (spatial)

¹ 26 Stat. 209, 15 U. S. C. A., secs. 1 to 7.

² See *MARKETING LAWS SURVEY, State Antitrust Laws, Scope Note.*

³ See Buck, *The Granger Movement* (1913).

⁴ E. g. Ala. Code (1907) sec. 7581, Code Ann. (Michie, 1928) sec. 5214; Ark. L. 1905, p. 1, as amended L. 1913, p. 680, Dig. Stat. (Pope, 1937) sec. 9413; Idaho L. 1911, c. 215, sec. 4, Code Ann. (1932) sec. 47-104; Iowa L. 1900, c. 225, sec. 1, Code (1939) sec. 9915 (4); Miss. L. 1900, c. 88, amended by L. 1908, c. 119, sec. 1 (m), amended by L. 1926, c. 182, sec. 2 (m), Code (1930) sec. 3437 (d); Neb. L. 1905, p. 638, Comp. Stat. (1929) sec. 59-806; N. C. L. 1913, c. 41, sec. 5 (c), (d), Code Ann. (Michie, 1939) sec. 2563 (3), (4); S. C. L. 1902, p. 1057, sec. 3, Code Ann. (1932) sec. 6634; Tenn. L. 1907, c. 36 and 360, Code Ann. (Michie, 1938) sec. 5889; Tex. Acts 1907, p. 457, Stat. (Vernon, 1936) Pen. Code, art. 1638.

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price discrimination.⁵ These formed an integral part of the antitrust law movement. This is shown by the typical requirement that an intent to create a monopoly or suppress competition be shown as an element of a violation. In the Federal field the price discrimination section of the Clayton Act of 1914⁶ belongs in the same category. In all of these laws there was no shift from the basic philosophy of the earlier antitrust laws. Rather, the objective was to implement the more general laws by the proscription of practices that had come to be the tools of an incipient monopoly. It was believed that government would act more effectively if it could step in and check the growth of monopoly rather than wait and seek to dissolve the trust after it had attained size and power.

This antitrust movement was directed largely against producers of goods. The most striking feature of recent legislation in the field of price control is that it is concerned with the marketing structure by which goods pass from the producer to the consumer.⁷ The new resale price control laws, prohibitions against sales below cost and antiprice discrimination laws all belong in this category. These are understandable only if account be taken of important and basic changes that have occurred in marketing processes since the turn of the century. Chain organizations of many forms, department stores, mail order houses, supermarkets, and cooperative buying pools have all reached such proportions in recent decades that they have almost displaced "the trust problem" of earlier days.

The focal point of recent legislative efforts of the States has been the retail trade, and under the sponsorship of organized trade groups the movement has spread with unusual rapidity. The result is that the year 1939 finds the States with 44 resale price control acts, 24 statutes prohibiting sales below cost and 24 antidiscrimination statutes applicable to commodities in general use.⁸ Adding to this several statutes prohibiting predatory price practices and antidiscrimination laws applicable only to specific commodities, one finds that price-control legislation has far exceeded the earlier antitrust laws both in the number and variety of statutes enacted.

⁵ E. g. Minn. L. 1907, c. 269, sec. 1, Stat. (Mason, 1927) sec. 10474; Okla. L. 1907-08, p. 750, sec. 5, Stat. Ann. (1938) tit. 79, sec. 2; Wis. L. 1909, c. 395, amended by L. 1935, c. 550, sec. 358, Rev. Stat. (1937) sec. 100.22; Mass. L. 1912, c. 651, secs. 1 and 5, Ann. L. (1933) c. 93, sec. 8, amended by Ann. L. (Supp. 1939) c. 93, sec. 8.

⁶ 38 Stat. 730, 15 U. S. C. A. secs. 12 to 27.

⁷ See McAllister, *Price Control By Law* (1937), 4 Law & Contemp. Prob. 273; Grether, *Price Control Under Fair Trade Legislation* (1939).

⁸ See Oppenheim, *Recent Price Control Laws* (1939). Eleven States have enacted unfair practices acts which include both antidiscrimination and sales below cost prohibitions.

In the Federal field the Miller-Tydings amendment to the Sherman Act⁹ was directly related to the movement for resale price control laws in the States. It was but a necessary complement if the objectives of the State laws were to be attained and under the same sponsorship it was passed in 1937. Similar efforts that went back many years under quite different sponsorship had been unsuccessful. The Robinson-Patman Act of 1936¹⁰ partakes of the same economic motivation and objectives. Though it bears a superficial resemblance to section 2 of the Clayton Act which it amends it is not loaded with the antitrust flavor of the earlier law. All of these laws, both State and Federal, represent simply different points of attack in the effort of trade groups with the aid of government to influence the course of events in the complex marketing structures that are a product of recent decades.

⁹ 26 Stat. 209, as amended by Public, No. 314, 75th Cong. (c. 690, Title VIII, 50 Stat. 693), 15 U. S. C. A., secs. 1 to 7.

¹⁰ Public, No. 692, 74th Cong. (c. 592, 49 Stat. 1526), 15 U. S. C. A., secs. 13 to 13b.

I. RESALE PRICE MAINTENANCE

“RESALE price maintenance may be defined as that system of distribution under which the manufacturer of trade-marked or otherwise identified goods names the prices at which his products shall be sold and distributed by wholesalers and retailers, thus controlling the margins realized by distributors and the prices paid by consumers.”¹

The forces which germinated and shaped this type of price control legislation derived from the conflict of interests in the market place. The movement for resale price maintenance must be viewed as one manifestation of a shifting system of distribution which has evolved new forms of control to keep pace with changes in the marketing structure.

At first the focal point is found in the efforts of manufacturers of branded products to protect themselves against what they conceived to be an exploitation of the goodwill embodied in their trade-marks and trade names by using goods so designated as “leaders” for price cutting. This practice became more acute as the sales volume of branded merchandise increased and the growth of department and chain stores confronted manufacturers with new threats to the maintenance of stipulated prices. In recent years the demands for controlled resale prices have emanated from the large body of small, independent retailers supported in part by the wholesalers who serve them.

The history of the campaign for resale price maintenance is replete with economic arguments.² The question is highly controversial and economists and businessmen are still debating the issues involved from the standpoint of the producer, the distributor, and the consumer. Earlier studies by the Federal Trade Commission are now being supplemented by an investigation initiated by that body early in 1939 to determine the effects of resale price maintenance as employed in 44 States and in interstate commerce. With these debatable

¹ Federal Trade Commission, *Report on Resale Price Maintenance*, 70th Cong., 2d sess., H. Doc. 546, pt. I, p. 2 (1929).

² Useful publications on the subject are: Murchison, *Resale Price Maintenance* (1919); Federal Trade Commission, *Report on Resale Price Maintenance* (pt. I, 1929; pt. II, 1931), *supra*; Seligman and Love, *Price Cutting and Price Maintenance* (1932); Haring, *Retail Price-Cutting and Its Control by Manufacturers* (1935); Zorn and Feldman, *Business Under The New Price Laws* (1937), c. 18, 19; Grether, *Price Control Under Fair Trade Legislation* (1939). The Congressional hearings on the Capper-Kelly bill, 72d Cong., 1st sess., S. Doc. 97 (1932), also contain valuable material on the subject.

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aspects this volume is not concerned, but it is well to bear in mind the approach suggested in the following statement by Mr. Justice Brandeis: "Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles."³

Viewed chronologically, resale price maintenance schemes antedated the present century, but the first significant stage in legal developments began in the first decade of the twentieth century and continued beyond the second decade. Within these years many lower Federal courts found resale price maintenance lawful⁴ but later the United States Supreme Court under the Sherman Antitrust and Federal Trade Commission Acts declared invalid all devices for resale price maintenance except the ineffectual simple refusal to deal⁵ and a bona fide agency transaction.⁶ These latter decisions affirmed and reaffirmed the invalidity of certain resale price maintenance methods in interstate sales as applied to proprietary,⁷ patented,⁸ and copyrighted⁹ articles.

Attention was in the meantime turned to the validation of resale price maintenance by statute. To this end, two bills were introduced in the Sixty-third Congress in 1914. The Metz bill permitted the manufacturer of a trade-marked commodity to fix a resale price by attaching to the article a notice containing such a restriction.¹⁰ The Stevens bill permitted contracts between the manufacturer and the retailer fixing the retail price of a trade-marked commodity.¹¹ Both these bills died in committee but the campaign to validate

³ *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 27, 38 Sup. Ct. 257, 62 L. Ed. 551 (1918).

⁴ *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960 (C. C. W. D. Pa. 1901); *Edison Phonograph Co. v. Pike*, 116 Fed. 863 (Cir. Ct. Mass. 1902); *Dr. Miles Medical Co. v. Goldthwaite*, 133 Fed. 794 (Cir. Ct. Mass. 1904); *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (C. C. N. D. Ill. 1906); *Dr. Miles Medical Co. v. Jaynes Drug Co.*, 149 Fed. 838 (Cir. Ct. Mass. 1906); *The Fair v. Dover Manufacturing Co.*, 166 Fed. 117 (C. C. A. 7th 1908).

⁵ *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992 (1919).

⁶ *United States v. Schrader's Son, Inc.*, 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471 (1920).

⁷ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911); *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551 (1918); *United States v. Schrader's Son, Inc.*, *supra*.

⁸ *Bauer & Cie v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041 (1913); *Straus v. Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866 (1917).

⁹ *Bodds-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086 (1908); *Straus v. American Publishers Ass'n.*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192 (1913).

¹⁰ H. R. 13860, 63d Cong., 2d sess.

¹¹ H. R. 13305, 63d Cong., 2d sess.

resale price maintenance was continued by the drug industry with unabated vigor. Thirty resale price maintenance bills were introduced in Congress from 1914 to 1933.¹² The Capper-Kelly bill permitting contracts fixing the resale price of trade-marked commodities was passed by the House in 1931 but went no further.¹³ The long struggle came to an end in 1937 when the Miller-Tydings bill amending the Sherman Antitrust Act became law.¹⁴

The status of resale price maintenance schemes varied in the several States. In several States, resale price contracts or devices were held valid either at common law or under the State antitrust law.¹⁵ In other States, various devices were either declared invalid at common law as in restraint of trade or were held contrary to the State antitrust law.¹⁶ Many State courts did not pass on the question. New Jersey was the first State to enact legislation for a permissive system of resale price maintenance. In 1914, a statute was passed which prohibited depreciation of the trade-mark and goodwill of the manufacturer when the article in question bore a notice

¹² For a complete Federal legislative history of resale price maintenance, see Seligman and Love, *Price Cutting and Price Maintenance* (1932), pp. 480-483; Kantor and Golden, *Resale Price Maintenance Legislation in the United States*, NRA Division of Review, Work Materials No. 16 pp. 6-7, 78-89 (1935); Merrill, Grether, and Kittelle, *Restriction of Retail Price Cutting With Emphasis on the Drug Industry*, NRA Division of Review, Work Materials No. 57, pp. 371-372 (1936).

¹³ H. R. 11, 71st Cong., 3d sess., 1931. This bill excluded from its operation all necessities of life and permitted sale below a fixed resale price if such sale still yielded at least 20 percent over the invoice price. However, it may be regarded as the basis of the California type statute since most of the language and provisions of the State law are to be found in this Capper-Kelly bill.

¹⁴ 26 Stat. 209, as amended by Public, No. 314, 75th Cong., c. 690, 50 Stat. 693, 15 U. S. C. A. secs. 1 to 7.

¹⁵ See *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912); *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67 (1898); *Raleigh Medical Co. v. Osborne*, 177 Ia. 208, 158 N. W. 566 (1916); *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427 (1901); *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174 (1900); *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901); *Clark v. Frank*, 17 Mo. App. 602 (1835); *Quinlivan v. Brown Oil Co.*, 96 Mont. 147, 29 Pac. (2d) 374 (1934); *John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136 (1903); *Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. Supp. 140 (1935); *Fisher Flouring Mills v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913).

¹⁶ See *United Artists Corp. v. Mills*, 135 Kan. 655, 11 Pac. (2d) 1025 (1932); *Hill Co. v. Gray & Worcester*, 163 Mich. 12, 127 N. W. 803 (1910); *Freeman v. Miller*, 21 Ohio Doc. 766 (1909); *McCall Co. v. O'Neil*, 25 Ohio Doc. 591 (1914); *Stewart v. Raleigh Medical Co.*, 58 Okla. 344, 159 Pac. 1187 (1916); *Hunt v. Raleigh Medical Co.*, 71 Okla. 193, 176 Pac. 410 (1918); *Brooks v. Watkins Medical Co.*, 81 Okla. 82, 196 Pac. 956 (1921), but cf. *Thomas v. Belcher*, 89 Okla. App. 361, 87 Pac. (2d) 1084 (1939). The Texas courts have usually held that when goods are shipped from one State to another with a resale price restriction, such transaction is in interstate commerce and the price restriction is invalid under the Sherman Antitrust Act. *New Century Mfg. Co. v. Scheuer*, 30 S. W. (2d) 388 (Ct. Civ. App. 1930); *Watkins Medical Co. v. Johnson*, 162 S. W. 394 (Ct. Civ. App. 1913); but cf. *McCall Co. v. J. D. Stiff Dry Goods Co.*, 142 S. W. 659 (Ct. Civ. App. 1911); *Caddell v. Watkins Medical Co.*, 227 S. W. 226 (Ct. Civ. App. 1921).

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imposing restrictions on such depreciation.¹⁷ When the notice required by the statute established a retail price, a retailer was enjoined from selling below the price so established.¹⁸ While this seemed to presage the opening of the flood gates for similar State legislation throughout the country, such was not the case. Congress still remained the focal point of the efforts to legalize resale price maintenance.

The campaign was continued with renewed vigor until a resale price maintenance bill was passed for the first time by a house of Congress in 1931.¹⁹ In the same year the long efforts of the drug industry finally came to fruition when California enacted a statute based upon the Capper-Kelly bill.²⁰ This law validated contracts between manufacturers and distributors or retailers fixing the resale price of commodities bearing a trade-mark. Inadequacy of this statute was soon made apparent when many distributors refused to sign such contracts because noncontracting retailers who continued their price-cutting practices were not within the reach of the law. In 1933 the statute was therefore amended to make all persons willfully and knowingly selling below the price fixed in a resale price contract liable to any person injured thereby.²¹ This amendment, soon known as the "nonsigners' clause" later became the target for those seeking to invalidate this and similar statutes. Emulating the example set by California, Oregon passed a statute very similar to the California Act of 1933.²²

¹⁷ L. 1913, c. 210, amended L. 1915, c. 376 and L. 1916, c. 107. This statute, still in effect, can be found in Rev. Stat. (1937), secs. 56:4-1, 2.

¹⁸ *Ingersoll & Bro. v. Hahne*, 88 N. J. Eq. 222, 101 Atl. 1030 (1917); 89 N. J. Eq. 332, 108 Atl. 128 (1918); but see *Ingersoll v. Goldstein*, 84 N. J. Eq. 445, 93 Atl. 193 (1915).

¹⁹ See note 13 *supra*.

²⁰ L. 1931, c. 278; amended L. 1933, c. 260, and L. 1937, c. 843, Gen. Laws (Deering, 1937), Act 8782.

²¹ Sec. 1½ of the California Fair Trade Act, L. 1933, c. 260.

²² The history of resale price maintenance legislation in Oregon is of special interest. The initial statute passed in 1933 (L. 1933, c. 311) differed from the California statute of 1933 in three respects: (1) It provided for resale price contracts only between producers and retailers; (2) it stated that the prices fixed should be "uniform to all vendees in like circumstances, differing only as to the quantity of such commodity sold, the point of delivery, and the manner of settlement"; (3) in the nonsigners' clause, the words "willfully and knowingly" were omitted and a violation was actionable in a suit by the producer only, "provided the producers shall, at the same time, bring action against all vendees of such commodity doing business within the county in which such action is brought, for damages suffered by him by reason of such unfair competition or flowing from the vendee's breach of contract, and his failure so to do shall constitute a bar to such action." (Id., sec. 6.) This statute was repealed in 1935 by the enactment of another act identical with the California statute. (L. 1935, c. 295, Code Ann. (Supp. 1935), secs. 70-401 to 70-406.) The 1935 law was in effect for about 2 years when it was completely amended and revised (L. 1937, c. 113). As the act now stands, it follows the model statute drafted by the National Association of Retail Drug-gists and differs greatly from the California statute.

Further efforts to enact State legislation were discontinued with the advent of the National Recovery Administration codes. While resale price maintenance did not win as much favor in the codes as prohibitions against loss leaders, several codes nevertheless contained permissive provisions which can properly be included within the definition of resale price maintenance. However, the drug industry, which had been the major proponent of resale price maintenance, now centered its attention on provisions prohibiting sales below cost. Many conflicts between the different distributive classes made impossible the adoption of code provisions acceptable to manufacturers, wholesalers, and retailers alike.²³ Being dissatisfied with the loss limitation provisions incorporated in the several codes, retail druggists again turned to the State legislatures for further action. Resale price control acts, similar to the California statute, were passed in nine States.²⁴ While the invalidation of the NRA codes apparently lent further encouragement to the retail druggists, doubt as to the constitutionality of the resale price control acts acted as a barrier to a Nation-wide enactment. Hence by December 7, 1936, only four more States had enacted such legislation.²⁵ On that date the Supreme Court upheld the constitutionality of the Illinois and California acts and the campaign of the retail druggists received a new impetus.²⁶ The National Association of Retail Druggists (NARD)

²³ For a detailed study of price-control provisions in the NRA codes, see Merrell, Grether, and Kittelle, *Restriction of Retail Price Cutting With Emphasis on the Drug Industry*, NRA Division of Review, Work Materials No. 57 (1936). See also Nelson, *Minimum Price Regulation Under Codes of Fair Competition*, NRA Division of Review, Work Materials No. 56 (1936).

²⁴ Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin. The Oregon statute repealed the 1933 statute (see note 22, *supra*). The Washington law was a temporary measure for 2 years only. It was reenacted in 1937. The Maryland statute was repealed in 1937 and the National Association of Retail Druggists (NARD) model statute was enacted.

²⁵ Louisiana, Ohio, Rhode Island, and Virginia. The Rhode Island and Virginia statutes followed an early draft of the NARD model statute. The Virginia statute was amended and revised in 1938 to conform to the final draft of the model statute. The vigorous campaign and the rapidity with which the statutes were enacted accounts for several interesting sidelights. Many typographical errors in the California law were included in other State statutes. Thus, where the California act provided "That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or such vendee," the words "in delivery" should have been "any dealer." However, this error was included in the original statutes of Iowa, Maryland, New Jersey, New York, Pennsylvania, and Washington. The Oregon statute of 1933 contained the words "any dealer" but when this law was repealed in 1935 by the enactment of a statute identical with the California act, the correct words were changed to the erroneous ones "in delivery." Again, the California statute used the words "label or content" instead of "label or container" and this error was incorporated in other statutes.

²⁶ *Old Dearborn Distributing Co. v. Seagram-Distillers' Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936). See McLaughlin, *Fair Trade Acts* (1938) 86 U. Pa. L. Rev. 803.

drafted a model law in the light of the opinion of Mr. Justice Sutherland in the case validating the Illinois resale price maintenance statute.²⁷ Thus in the deluge of bills in the State legislatures, some were based on the California statute, while others were similar to the model statute of the NARD.

The campaign of the retail druggists was so successful that by September 1, 1939, resale price control laws had been enacted in 44 States. The Legislatures of Delaware, Missouri, Texas, and Vermont have thus far repulsed the onslaught of the drug trade associations. They have been aided in this respect by large department and mail-order stores which have continuously resisted resale price maintenance legislation.²⁸ Mindful of the fact that the resale price control laws permitted resale price maintenance only in intrastate transactions,²⁹ attention was redirected to Congressional action. Success was again achieved when, despite the strong disapproval of the Federal Trade Commission and the President, the Miller-Tydings amendment to the Sherman Antitrust Act was passed by Congress as a "rider" to an appropriation bill. Under this compulsion, the bill was signed by the President and became effective on August 17, 1937.³⁰ This amendment permits resale maintenance contracts in interstate transactions when such a contract is valid in the State in which the commodity is to be resold.

In the face of continued opposition by some groups, the retail druggists continued their campaign. Resale price-control bills were introduced in the recent legislative sessions in Delaware, Missouri, Texas, and Vermont and although they failed of enactment, it is likely that these bills will be reintroduced in the next session of these State legislatures. The bill introduced in Congress for the District of Columbia is still pending. In the meantime, coincident with the initiation by the Federal Trade Commission of its present economic study of resale price maintenance, retail druggists' associations announced a drive for more strict enforcement through the creation of so-called "Fair Trade Councils" throughout the country. Efforts are now being made to induce many manufacturers to adopt resale price maintenance contracts in the distribution of their commodities.

Thus, after a struggle of almost four decades, resale price maintenance has attained a legal status. How secure and how significant that achievement will be remains to be seen.

²⁷ The NARD model bill had gone through several drafts prior to the Supreme Court case. The final draft was completed in January 1937 after this decision and included provisions to meet certain questions raised by the court.

²⁸ When a Senate committee of the Vermont Legislature "killed" a bill on March 1, 1939, R. H. Macy & Co. published a quarter page advertisement in the New York Times, congratulating the citizens of that State on their action.

²⁹ Resale price contracts in interstate commerce still come under the ban of the Sherman Antitrust Act. See notes 7, 8, and 9, *supra*.

³⁰ 26 Stat. 209, as amended by Public, No. 314, 75th Cong., c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. A., secs. 1 to 7.

A HORIZONTAL picture of State resale price maintenance legislation is facilitated by comparing the statutes with the California (old type) act and with the final draft of the model statute of the NARD (new type). Twenty-three acts are based on the old type law,³¹ while 19 States follow the new type act.³² Two states have enacted statutes which include provisions from both these models.³³

The gist of the acts lies in two provisions which validate contracts fixing the resale price of trade-marked commodities and make actionable price cutting by any person with notice of a price restriction.³⁴ These provisions are present in all the acts. Excepted from the provisions of all the acts are closing-out sales, sales of damaged or deteriorated goods, and sales by court order.³⁵ Both types of statute include definitions of terms used. Those of the new-type law are greater in number.³⁶

Since the model statute of the NARD was not finally drafted until after the Supreme Court decision, its provisions were designed to strengthen the old-type law. Thus the newer statute prohibits the making of gifts, concessions, or combination sales in connection with price-restricted commodities.³⁷

The new-type statute includes commodities bearing the trade-mark of the distributor in addition to those bearing the trade-mark of the producer. Of the old-type acts, only Colorado and South Carolina have a similar provision. Eight States include commodities sold through vending equipment bearing a trade-mark.³⁸

³¹ Arizona, California, Colorado, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Washington, and Wisconsin. See Oppenheim, *Recent Price Control Laws* (1939).

³² Alabama, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Maryland, Minnesota, Montana, Nebraska, North Carolina, Oregon, South Dakota, Utah, Virginia, West Virginia, and Wyoming.

³³ Nevada and Rhode Island. While listed here as a combination act, the Rhode Island statute is based substantially upon an early model of the NARD law drafted in January 1936.

³⁴ This latter provision, the "nonsigners' clause," is included in almost identical language in all but one of the acts. The Rhode Island statute still follows the earlier NARD bill. See sec. 4 of the Rhode Island act, *infra*, part I. The nonsigners' clause reads as follows: "Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

³⁵ The statute of Wisconsin does not exempt judicial sales.

³⁶ The statutes of Illinois, Kentucky, Maine, Massachusetts, and New Hampshire do not include definitions. Although based on the California (old-type) act, the statutes of Colorado and South Carolina follow the definitions of the new-type act. Michigan and Ohio have definitions unlike either model.

³⁷ Nebraska does not include this prohibition.

³⁸ California, Maine, Massachusetts, Nevada, New Jersey, Oregon, Utah, and Washington.

XXXVIII PRICE CONTROL LEGISLATION

The Virginia statute defines "commodity" so as to exclude various foods and wearing apparel.³⁹ The Kansas act includes only commodities bearing a registered trade-mark.

The new-type statute excepts from its operation sales of commodities from which the trade-mark has been removed.⁴⁰ This proviso is attributable to the statement in the opinion of Mr. Justice Sutherland in the Supreme Court case upholding the validity of the Illinois statute that the purpose of the statute is to prevent depreciation of the trade-mark and goodwill of the producer and that the act is therefore inapplicable to sales of commodities not bearing a trade-mark.

In closing-out sales, the NARD statute provides that the dealer must give the producer or distributor of the commodity prompt and reasonable notice of such sale and an opportunity to purchase such stock at the original invoice price. Ten old-type statutes include a similar provision.⁴¹ The statute of North Carolina also excepts sales to religious, charitable, or educational institutions and further provides that purchases by the State, its agencies, or any of its political subdivisions shall not be subject to the provisions of the act. Payment of patronage dividends by cooperatives is not a violation of the statutes of Colorado and Michigan. A cooperative exemption, much wider in scope, in the Wisconsin statute has been declared unconstitutional.⁴²

The new-type statute provides for the fixing of a minimum price. Generally, the old-type statute permits only the fixing of a specific price. However, seven statutes of the latter type provide for the establishment of a minimum price.⁴³ The Nevada act provides that any price fixed shall be subject to sales and excise taxes.

Wyoming is the only state which provides a criminal penalty for violation of the act. In addition, the attorney general is empowered to institute quo warranto proceedings against a corporate offender. The acts of Maine, Michigan, New Hampshire, and Ohio specifically

³⁹ See sec. 1463 (i) of the Virginia statute for text of this definition, *infra*, page 329.

⁴⁰ The acts of Florida, Minnesota, Oregon, and Virginia do not include this provision. The old-type statute of Colorado contains this exemption.

⁴¹ Colorado, Illinois, Kentucky, Maine, Massachusetts, Michigan New Hampshire, Ohio, South Carolina, and Washington. Michigan and Ohio include a similar clause but provide for the purchase of the stock at the prevailing and not at the original invoice price.

⁴² Sec. 8 of this statute provided that "This section [act] shall not apply to any cooperative society or association not organized for profit." As the exemption was not limited to sales by cooperatives to its members, the court in *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937), held that this provision was unduly discriminatory as against retailers who would be competitors of a cooperative association in selling to the general public.

⁴³ Colorado, Maine, Michigan, New Hampshire, Ohio, Oklahoma, and South Carolina. Michigan has a qualifying clause: "at less than the price stipulated."

provide for injunctive relief, and treble damages may be recovered under the statutes of Maine and New Hampshire. While the "non-signers' clause" allows suit by any person damaged by a violation, the statutes of New Jersey and Ohio are the only ones which specifically allow suit by a retailer. Trade associations may enforce compliance with a resale price restriction under the New Hampshire law. In an effort to prevent the fixing of excessively high prices, the Wisconsin act allows review of resale prices fixed in any contract by the department of agriculture and markets. If, after a hearing, the department shall find such prices to be unfair, the department is empowered to declare such contract to be in restraint of trade.

These, in brief, are the material provisions, similarities, and dissimilarities in the 44 resale price-control acts. Many problems not provided for have already arisen. Some are being solved by legislative amendment, others by judicial interpretation. Legislatures, however, can cope with only some of the faults in the drafting of the statutes. The courts will ultimately determine their scope and operation. To understand these laws properly it is necessary therefore to look at these acts in the courts and to review the judicial interpretations which in some instances have expanded the meaning of the laws far beyond their original limits.

ON December 7, 1936, the Supreme Court of the United States upheld the constitutionality of the Illinois act and thus wrote finis to a race for decision between the laws of three States.⁴⁴ California was the first to enact this legislation, but the New York statute was the first to be tested in the highest State court. The court of appeals in that State, adopting a rigid interpretation of the nonsigners' clause agreed upon by the contesting parties, held the statute unconstitutional, stating that while the statute might validly permit resale price maintenance agreements and the creation of an "equitable servitude" upon a trade-marked commodity, it might not constitutionally compel price fixing in the absence of contract.⁴⁵ Shortly after this decision, the Supreme Court of California upheld the validity of the act in that State, declaring that the nonsigners' clause was an extension of the tort doctrine of unjustifiable interference with contract rights and that a noncontracting retailer who purchased

⁴⁴ *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *McNeil v. Joseph Triner Corp.*, 299 U. S. 183, 57 Sup. Ct. 130, 81 L. Ed. 109 (1936).

⁴⁵ *Doubleday-Doran & Co., Inc. v. R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409 (1936). See Martin, *The Fair Trade Act* (1936), 5 Ford L. Rev. 50.

trade-marked commodities with notice of a price restriction was bound by that restriction.⁴⁶ Subsequently the Illinois statute was declared constitutional by the State supreme court⁴⁷ and was the first act to come before the United States Supreme Court.⁴⁸

In declaring the statute constitutional, the Supreme Court emphasized the fact that in all the discussions on proposed Federal resale price maintenance legislation, no constitutional objection had ever been urged and that in previous cases, the court had struck down resale price fixing "in the absence of contract or statutory right," plainly implying the validity of legislation granting this right. Proceeding to the specific objections to the statute, the Court stated that it merely permitted resale price contracts and that the limitation of this grant to trade-marked commodities was a reasonable classification and within the power of a legislature to create. In sustaining the validity of the nonsigners' clause, the Court declared that selling below the stipulated price was a violation only when done willfully and knowingly. Then follows this ambiguous language which has been the subject of much discussion and interpretation: "We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds willfully to resell in disregard of it."⁴⁹ While the first clause smacks of the equitable servitude doctrine, the second mentions notice at the time of resale and implies the tort doctrine of unjustifiable interference with contract rights. The Court stated further that the nonsigners' clause was not a restriction on the disposal of the commodity qua commodity but on the misuse of the trade-mark and goodwill of the producer and was therefore "an appropriate means to that perfectly legitimate end."

Subsequently the Court of Appeals of New York overruled its former decision and held the New York statute constitutional, stating merely that it was bound by the ruling of the Supreme Court.⁵⁰ Many State courts have since upheld the statutes but all rely to a great extent upon *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, without attempting to analyze the many objections

⁴⁶ *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 Pac. (2d), 177 (1936); *Pyroil Sales Co. v. Pep Boys*, 5 Cal. (2d), 784, 55 Pac. (2d), 194 (1936).

⁴⁷ *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. (2d), 929 (1936); *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940 (1936).

⁴⁸ See footnote 44, (*Old Dearborn v. Seagram*) *supra*.

⁴⁹ *Id.*, at p. 193.

⁵⁰ *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937).

raised.⁵¹ Because of this, many basic questions remain unanswered in most jurisdictions.⁵²

In reviewing the major judicial interpretations of the statute, it will be well to consider first those questions provided for in the new-type statutes but left open in the old-type statutes. The new-type statute limits the right to establish a resale price to the producer or to a distributor expressly authorized by the producer. The question has arisen under several of the old-type acts. While several courts have stated that any vendor or owner of a commodity may establish a resale price by contract with a vendee,⁵³ the opinions of these courts qualify this statement considerably. In all the cases that have arisen only the right of a producer or of a "sole exclusive distributor" has been involved, and while this right has been upheld, the language of the various courts must be interpreted in the light of these specific holdings.⁵⁴

Again, the new-type statute prohibits indirect price cutting through the making of gifts and concessions while the old-type statute con-

⁵¹ See *Johnson & Johnson v. Weissbard Bros.*, 121 N. J. Eq. 585, 191 Atl. 873 (Ct. Errors & App. 1937); *Weeco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937); *Broff v. Silver Liquor Stores, Inc.*, 25 Conn. L. J. 204, 5 Conn. Supp. 288 (Super. Ct. 1937); *Bristol-Myers Co. v. Lit Bros.*, 6 Atl. (2d) 843 (Pa. Sup. Ct. 1939); *Shryock v. Assn. of United Fraternal Buyers, Inc.* (Pa. Ct. Com. Pl. 1938), CCH 25150, revd. on other grounds 5 Atl. (2d) 581, 135 Pa. Super. 428 (1939); *Weeco Products Co. v. Sam's Cut Rate Inc. & Randolph Drug Co.* (Mich. Cir. Ct. 1937), P.-H. par. 40392; *Goldsmith's Cut Rate Store v. Mead, Johnson & Co.*, 7 Atl. (2d) 176 (Md. Ct. of App. 1939). In *Eli Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528 (1939), the court in a well-considered opinion upheld the act as a constitutional exercise of the legislative power. The South Carolina statute was held valid in the Federal district court in *Calvert Distilling Co. v. Brandon*, 24 Fed. Supp. 857 (1938). The Florida statute was held unconstitutional in that the title, referring to voluntary agreements, did not express the contents of the law as prescribed by the State constitution. *Bristol Myers Co. v. Webb's Cut Rate Drug Co., Inc.*, 188 So. 91 (Sup. Ct. 1939). This statute was repealed by a new act in 1939. A lower State court held the South Dakota statute unconstitutional under the State constitution which prohibited any contract to fix prices in order to prevent competition in such prices. *In re Dargen v. Townsend* (Cir. Ct. 1939), CCH 25312.

⁵² It is well to note in this connection the opinion of the court in *Coty, Inc. v. Hearn Department Stores*, 158 Misc. 516, 284 N. Y. Supp. 909 (1935). In holding the New York act unconstitutional, the court undertakes a discussion and analysis of the statute to an extent unhappily missing in all other cases. The court anticipates such problems as "Must prices fixed be uniform among retailers?", "May prices differ in different competitive areas?", "By which resale price contract is a noncontracting retailer bound?", "May a producer fix unreasonable and exorbitant prices?", "Does a producer have the right to enforce price restrictions against some and not against others?" Because of the absence of fair standards in the statute, the act was held unconstitutional as being arbitrary, discriminatory, and unreasonable.

⁵³ See *Schenley Products Co. v. Franklin Stores Co.*, 124 N. J. Eq. 100, 199 Atl. 402 (Ct. Errors & App. 1938); *Parrott & Co. v. Somerset House* (Cal. Super. Ct. 1937) CCH 25026.

⁵⁴ See also *Hiram Walker, Inc. v. Goldman* (Wis. Cir. Ct. 1938), CCH 25137; *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N. Y. Supp. (2d) 320 (1938).

tains no similar provision. Under the old-type statute it has been held that a discount to employees which resulted in a price less than that fixed in a contract is a violation.⁵⁵ Similarly, the issuance of profit-sharing coupons has been held a violation on the ground that these coupons constituted "value."⁵⁶ On the other hand the issuance of trade stamps redeemable in merchandise has been held valid where the stamps issued to the customer are not redeemable until 900 have been collected.⁵⁷ The court here stated that there was little if any value in an individual trade stamp as issued.

Three basic questions present in both types of statute have been the subject of much discussion and some judicial interpretation. The analysis of the nonsigners' clause by the Supreme Court has resulted in a similar ambiguity in the opinions of many State courts. Some appear to follow the "equitable servitude" doctrine,⁵⁸ others the tort doctrine of unjustifiable interference with the contractual relations of others,⁵⁹ and one State makes a gallant effort to follow both theories at the same time.⁶⁰ With all this somewhat theoretical analysis, one important feature must be remembered. In every case where the noncontracting retailer has been held bound by a resale price restriction, it has been established that the retailer had notice of the restriction at the time he purchased the goods. Again, an injunction has been denied where prior notice had not been satisfactorily shown.⁶¹ This emphasizes the importance of following what the courts do and not what they say.

⁵⁵ *Bristol-Myers Co. v. Bamberger Co.*, 122 N. J. Eq. 559, 195 Atl. 625 (1937), *affd.* 124 N. J. Eq. 235, 1 Atl. (2d) 332 (Ct. Errors & App. 1938).

⁵⁶ *Bristol-Myers Co. v. Soble* (Pa. Ct. Com. Pl. 1938), C. C. H. Trade Regulation Service, par. 25114.

⁵⁷ *Bristol-Myers Co. v. Lit Bros.*, 6 Atl. (2d) 843 (Pa. Sup. Ct. 1939).

⁵⁸ *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936); *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co.*, 287 Ill. App. 187, 4 N. E. (2d) 658 (1936); *Johnson & Johnson v. Weissbard Bros.*, 121 N. J. Eq. 585, 191 Atl. 873 (Ct. Errors & App. 1937); *Lentheric v. Weissbard*, 122 N. J. Eq. 573, 195 Atl. 818 (1937); *Hiram Walker, Inc., v. Goldman* (Wis. Cir. Ct. 1933), CCH 25137. The Court of Appeals of Maryland avoided the issue by stating that even if notice at the time of acquisition was necessary, the burden of proving lack of knowledge should be on the retailer. *Goldsmith's Cut Rate Store v. Mead, Johnson & Co.*, 7 Atl. (2d) 176 (1939). The North Carolina Supreme Court in upholding the constitutionality of the statute stated: "The restriction is not imposed after the acquisition of the property, and is not in derogation of an existing or established right. Under the statute it was a condition that had already attached to the property. It was known to the prospective purchaser and he was under no obligation to assume it. Morally and legally he is presumed to have accepted the condition by his voluntary act of purchase." *Eli Lilly & Co. v. Saunders*, 216 N. C. 163, 176, 4 S. E. (2d) 528, 537 (1939). See *Fair Trade Acts in Operation* (1938) 52 Harv. L. Rev. 284.

⁵⁹ See *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 Pac. (2d) 177 (1936). In *Shryock v. Assn. of United Fraternal Buyers, Inc.*, 135 Pa. Super. 428, 5 Atl. (2d) 581 (1939) the court implies that notice of the price restriction at the time of sale is sufficient to bind the defendant.

⁶⁰ See *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc.*, 281 N. Y. 101, 22 N. E. (2d) 253 (1939).

⁶¹ *Oneida Ltd. v. Macher Watch Co., Inc.*, 99 N. Y. L. J. 1706 (Sup. Ct. N. Y. County, 1938), CCH 25118.

The second major problem common to both types of statute is the question "who may enforce a resale price restriction." On the ground that both the producer and distributor of a trade-marked commodity have an interest in the goodwill it has been held in several States that they may enforce the resale price restriction.⁶² The New York Court of Appeals has held that a contracting retailer may maintain an action in order to prevent interference by a noncontracting retailer with the contractual relations of the plaintiff and that a contracting retailer is a person damaged within the purview of the statute. It has been generally held that a contracting retailer may enforce a resale price restriction.⁶³

The resale price control acts make no provision for uniform enforcement. Thus the question as to what extent the courts will apply the equitable doctrine of "clean hands" has arisen. Actions to enforce resale price agreements arose in very early cases. While the language of various courts differs in some slight respects, several general rules have been laid down. Several courts held that the producer or distributor may not act arbitrarily in enforcing the observance of fixed prices, and that there must be a reasonable and diligent effort to prevent price cutting, without discrimination.⁶⁴ One court has ruled that proof of price cutting by the plaintiff will constitute a valid defense to an action for violation of a resale price restriction.⁶⁵ It has further been held that discrimination by the producer in selling his commodity will justify the denial of an injunction in his favor against price cutting by the defendant.⁶⁶ Thus while no inflexible rule may be laid down it appears that fair conduct by the plaintiff will play a large part in the exercise of discretion by the courts in passing upon injunctions for price cutting.

⁶² *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co.*, 287 Ill. App. 187, 4 N. E. (2d) 658 (1936); *Max Factor & Co. v. Kunsman*, *supra*; *Parrott & Co. v. Somerset House* (Cal. Super. Ct. 1937), CCH 25026; *Hiram Walker, Inc. v. Goldman* (Wis. Cir. Ct. 1938), CCH 25137.

⁶³ *Port Chester Wine & Liquor Shop, Inc., v. Miller Bros. Fruiters, Inc.*, *supra*. And see *Shryock v. Assn. of United Fraternal Buyers, Inc.*, *supra*, where a retailer was allowed to maintain an action. Cf. *Broff v. Silver Liquor Stores, Inc.*, 25 Conn. L. J. 204, 5 Conn. Supp. 288 (Super. Ct. 1937) where the court expressed doubt as to whether a contracting retailer was the proper party plaintiff.

⁶⁴ *Calvert Distilling Co. v. Gold's Drug Stores*, 123 N. J. Eq. 458, 198 Atl. 536 (1938); *Lentheric, Inc. v. F. W. Woolworth Co.* (Pa. Ct. Com. Pl. 1939), CCH 25275; *Hiram Walker, Inc. v. Goldman*, *supra*; *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N. Y. Supp. (2d) 320 (1938).

⁶⁵ *Ray Kline, Inc., v. Davega-City Radio*, 168 Misc. 185, 4 N. Y. Supp. (2d) 541 (1938).

⁶⁶ *Lucien Lelong, Inc., v. H. Mohr & Co.*, 169 Misc. 560, 8 N. Y. Supp. (2d) 131 (1938); *Gillette Safety Razor Co. v. Green*, 167 Misc. 251, 3 N. Y. Supp. (2d) 822 (1938); *Lentheric v. Weissbard*, 122 N. J. Eq. 573, 195 Atl. 818 (1937). Cf. *Reylon Nail Enamel Corp. v. Charmley Drug Shop*, 123 N. J. Eq. 301, 197 Atl. 661 (1938).

While many other problems of less importance have arisen, they have been confined in the main to courts of the first instance. They are treated in this volume in the case annotations to the individual statutes. The merit of one set of "rules," however, justifies their inclusion at this point. In *Calvert Distillers Corporation v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N. Y. Supp. (2d) 320 (1938), the court laid down the following interpretations of the Resale Price Control Act:⁶⁷

"1. The suit may be instituted by the owner or holder of the brands or marks or by one having the exclusive right to use such marks in a given territory.

"2. The resale price sought to be maintained must be a fixed price or a stipulated price, not merely a price suggested or recommended by the owner or producer.

"3. Notice of the fixed prices and of changes thereof must be given to all who are sought to be bound thereby, and this applies not alone to direct changes in prices, but also to changes in discounts and other general business practices reflected in the price of the commodity.

"4. To invoke the Fair Trade Act it is unnecessary that agreements providing for the maintenance of fixed resale prices be made with all or substantially all of the dealers in a commodity. It is enough if there are agreements made indicating an intention to resort to the provisions of the act. Nor is it necessary for the owner or producer to sell directly to the retailer; he may deal with a wholesaler who in turn sells to the retailer.

"5. A dealer who does not sign a price maintenance agreement is just as amenable to the act as one who does sign. Before any relief may be obtained against him, however, it must appear that he had notice of the fixed prices and of all changes thereof at the time of sale.

"6. Implicit in the statute is the requirement that the prices fixed for resale by retailers be uniform in any one competitive area. Implicit also is the requirement that there shall be no unfair discrimination in prices to retailers. That does not preclude discounts or fair variations in prices having a general application in the trade based, for example, upon quantity sold or time of payment.

⁶⁷ In *Calvert Distillers Corp. v. Stockman*, 26 Fed. Supp. 73 (E. D. N. Y. 1939), the court at p. 75, said: "Judge Shientag, in the cases of *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, and *Seagram Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N. Y. Supp. (2d) 320, in a well-considered opinion, has formulated certain 'rules' which he deemed applicable to the issues in those cases which were brought under section 2 of the * * * act. These 'rules' are so well formulated that I shall adopt the same as applicable to this case."

"7. A producer or owner invoking the statute is not required as a matter of law to resort to legal process against every violator of its provisions or of the contracts made pursuant thereto before he can enforce a remedy against any one violator. * * * At least where he does not resort to legal action, the producer is required to use reasonable diligence to see to it that none of his products continue to be sold to a retailer who cuts prices after the producer has notice of such violation. In the last analysis it all comes down to a question of whether the producer or owner by his acts or conduct, whether of commission or omission, may be said to have waived or abandoned his rights, with respect to all retailers, under the statute or agreements made thereunder. He will not be allowed directly or indirectly to discriminate unfairly. In availing himself of the benefits of the statute he must accept its burdens. The Fair Trade Act in its very essence calls for uniform enforcement without discrimination or favoritism. The producer cannot act arbitrarily in enforcing observance of fixed prices. There must be a sincere and diligent effort to prevent price cutting of branded products through legal process if necessary.

"8. A dealer not signing a fair trade agreement may not take advantage of the producer's alleged breach of contracts made with others unless those violations amount to improper discrimination, unfair business practices, or indicate an acquiescence in the unlawful cutting of prices or a waiver or abandonment of rights under the statute.

"9. The only practical method of securing any kind of enforcement of the statute as now drawn is by way of injunctive relief. To obtain such relief under the statute it is unnecessary, generally speaking, for the owner or producer to prove the actual damage sustained. It is sufficient to establish that there is in existence a 'goodwill' to be protected and injury thereto will ordinarily be presumed if there is unlawful price cutting."

Present indications tend toward further rigid development of the case law.

MILLER-TYDINGS AMENDMENT TO
SHERMAN ANTITRUST ACT

(26 Stat. 209, as amended by Public, No. 314, 75th Cong., 15 U. S. C. A.,
secs. 1 to 7)

SECTION 1. Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: [Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.] Every person who shall make any contract or engage in any combination or conspiracy [hereby declared to be illegal] 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 1 year, or by both said punishments, in the discretion of the court.

(The matter shown in brackets was added by amendment.)

STATE RESALE PRICE MAINTENANCE ACTS

(For text of statutes, see *infra*)

State	Citation
ALABAMA.....	Laws 1939, H. B. 102.
ARIZONA.....	Laws 1936, 1st Sp. Sess., c. 11.
ARKANSAS.....	Dig. Stat. (Pope, 1937) sec. 5606.
CALIFORNIA.....	Gen. Laws (Deering, 1937) Act 8782, Laws 1937, c. 843.
COLORADO.....	Stat. Ann. (Michie's Supp. 1938) c. 165, sec. 20 (1).
CONNECTICUT.....	Gen. Stat. (Supp. 1939) sec. 921e.
FLORIDA.....	Comp. Gen. Laws Ann. (Skillman, Supp. (1940) sec. 7100(14))
GEORGIA.....	Code Ann. (Park's Supp. 1938) tit. 106, sec. 401.
IDAHO.....	Laws 1937, c. 240.
ILLINOIS.....	Rev. Stat. (Smith-Hurd) c. 121½.
INDIANA.....	Stat. Ann. (Burns) sec. 66-301.
IOWA.....	Code (1935) sec. 9884-g1.
KANSAS.....	Gen. Stat. Ann. (Corrick's Supp. 1937) sec. 50-301.
KENTUCKY.....	Stat. Ann. (Baldwin's Carroll Supp. 1939) sec. 4748i-1.
LOUISIANA.....	Gen. Stat. Ann. (Dart, 1939) sec. 9809.1.

SCOPE NOTE

XLVII

<i>State</i>	<i>Citation</i>
MAINE.....	Laws 1937, c. 204, Laws 1939, c. 83.
MARYLAND.....	Laws 1937, c. 239.
MASSACHUSETTS.....	Ann. Laws (Supp. 1939) c. 93, sec. 14A, Laws 1939, c. 231, 313.
MICHIGAN.....	Stat. Ann. (Henderson's Supp. 1938) sec. 19.321.
MINNESOTA.....	Stat. (Mason's Supp. 1938) sec. 3976-51.
MISSISSIPPI.....	Code Ann. (Supp. 1938) sec. 478.1.
MONTANA.....	Laws 1937, c. 42.
NEBRASKA.....	Comp. Stat. (Kyle's Supp. 1937) sec. 59-1101.
NEVADA.....	Comp. Laws (Hillyer's Supp. 1938) sec. 1470.21.
NEW HAMPSHIRE.....	Laws 1937, c. 184.
NEW JERSEY.....	Rev. Stat. (1937) sec. 56:4-3, Laws 1938, c. 165.
NEW MEXICO.....	Stat. Ann. (Courtright's Supp. 1938) sec. 145-107.
NEW YORK.....	Unconsol. Laws (McKinney) sec. 2201.
NORTH CAROLINA.....	Code Ann. (Michie, 1939) sec. 5126 (k).
NORTH DAKOTA.....	Laws 1937, c. 126.
OHIO.....	Code Ann. (Baldwin's Throckmorton, 1936) sec. 6402-2.
OKLAHOMA.....	Stat. Ann. (Supp. 1938) tit. 78, sec. 41.
OREGON.....	Code Ann. (Supp. 1935) sec. 70-401, Laws 1937, c. 113.
PENNSYLVANIA.....	Stat. Ann. (Purdon's Supp. 1938) tit. 73, sec. 7.
RHODE ISLAND.....	Rev. Gen. Laws (1938) c. 393.
SOUTH CAROLINA.....	Code (Supp. 1938) sec. 6044-1.
SOUTH DAKOTA.....	Code Ann. (1939) c. 54.04.
TENNESSEE.....	Code Ann. (Michie, 1938) sec. 6770-1.
UTAH.....	Rev. Stat. Ann. (Supp. 1939) sec. 95-3-1.
VIRGINIA.....	Code Ann. (Michie's Supp. 1938) sec. 1463 (i).
WASHINGTON.....	Rev. Stat. Ann. (Remington's Supp. 1938) sec. 5854-11.
WEST VIRGINIA.....	Code Ann. (Michie-Sublett, 1937) sec. 4678(1).
WISCONSIN.....	Rev. Stat. (1937) sec. 133.25.
WYOMING.....	Laws 1937, c. 58.

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(26 Stat. 209, as amended by Public, No. 314, 75th Cong., 15 U. S. C. A.,
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CONNECTICUT	Gen. Stat. (Supp. 1939) sec. 921e.
FLORIDA	Comp. Gen. Laws Ann. (Skillman, Supp. (1940) sec. 7100(14))
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KENTUCKY	Stat. Ann. (Baldwin's Carroll Supp. 1939) sec. 4748i-1.
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SCOPE NOTE

XLVII

<i>State</i>	<i>Citation</i>
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NEVADA.....	Comp. Laws (Hillyer's Supp. 1938) sec. 1470.21.
NEW HAMPSHIRE..	Laws 1937, c. 184.
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NEW YORK.....	Unconsol. Laws (McKinney) sec. 2201.
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NORTH DAKOTA..	Laws 1937, c. 126.
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OKLAHOMA.....	Stat. Ann. (Supp. 1938) tit. 78, sec. 41.
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WEST VIRGINIA....	Code Ann. (Michie-Sublett, 1937) sec. 4678(1).
WISCONSIN.....	Rev. Stat. (1937) sec. 133.25.
WYOMING.....	Laws 1937, c. 53.

II. STATUTES PROHIBITING SALES BELOW COST

A SECOND price-control device which has found its way into State legislation is one which creates a minimum level for the computation of price. Whereas resale price maintenance statutes permit the creation of a rigid price, the essence of statutes prohibiting sales below cost is the creation of a floor price which is flexible according to the particular business affected. Again, while the resale price control acts permit vertical price regulation, the "loss limitation" statutes provide for the control of prices along horizontal lines.¹ Further, the resale price maintenance acts are permissive statutes with civil remedies while the sales-below-cost prohibitions, criminal in nature, are mandatory laws which create a relationship between the State and the merchant. The history of this type of legislation shows that, until recently, it has always been second to resale price maintenance laws in the favor of trade and commercial groups.

While the terms "loss limitation" and "loss leader" are of comparatively recent origin in our economic-legal terminology, legislation establishing minimum levels of prices was first enacted many years ago as an integral part of State antitrust laws. In the early part of this century, some antitrust laws contained provisions which were wide in scope and encompassed the purpose of recent minimum floor-price laws. Several States enacted legislation which prohibited the sale of commodities at less than the fair market value, or the doing of any act for the purpose and with the intention of driving a competitor out of business or restraining competition.² Others, like South Carolina, enacted provisions prohibiting the sale of commodities at less than the cost of manufacture or less than the cost in the open market, for the purpose of injuring competitors or

¹ Vertical price control refers to price restrictions applicable to different planes of the marketing process, such as a restriction imposed by manufacturers on retailers. Horizontal price control refers to price restrictions applicable to sellers on the same plane, for example, a price agreement between manufacturers or between retailers.

² Ala. Code (1907), sec. 7581, Code Ann. (Michie, 1928), sec. 5214; Idaho L. 1911, c. 215, sec. 4, Code Ann. (1932), sec. 47-104; Iowa L. 1909, c. 225, sec. 1, Code (1939), sec. 9915 (4); Neb. L. 1905, p. 638, Comp. Stat. (1929), sec. 59-806; N. C. L. 1913, c. 41, sec. 5 (c), Code Ann. (Michie, 1939), sec. 2563 (3), (4); Tex. Acts 1907, p. 457, Stat. (Vernon, 1936) Pen. Code, art. 1638. The Alabama provision appears in the Code of 1907 without any parenthetical number to a prior code citation or marginal reference to a date of enactment. The preface to this Code states: "The absence of any marginal reference and any parenthetical number indicates that such section was written by the [Code] Commissioner and adopted by the Legislature as a part of the code."

suppressing competition.³ These laws were the first to establish "cost" as the minimum base in computing price. However, there was no attempt to define "cost" and the statutes, being merely indicative of an extension of the general antitrust policy, laid down a broad prohibition.

After the hue and cry of the "trust-busting" period in the first decade of the century had ended, State legislation of this type came to an abrupt halt. Not until the advent of loss leaders was attention again focused on this problem. It became the practice of numerous merchants to advertise and sell leading brands of commodities at prices which were either much less than their market price or were below cost for the purpose of attracting customers to their places of business. This leader and loss leader practice has been the subject of much investigation and discussion.

California seems to have been the State chosen by interested trade groups as the testing ground. Having enacted a resale price maintenance statute in 1931, this State two years later passed a detailed statute prohibiting sales below cost.⁴ Here, for the first time, cost was defined and included invoice or replacement cost plus the cost of doing business. The statute then stated the various items which were to be included in computing cost of doing business. The major difficulty confronting the group favoring minimum floor price laws as opposed to resale price maintenance statutes was the formulation of a definition of cost which would adequately serve all types of business. The enactment of the California statute with its itemized definition of cost foreshadowed a conflict of opinion in this group which was to become apparent five years later.

With the advent of the National Recovery Administration and the adoption of various codes, the proponents of loss limitation provisions came to grips with those favoring resale price maintenance. The adoption of loss limitation provisions in the codes⁵ stimulated the advocates of resale price maintenance to turn to State legislation as the answer to their problem. The loss limitation provisions of the various codes contained no detailed definition of cost as found

³ Ark. L. 1905, p. 1, Dig. Stat. (Pope, 1937), sec. 9413; Miss. L. 1908, c. 119, sec. 1 (m), Code (Hemingway, 1917), sec. 3283; S. C. L. 1902, c. 26, sec. 19, Code (1932), sec. 6634; Tenn. L. 1907, c. 36 and 360, Code Ann. (Michie, 1938), sec. 5889. The Mississippi provision was impliedly repealed by L. 1926, c. 182, sec. 2, when subdivision (m) omitted reference to the cost of production. In the 1930 Code, subdivision (m) appears as subdivision (d) of section 3437.

⁴ L. 1933, p. 1280, Gen. Laws (Dearing, 1937), Act 8781.

⁵ Most of the codes contained prohibitions against sales below cost. See Haring, *Retail Price Cutting and Its Control by Manufacturers* (1935), p. 212; Nelson, *Minimum Price Regulation Under Codes of Fair Competition*, NRA Division of Review, Work Materials No. 56, p. 102 (1936).

1 PRICE CONTROL LEGISLATION

in the California statute. The usual provision stated that any sales below invoice cost plus a stated mark-up was an unfair practice and a violation of the code.⁶ In some codes, the manufacturer's list price, being the basic unit price in several industries, was adopted as the minimum level.⁷ Having once tasted victory, the invalidation of the NRA by the Supreme Court only served to reinforce the determination of the loss limitation group to secure widespread adoption of this type of legislation in the several States. Connecticut and Louisiana enacted Retail Drug Control Acts which closely followed the Retail Drug Code of the National Recovery Administration and prohibited sales of drugs and cosmetics at retail at prices less than the manufacturer's list price per dozen.⁸ At this time, the divergent forces within this group became apparent. The National Food and Grocery Conference Committee drafted a model statute which was called the Unfair Sales Act. This statute provided for a 6-percent mark-up to be added to the invoice or replacement cost. Against this, interested forces succeeded in having enacted in California the Unfair Practices Act which combined antidiscrimination provisions with a prohibition of sales below cost.⁹ The California statute was merely a reenactment of a former antidiscrimination law and the 1933 sales-below-cost statute in one act. Thus, as in the case of the Resale Price Control Acts, State legislatures were deluged with minimum floor price bills of two types. By September 1939, 24 States had enacted legislation which, except for two States, was similar to one or the other of these models.¹⁰ Ten State statutes follow the model statute of the National Food and Grocery Conference Committee,¹¹ nine statutes are based on the California Act,¹² three statutes include the mark-up provisions of one model with many provisions from the other,¹³ and two statutes, entitled Fair Sales Acts, differ from both of these models.¹⁴ The campaign is continuing with unabated vigor.

⁶ E. g. Retail Food & Grocery Code (6-percent mark-up), Retail Trade Code (10-percent mark-up), Retail Booksellers' Code (10-percent mark-up).

⁷ E. g. Retail Drug Code.

⁸ Conn. Gen. Stat. (Supp. 1935), c. 135a; La. Gen. Stat. Ann. (Dart, 1939), sec. 3316 (1)-(6).

⁹ See footnote 4, *supra*. See also Cupp, *The Unfair Practices Act* (1936), 10 So. Calif. L. Rev. 18.

¹⁰ Nebraska enacted a statute similar to the California model but repealed it in 1939 after it had been declared unconstitutional in *State v. Ruback*, 135 Neb. 335, 281 N. W. 607 (1938). Oklahoma has enacted a general prohibition against the sale of advertising space below cost. (Stat. Ann. (1936) tit. 79, sec. 6.) The predatory price-cutting statutes in the antitrust laws are not included in this total.

¹¹ Arizona, Connecticut, Idaho, Maine, Maryland, Massachusetts, Rhode Island, Tennessee, Virginia, and Wisconsin.

¹² Arkansas, California, Colorado, Kentucky, Michigan, Montana, Oregon, Washington, and Wyoming. The Michigan statute is applicable only to bakery and petroleum products.

¹³ Utah, Minnesota, and West Virginia.

¹⁴ New Jersey and Pennsylvania.

Recently the trade groups sponsoring this legislation received a serious set-back when the Governors of Nebraska and New York vetoed Unfair Sales Acts.

The efficacy of this legislation is still a matter of debate and its place in our national economy is not unchallenged. The various statutes have been attacked on constitutional grounds and several have fallen by the wayside. Much criticism has been levelled at these laws on economic grounds, especially upon the contention that they require the introduction of cost accounting with all its complexities into the smallest business. No well-founded appraisal of the benefits or detriments of these laws is yet available.

WHILE the Unfair Sales Act drafted by the National Food and Grocery Conference Committee is a comparatively short statute, the laws prohibiting sales below cost patterned after the California act are usually found with antidiscrimination provisions in an Unfair Practices Act.¹⁵ The major dissimilarities between the two models are reflected in the different methods of establishing a cost base.

The California model includes a provision for a minimum production as well as distributing cost and the statute is therefore made applicable to anyone doing business in the State.¹⁶ The Unfair Sales Act, on the other hand, covers only wholesalers and retailers.¹⁷ While the statute of Minnesota is applicable to wholesalers and retailers, the act provides that creameries, canneries, and other processors of agricultural products are defined to be manufacturers or producers and are not to be included within the meaning of the term "wholesaler."¹⁸ All sales-below-cost statutes except that of Michigan are applicable to all commodities¹⁹ and the statutes based on the California model specifically include "service or output of service trades."²⁰

¹⁵ See Oppenheim, *Recent Price Control Laws* (1939). The 24 sales-below-cost statutes can roughly be divided into 4 classes. In the following analysis of statutory provisions the statutes of Arkansas, Colorado, Kentucky, Michigan, Montana, Oregon, Washington, and Wyoming are termed California-model statutes. The Unfair Sales Acts include the laws of Arizona, Connecticut, Idaho, Maine, Maryland, Massachusetts, Rhode Island, Tennessee, Virginia, and Wisconsin. New Jersey and Pennsylvania have Fair Sales Acts, whereas the statutes of Minnesota, Utah, and West Virginia combine features of the two major model acts.

¹⁶ The Utah statute is similarly broad in scope.

¹⁷ The laws of Minnesota, New Jersey, Pennsylvania, and West Virginia contain a similar limitation.

¹⁸ The Virginia act is not applicable to fertilizer companies. The statutes of Colorado, Montana, Oregon, and Utah provide that the payment of patronage refunds by cooperatives is not a violation of the act.

¹⁹ The Michigan statute is applicable only to bakery and petroleum products.

²⁰ Wyoming does not follow the California statute in this respect.

Mindful of the decision of the Supreme Court in *Fairmont Creamery Co. v. State of Minnesota*,²¹ most of the statutes require as an element of violation the intent or effect of injuring competition. Thirteen statutes require the intent to injure competitors or destroy competition²² and seven acts make necessary the intent or effect of unfairly diverting trade from or otherwise injuring a competitor.²³ The statute of Oregon makes unlawful a sale below cost where the effect is to prevent, hinder, or injure competition or competitors. The Fair Sales Acts of New Jersey and Pennsylvania have an absolute prohibition of sales below cost, regardless of intent or effect. While based on the model Unfair Sales Act, the statute of Idaho omits the clause which requires intent or effect of diverting trade or otherwise injuring a competitor and, as enacted, contains an absolute prohibition against selling below cost.

In defining cost the California statute includes in detail many of the items which enter into its composition and, on its face, seems to require the introduction of a cost accounting system in all types of business. Production cost is defined as the cost of raw materials, labor, and all overhead expenses.²⁴ Distribution cost is defined as invoice or replacement cost, whichever is lower, plus the cost of doing business,²⁵ and the last item is so stated to be all costs of doing business, including without limitation: Labor, rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance, and advertising.²⁶

The Unfair Sales Act attempts to meet the problem of cost accounting by establishing a percentage mark-up as presumptively equal to the cost of doing business. Cost to the retailer is defined as invoice or replacement cost, within 30 days of the date of sale, whichever is lower, minus trade discounts except customary discounts for cash, plus freight charges, cartage (which is presumed to amount to $\frac{3}{4}$ percent), and the cost of doing business which in the absence of proof

²¹ 274 U. S. 1, 47 Sup. Ct. 506, 71 L. Ed. 893 (1927).

²² Arkansas, California, Colorado, Connecticut, Kentucky, Maine, Massachusetts, Michigan, Montana, Rhode Island, Washington, West Virginia, and Wyoming.

²³ Arizona, Maryland, Minnesota, Tennessee, Utah, Virginia, and Wisconsin.

²⁴ Utah includes this definition.

²⁵ Oregon omits the alternative of invoice cost and limits replacement cost to that within 10 days prior to the date of sale. Michigan defines distribution cost as "cost to the distributor or vendor plus necessary overhead," necessary overhead not being defined.

²⁶ Washington omits "interest on borrowed capital" from this list. Oregon adds "building and fixtures, light, heat, water, and power" to the other items. In food commerce the Oregon statute provides that cost to a wholesaler shall be the price paid, while cost to a retailer shall be replacement cost plus either a mark-up of 6 percent or the average monthly cost of doing business during the past year to include without limitation the items listed above.

to the contrary, is presumed to be 6 percent of the total cost.²⁷ The statutes of Arizona and West Virginia vary in requiring a mark-up of 12 percent and 7 percent respectively.²⁸ Cost to the wholesaler is similar to the above definition but does not include the cost of doing business.²⁹ However, eight statutes include a two percent mark-up to cover the cost of doing business.³⁰

The statute of Minnesota follows the Retail Drug Code in basing cost on the manufacturer's list price. Cost is defined as invoice or replacement cost plus cost of doing business, but the act provides that the manufacturer's list price plus the cost of doing business shall be prima facie evidence of cost. Cost of doing business is defined as all current costs of doing business which must include the items listed in the California statute, omitting interest on borrowed capital and credit losses.³¹ Additional provisions of the statute make a retail sale at less than 10 percent above list price or invoice or replacement cost a prima facie sale below cost³² and a retail sale at 15 percent or more above list price or invoice or replacement cost a sale in full compliance with the act. Any sale by a wholesaler at less than two percent above list price or invoice or replacement cost is prima facie evidence of a sale below cost.

The Fair Sales Acts of New Jersey and Pennsylvania differ radically from all other statutes in their computation of cost. New Jersey defines cost to retailers as replacement cost within 30 days prior to the date of sale minus customary trade discounts exclusive of discounts for cash. Cost to wholesalers is similar but provides for

²⁷ The statute of Idaho allows a time limit of 60 days while that of Maryland has no time limitation. Utah follows this definition of cost to the retailer. The Tennessee definition is invoice cost within 60 days or replacement cost plus the minimum cost of distribution to the most efficient retailer which, in the absence of proof to the contrary, is presumed to amount to a mark-up of 6 percent.

²⁸ West Virginia does not expressly include the item of cartage in defining cost to the retailer.

²⁹ The statutes of Arizona, Maryland, and Utah follow the National Food and Grocery Conference Committee model act in this respect. Maryland, however, does not include the time limitation on invoice or replacement cost. Tennessee includes only invoice cost within 60 days or replacement cost.

³⁰ Connecticut, Idaho, Maine, Massachusetts, Rhode Island, Virginia, West Virginia, and Wisconsin. The statute of West Virginia is similar but does not expressly include the item of cartage.

³¹ The 1939 amendment to the Minnesota statute includes the following provision: "The 'cost of doing business' including without limitation the aforesaid items of expense, incurred in the conduct of such business during the calendar year or the 12 months immediately preceding any alleged violation of this act, or in the event that any retailer or wholesaler shall have been engaged in business within the State for a shorter period of time, then such cost for such period of time immediately preceding any alleged violation of this act shall be prima facie evidence of 'cost' as herein defined." Because of the obvious inconsistency between this provision and the definition of cost, it would appear that the term "cost" was intended to be "cost of doing business."

³² Proof of injurious intent or effect is still necessary to constitute a violation of the statute.

replacement cost within 60 days and a mark-up of two percent for delivery charges is added. Pennsylvania similarly defines cost to retailers, but includes as an alternative the total consideration of the merchandise. Cost to wholesalers is similar to the New Jersey definition but does not include a mark-up.

All statutes provide that exceptional sales not justified by existing market conditions or outside the usual channels of trade cannot be used as a basis for computing cost. New Jersey and Pennsylvania are the only statutes which do not prohibit the giving away of any article or provide that in combination sales, the selling price shall include the cost of each item as set forth in the statute.

To ascertain cost in a practicable manner, the California-model statute provides that cost surveys conducted by an industry of which the defendant is a member, shall be admissible as evidence in proving cost.³³ Some statutes go further in providing that proof of the average overall cost of doing business plus invoice or replacement cost shall be prima facie evidence of cost.³⁴ The Utah statute makes such cost surveys prima facie proof of cost.

To combat the difficulty of proving unlawful intent, many statutes provide that proof of a sale below cost shall be prima facie evidence of violation.³⁵ Three States provide that proof of a sale below cost shall be prima facie evidence of intent to injure competition³⁶ while others require proof of sale below cost plus proof of injurious effect before such presumption shall arise.³⁷

Closing out or liquidation sales, sales of damaged or deteriorated goods, and judicial sales are exempted from the operation of all the statutes. Most States also except sales of perishable goods³⁸ while the California-model statutes do not apply to sales of seasonal goods.³⁹ All Unfair Sales Acts exempt sales to government departments or agencies, sales to charitable or relief institutions,⁴⁰ and clearance sales,⁴¹ while several also except isolated transactions not in the usual course of business.⁴² The Virginia statute is not applicable to sales by a wholesaler to a wholesaler or a retailer to a retailer for accom-

³³ Minnesota repealed this provision in 1939.

³⁴ California and Washington.

³⁵ Arizona, Idaho, Maryland, Tennessee, Virginia, West Virginia, and Wisconsin.

³⁶ Connecticut, Massachusetts, and Rhode Island.

³⁷ California and Washington. These two States further provide that in an action for violation of the statute, proof that the person complained against is including labor at less than the prevailing wage scale shall be admissible to prove unlawful intent.

³⁸ Michigan, New Jersey, and Pennsylvania do not include this provision.

³⁹ Michigan does not follow the California statute in this respect.

⁴⁰ West Virginia includes these exceptions.

⁴¹ Connecticut excepts closing out sales for the purpose of discontinuing dealing in any commodity and is therefore included in this list.

⁴² Connecticut, Maine, Massachusetts, Tennessee, and Rhode Island. Maryland provides that the statute shall not apply to sales outside the usual channels of trade.

modation purposes and to sales by a fiduciary or trustee in a deed of trust or deed of assignment for benefit of creditors.

Most statutes permit the lowering of prices in order to meet competition.⁴⁸ The California-model statutes permit the meeting of legal prices⁴⁴ but several of the Unfair Sales Acts permit the fixing of prices to meet all competition.⁴⁵ Some statutes allow the meeting of legal⁴⁶ or lawful⁴⁷ competition and Minnesota permits the meeting of local prices.

The procedural and remedial provisions of the California-model statutes are more extensive than those of the Unfair Sales Acts. The former provide that contracts in violation of the statute are void⁴⁸ and that a corporation contravening the provisions of the law shall suffer revocation of its charter.⁴⁹ Trade associations are permitted to sue for injunctive relief under these statutes.⁵⁰

Most of the statutes provide for fine or imprisonment⁵¹ and injunctive relief for violation⁵² and nine States permit the recovery of treble damages.⁵³

While some of the laws include additional minor provisions, the substance of the various sales-below-cost statutes has been given above. Many of the statutes are still being amended. It is not improbable that after the various individual provisions have been tested both by the courts and by enforcing agencies, the dissimilarities among these laws will be minimized.

ATTENTION has been so concentrated upon issues concerning the constitutionality of statutes prohibiting sales below cost that there has been little, if any, actual enforcement. This condition will presumably exist for some time since this issue is far from solution.

The ever-growing scope of the police power of the State is invoked in support of these laws. Under its police power a State

⁴⁸ Connecticut, Idaho, and Rhode Island do not include such a provision.

⁴⁴ Michigan omits the word "legal." Tennessee, New Jersey, Pennsylvania, Utah, and West Virginia are similar to the California statute in this respect.

⁴⁵ Arizona, Maryland, Massachusetts, and Wisconsin. Michigan has a similar provision.

⁴⁶ Maine.

⁴⁷ Virginia.

⁴⁸ Michigan does not include this provision. The statutes of Utah and West Virginia do.

⁴⁹ California, Oregon, and Washington do not so provide. A similar clause in the California statute was repealed in 1937. West Virginia includes this penal provision.

⁵⁰ Oregon and Washington omit this provision.

⁵¹ Connecticut does not so provide.

⁵² The New Jersey statute provides that nothing in the act shall prevent the granting of injunctive relief.

⁵³ Arkansas, Colorado, Kentucky, Maine, Michigan, Montana, Oregon, Utah, and West Virginia.

may enact legislation for the protection of the health, morals, and welfare of its citizens subject to the restrictions imposed by the due process and equal protection clauses of the Fourteenth amendment to the Federal Constitution and to similar provisions in the several State constitutions, viz: (1) Any statute so enacted must be reasonably related and adapted to the attainment of a proper police end and (2) must not be unreasonable, arbitrary, or capricious in its terms.⁵⁴

To date, 10 statutes prohibiting sales below cost have been challenged on this constitutional issue, 6 unsuccessfully and 4 successfully.⁵⁵ It has generally been held that loss limitation statutes are within the police power of the State for the protection of the public welfare.⁵⁶

Under the doctrine laid down in *Fairmont Creamery Co. v. State of Minnesota*⁵⁷ unlawful intent to injure competition is a necessary element in the statute to effect compliance with the first limitation of the due process clause stated above. At common law, price cutting in itself was not actionable⁵⁸ and was not deemed to be injurious to the public. The constitutional problem on this point is posed, in the words of Mr. Justice McReynolds: "May the State in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way theretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents."⁵⁹

This question was answered in the negative, and in holding the statute in question unconstitutional, the Court said: "We think the

⁵⁴ *Nebbia v. New York*, 291, U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

⁵⁵ Statutes held UNCONSTITUTIONAL: Maryland: *Loughran Co., Inc. v. Lord Baltimore Candy Co., Inc.*, 8 U. S. Law Week, 629 (April 4, 1940). Minnesota: *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 Fed. Supp. 70 (1938). Nebraska: *State v. Ruback*, 135 Neb. 335, 281 N. W. 607 (1938). The Nebraska statute was repealed in 1939. New Jersey: *State ex. rel. Lief v. Packard-Bamberger & Co., Inc.*, 123 N. J. L. 180, 8 Atl. (2d) 291 (1939). Pennsylvania: *Commonwealth v. Zasloff*, 137 Pa. Super. 96, 8 Atl. (2d) 801 (1939); *Commonwealth v. Hodin*, 34 D. & C. 270 (Quarter Sessions, 1938).

Statutes held CONSTITUTIONAL: Arizona: *Hammond v. Bayless Markets, Inc.*, (Super. Ct. 1937) P-H, 40489. This statute was repealed by the enactment in 1939 of an Unfair Sales Act. California: *Wholesale Tobacco Dealers Bureau of So. Cal. v. National Candy and Tobacco Co.*, 11 Cal. (2d) 634, 82 Pac. (2d) 3 (1938). Colorado: *Jonke v. Save-A-Nickel Stores*, (Dist. Ct. 1937) P-H, 40376. Montana: *Associated Merchants of Montana v. Ormesher*, 107 Mont. 530, 86 Pac. (2d) 1031 (1939). Tennessee: *Rust v. Griggs*, 172 Tenn. 565, 113 S. W. (2d) 733 (1938). Wyoming: *State v. Langley*, 53 Wyo. 332, 84 Pac. (2d) 767 (1938).

See Oler, *Statutory Inhibition Against Sales Below Cost* (1939, 43 Dick. L. Rev. 112; Note (1938) 32 Ill. L. Rev. 816; 118 A. L. R. 506.

⁵⁶ *State v. Langley, supra*; *Great Atlantic & Pacific Tea Co. v. Ervin, supra*; *Rust v. Griggs, supra*.

⁵⁷ 274 U. S. 1, 47 Sup. Ct. 506, 71 L. Ed. 893 (1927). The statute in that case prohibited locality discrimination regardless of intent or effect.

⁵⁸ *Katz v. Kapper* 7 Cal. App. (2d) 1, 44 Pac. (2d) 1060 (1935).

⁵⁹ *Fairmont Creamery Co. v. State of Minnesota, supra*.

inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition.”⁶⁰

The omission of this requirement of unlawful intent has caused the Fair Sales Acts of New Jersey and Pennsylvania to be declared unconstitutional.⁶¹ While the opinion in the *Fairmont Creamery* case implies that the requisite element of effect of injuring competition would be sufficient to sustain such a statute, the Nebraska Unfair Practices Act containing such a provision was invalidated, the State supreme court holding that the statute did not sufficiently distinguish between lawful and unlawful conduct before the commission of any act.⁶² However, seven statutes prohibiting sales below cost with intent to injure competition have been sustained under this principle.⁶³

As previously stated, the doctrine of the police power of the State is an expanding one. The *Fairmont Creamery* opinion refers to acts “not shown now to be accompanied by evil results as ordinary incident.” It appears likely, therefore, that as various price-cutting practices are shown to be regarded as harmful per se to the general welfare, the first limitation of the due-process clause will not require this element of unlawful intent, the prohibition itself being directly related to the protection of the general welfare of the people.

The second limitation imposed on any statute enacted under the police power of the State is that its terms shall not be unreasonable, arbitrary, or capricious. Because of the difficulty of defining cost, it is not surprising that this should prove the major obstacle to loss limitation statutes. The statutes following the California act define cost as invoice or replacement cost plus the cost of doing business. Several courts have stated that the legislature meant, by cost, what “business men generally mean—the approximate cost arrived at by a reasonable rule” and that this interpretation renders the statute sufficiently definite to be sustained.⁶⁴ The cost of doing business is defined as all costs of doing business to include without limitation certain items specifically mentioned⁶⁵ and it has been held that this means that the cost of each article shall include not only the initial cost but also its proportionate share of the burden of carrying on the business through which it is sold.⁶⁶

The statutes based on the model law of the National Food and Grocery Conference Committee define cost as invoice or replacement

⁶⁰ *Ibid.* (footnote 59).

⁶¹ See cases cited, footnote 55, *supra*.

⁶² *State v. Ruback, supra*.

⁶³ See cases cited, footnote 55, *supra*. The Minnesota statute was also upheld on this ground.

⁶⁴ *State v. Langley, supra*; *Associated Merchants of Montana v. Ormesher, supra*.

⁶⁵ See p. xxvi, *supra*.

⁶⁶ *People v. Kahn*, 19 Cal. App. (2d) 758, 60 Pac. (2d) 596 (1936); *State v. Langley, supra*. Contra, *Balcer v. Calcer*, 74 Pac. (2d) 839 (Dist. Ct. App. 1937).

cost plus the minimum cost of distribution by the most efficient retailer which, in the absence of contrary proof is presumed to amount to a mark-up of 6 percent.⁶⁷ This definition has been held valid, the court stating that the minimum cost of distribution can be ascertained from trade journals and trade surveys and that the presumption of a 6 percent mark-up is merely a rule of evidence, clearly within the power of the legislature to prescribe.⁶⁸ The first Unfair Trade Practices Act of Minnesota was held unconstitutional as contrary to the second limitation imposed by the Fourteenth amendment.⁶⁹ The statute, since amended to meet the objections raised,⁷⁰ defined cost as the manufacturer's list price less discounts plus the cost of doing business, or if no list price has been published, invoice or replacement cost plus the cost of doing business. It was held that the first definition was invalid as the list price may not be the actual cost and, when made conclusive of cost, was arbitrary. The statute then defined cost of doing business as the average of all costs of doing business during the preceding calendar year. This was also held invalid, the court stating that no effect was given to current selling cost which might be lower and since the definition was conclusive, it was unreasonable.

The Unfair Practices Act provides that trade cost surveys shall be admissible as evidence to prove cost. This provision has been upheld⁷¹ but the provision in the Minnesota statute making such surveys presumptive proof of cost was declared invalid, the court stating that the provision was indefinite and vague.⁷² Several statutes include other evidentiary presumptions. The original Minnesota act provided that any sale at less than 10 percent above list price or invoice or replacement cost is a prima facie violation of the statute. This was held unconstitutional, the court stating that while there was a reasonable inference that such a sale was below cost, it furnished no basis for a presumption of the necessary unlawful intent. Another presumption found in many Unfair Practices Acts is one which infers the unlawful intent of an agent from proof of the unlawful intent of his principal in a prosecution of the agent for violation of the statute. This provision has been held violative of the due process clause, it not being within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.⁷³

⁶⁷ For text of these statutes, see *infra*.

⁶⁸ *Rust v. Griggs*, 172 Tenn. 565, 113 S. W. (2d) 733 (1938).

⁶⁹ *Great Atlantic & Pacific Tea Co. v. Ervin*, *supra*.

⁷⁰ A reading of the present statute, *infra* at p. 149, shows that the amendments cover each objection and suggestion made by the court, frequently in identical language.

⁷¹ *Associated Merchants of Montana v. Ormesher*, *supra*.

⁷² *Great Atlantic & Pacific Tea Co. v. Ervin*, *supra*.

⁷³ *Ibid*.

These rulings constitute the bulk of the judicial construction of statutes prohibiting sales below cost. While several opinions by attorneys general have been rendered there has been little, if any, application of the statutes to actual facts. Whether the several provisions of the acts are susceptible of practical enforcement has been questioned. Recently the Governor of New York in vetoing a recent Unfair Sales Act rested his action upon this doubt.

RECENT STATUTES PROHIBITING SALES BELOW COST *

(For text of statutes, see *infra*)

State	Citation
ARIZONA.....	Laws 1939, c. 39.
ARKANSAS.....	Dig. Stat. (Pope, 1937) sec. 14313.
CALIFORNIA.....	Gen. Laws (Deering, 1937) Act 8761, Laws 1939, c. 175.
COLORADO.....	Stat. Ann. (Michie's Supp. 1938) c. 48, sec. 302.
CONNECTICUT.....	Gen. Stat. (Supp. 1939) sec. 922e.
IDAHO.....	Laws 1939, c. 209.
KENTUCKY.....	Stat. Ann. (Carroll, 1936) sec. 4748 h (1).
MAINE.....	Laws 1939, c. 240.
MARYLAND.....	Laws 1939, c. 248.
MASSACHUSETTS.....	Ann. Laws (Supp. 1938) c. 93, sec. 14E. Laws 1939, c. 189.
MICHIGAN.....	Stat. Ann. (Henderson Supp. 1939) sec. 28.78 (1).
MINNESOTA.....	Stat. (Mason's Supp. 1938) sec. 3976-40, Laws 1939, c. 403.
MONTANA.....	Laws 1937, c. 80, Laws 1939, c. 50.
NEW JERSEY.....	Rev. Stat. (Supp. 1938) sec. 56:4-7.
OREGON.....	Laws 1937, c. 215, Laws 1939, c. 495.
PENNSYLVANIA.....	Stat. Ann. (Purdon's Supp. 1938) tit. 73, sec. 201.
RHODE ISLAND.....	Laws 1939, c. 671.
TENNESSEE.....	Code Ann. (Michie, 1938) sec. 6770 (6).
UTAH.....	Rev. Stat. (Supp. 1939) tit. 94A, c. 2, Laws 1939, c. 28, 29.
VIRGINIA.....	Code Ann. (Michie's Supp. 1938) sec. 1463 (1).
WASHINGTON.....	Laws 1939, c. 221.
WEST VIRGINIA.....	Laws 1939, c. 151.
WISCONSIN.....	Laws 1939, c. 56.
WYOMING.....	Laws 1937, c. 73.

*This table does not include statutory prohibitions against selling below cost which are contained in the antitrust laws, nor similar prohibitions contained in the liquor laws of California and New Mexico nor the Retail Drug Control Acts of Connecticut and Louisiana.

III. ANTIDISCRIMINATION LEGISLATION

Antidiscrimination legislation had its inception in several local price-cutting laws enacted in the last part of the nineteenth century. These laws were directed against the practices of railroads and grain warehouses in granting discriminatory prices or rebates to favored customers.¹ In 1913, California enacted its Unfair Competition

¹ Oppenheim, S. C., *Recent Price Control Laws* (1939), p. 105.

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Act.² This law resulted from public antagonism toward the monopolistic and discriminatory practices of large oil companies and public utilities.³ Other antilocality discrimination laws appeared for similar reasons and, prior to 1916, 23 States prohibited local price cutting in some form.⁴ In 1931, California strengthened its legislation by adopting the Antidiscrimination Act.⁵ This legislation was largely a reenactment of the Unfair Competition Act with increased penalties. It is interesting to note that it was regarded as an antichain measure sponsored by associations of independent dealers as a blow to chain stores.⁶ The California law was amended in 1933⁷ and again in 1935⁸ when it became the Unfair Practices Act, incorporating the prohibition of locality discrimination from the 1913 Unfair Competition Act. Amendments were made again in 1937⁹ but the local price discrimination provision remained, although it permitted variations in prices to customers in different functional classifications and variations in cost arising from differences in grade, quality or quantity as related to cost of manufacture, sale, and delivery.

With the advent of the California Unfair Practices Act in 1935, antidiscrimination legislation spread rapidly. Today 37 States have antidiscrimination legislation in some form, either general or special, or both. Statutes general in nature are applicable to commodities in general use, while special antidiscrimination statutes are applicable to the sale and purchase of specific commodities exclusive of public utility services.

Some of these laws are separate and distinct antidiscrimination acts. Some are included in Unfair Practice Acts and others are parts of antitrust legislation.

Antidiscrimination statutes of a general nature prohibit the selling of commodities at a lower price or the buying of commodities at a higher price in one section, community or city of the state than is charged or paid for the same commodities in another section, community or city within the State. The conception of unfair discrimination in prices is embodied by such prohibitions in all statutes purporting to eliminate price differentials which are not commensurate with fair competitive prices. There are slight variations in the prohibition in one or two States. Idaho condemns discrimination between

² Calif. L. 1913, p. 508.

³ Grether, E. T., *Price Control Under Fair Trade Legislation* (1939), p. 67.

⁴ Davies, I. E., *Trust Laws and Unfair Competition* (1916), p. 137ff.

⁵ California L. 1931, c. 617.

⁶ Grether, E. T., *Price Control Under Fair Trade Legislation* (1939), p. 68 Cf. Robinson-Patman Antidiscrimination Act, Public No. 692, 74th Cong., 15 U. S. C. A., secs. 13 to 13b.

⁷ California L. 1933, pp. 793, 1280.

⁸ California L. 1935, p. 1546.

⁹ California Gen. Laws (Deering, 1937) Act. 8781.

sections, communities, cities or portions thereof and "between different locations in such sections, communities, cities or portions thereof"¹⁰ in what is apparently an attempt to avert any possible infractions of the law. The Wyoming statute prohibits such discrimination not only within divisions of the State, but makes it unlawful to charge a higher rate within the State for any commodity or manufacture produced therein than is charged for such commodity or manufacture when it is sold in any other State.¹¹

The emphasis is usually against discrimination the effect of which is substantially to lessen, destroy, or prevent competition or which tends to create a monopoly. South Carolina has a rather broad prohibition which includes 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 the competitor to compete with or meet the prices of the seller.¹² Not all States specifically require the element of intent as a prerequisite to violation of the statute. Idaho, Mississippi, Oregon, and Utah forbid discrimination, the "effect" of which is to injure or destroy competition.¹³ The Mississippi law clearly states that if a discriminatory practice accomplishes results to a degree inimical to the public welfare it is unlawful regardless of the intent.

Provisions which forbid discrimination against a regularly established dealer or against any person intending in good faith to become a regularly established dealer, are common. However, allowances are made for the meeting in good faith of competition and for bona fide selection of customers. In addition, specific authorization is frequently given for a functional classification of customers such as brokers, jobbers, wholesalers or retailers, as well as for the allowance of price differentials between customers in different functional classifications.

In all States, equalizing differentials are permitted. These differentials take into account the grade or quality of the commodity, the actual cost of transportation from the point of buying or of production if a raw product, or from the point of manufacture if a manufactured product. In Idaho, trades or industries may conduct an established cost survey which will be admitted as competent evidence in the courts of that State.¹⁴ Nebraska has a somewhat similar provision applicable only to motor vehicle dealers. Forty percent of the licensed dealers in any county may, under authoriza-

¹⁰ Idaho L. 1937, c. 229, sec. 2 (a); Wyoming L. 1937, c. 73, sec. 1.

¹¹ Wyo. Rev. Stat. Ann. (Courtright, 1931) sec. 117-201.

¹² S. C. Code (1932), sec. 6626.

¹³ Idaho L. 1937, c. 229; Miss. Code Ann. (1936) sec. 3437; Oreg. L. 1937, c. 215, as amended by L. 1939, c. 495; Utah Rev. Stat. Ann. (Supp., 1939), 94A-2-3.

¹⁴ Idaho L. 1937, c. 229, sec. 4 (d).

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tion of the administrator for the department of roads and irrigation, conduct a survey for the purpose of determining a fair basis for allowances to be made on used cars. It should be noted that this statute, however, makes no provision relative to the competency of the survey as evidence, authorization merely being given to use the survey as a guide in determining trade-in allowances.¹⁵ Some states, in addition to other differential allowances, specifically permit differentials based upon the quantity of goods sold. In a consideration of differentials in price, it should be noted that the Minnesota statute¹⁶ requiring that the actual cost of hauling by wagon or truck be deducted from the purchase price of farm products was invalidated by the Minnesota court on the ground that it violated due process of law because of vagueness and uncertainty. The court pointed out that no account was taken of items such as repairs, depreciation or wages of drivers, and indicated that such a statute can have no valid application to a private carrier because of the difficulty of establishing cost. No opinion was expressed concerning instances in which shipment is made by a common carrier having a known schedule of rates or by contract carrier making a specific charge for each trip.¹⁷

Several states expressly prohibit the granting of a commission, brokerage or other compensation, allowance or discount to the other party to the transaction, his agent, representative or intermediary. In addition, many states have legislated specifically against the allowance of secret or special rebates, refunds, collateral contracts or other devices effecting discrimination. Other typical provisions preventing circumvention of the statute include prohibitions against compensation for services such as processing, handling, storing, selling or offering for sale unless such compensation is available on proportionately equal terms to all other customers. Frequently forbidden also is the furnishing of any facilities connected with the processing, handling, storing, selling, or offering for sale of any commodity.

Ordinarily, antidiscrimination statutes have no application in situations where changing conditions affect the marketability of goods. Such conditions include deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court orders, and good faith sales in the discontinuance of business.

Definite exemptions are found in most antidiscrimination acts. Several state laws include prohibitions on discrimination in the sale of services or the output of service trades, but public utilities often are exempt from the act where they are under the control of a

¹⁵ Nebraska Comp. Stat. (Kyle, Supp. 1939) sec. 60-913.

¹⁶ Minnesota L. 1937, c. 420, sec. 2.

¹⁷ *State v. Northwestern Poultry and Egg Co.*, 203 Minn. 458; 281 N. W. 753 (1938).

specified agency of the state, local, or municipal government. In Nebraska, the production, sale and distribution of electricity has been held to be within the contemplation of the term "any commodity in general use" and subject to the provisions of the statute.¹⁸

Cooperatives, also, are frequently exempted from the requirements of the statute. Vermont, for example, has a special antidiscrimination statute covering dairy products which specifically prohibits discrimination which destroys or affects adversely the operations of a producer's cooperative bargaining or marketing association.¹⁹

Motion pictures delivered under leases to motion picture houses are exempted from the statutes of California, Colorado, Kentucky, and Washington.²⁰ New Mexico, however, attempts to prohibit discrimination among exhibitors of the state by producers of motion pictures and has enacted elaborate legislation designed to achieve that end.²¹ In Texas all reputable theatres, operas, shows or other public amusements are covered by a special antidiscrimination statute which is considerably broader than the regulation provided for in New Mexico.²²

It is significant that many of the penalty provisions applying to antidiscrimination legislation are the same as those applying to sales below cost legislation and that the remedies frequently are cumulative. All antidiscrimination statutes contain penalty provisions which are criminal in nature. Most of the statutes levy fines, but some stipulate imprisonment and fines, or both. Frequently there is specific authority for a civil action for damages by the injured party. Usually, contracts in violation of the act are declared void and frequently violation by corporations is penalized by charter revocation or ouster from doing business in the State. The statutes in many States stipulate that selling at a price below that of a competitor constitutes prima facie evidence of unfair discrimination and that the burden of rebutting the evidence is on the defendant.

Special antidiscrimination acts are similar in their provisions to the general statutes just discussed. They apply only to specific business enterprises. In some States they complement general antidiscrimination statutes, while in others they operate in the absence of any other similar legislation. They cover everything from dairy products and alcoholic beverages in California²³ and other States

¹⁸ *State v. Interstate Power Co.*, 118 Nebr. 756, 226 N. W. 427 (1929).

¹⁹ Vermont Rev. Pub. Laws (1933), sec. 7722.

²⁰ California Gen. Laws (Deering, 1937) Act 8781 as amended by L. 1939, c. 175; Colorado L. 1937, c. 261; Ky. Stat. Ann. (Baldwin's Carroll, 1936) sec. 474Sh-1; Washington L. 1939, c. 221.

²¹ New Mexico Stat. Ann. (Courtright Supp., 1938) sec. 35-2910.

²² Texas Stat. (Vernon, 1936) Pen. Code, art. 1646-1648, 179.

²³ California Agric. Code (Deering, 1939) secs. 1299.1-1299.12; Gen. Laws (Deering, 1937) secs. 54 (h)-54 (k), 55.7.

to hog cholera serum in Minnesota,²⁴ and biological products in Iowa.²⁵

Several States have enacted special antidiscrimination legislation directed at newsgathering services. Such statutes make unlawful the refusal to furnish a regular system of news reports to any newspaper upon demand and proffer of the usual charge. They also provide for uniform rates to be charged therefor. Iowa has an unusual statute which establishes a committee consisting of the Governor and the attorney general, and this committee has full power and authority to protect the State against the practice in the steel trade commonly known as the "Pittsburgh-plus" plan, and other similar trade practices.²⁶

It may be noted that special antidiscrimination acts are frequently characterized by the fact that the power of investigation and prosecution is in the hands of an administrative agency. The agency charged with the enforcement of a particular type of legislation such as that pertaining to the dairy industry usually investigates and prosecutes violations of these special or distinctive statutes. In those cases where the agency passes judgment, there is always a right of appeal to a court of competent jurisdiction.

Relatively few cases are available in which the validity of anti-discrimination legislation as such is involved. The statutes in these few cases have usually been upheld as valid exercises of the police power. The courts are inclined to the view that a statute which requires an intent to injure or destroy competition before there is a violation constitutes due process and is within the equal protection clause.²⁷ However, the facts of the case must clearly show an intent to suppress competition.²⁸ The *Fairmont case*²⁹ seemed to establish quite clearly the principle that intent is a requisite element to the validity of the statute.³⁰

*Great Atlantic & Pacific Tea Co. v. Ervin*³¹ is one of the most important cases to date and invalidated a part of the Minnesota Unfair Trade Practice Act. The court followed the *Fairmont case* in holding that intent is a requisite element and that a mere state-

²⁴ Minnesota Stat. (Mason, 1927) secs. 5453-5454.

²⁵ Iowa Code (1939) secs. 2741, 2717, 2743.

²⁶ Iowa Code (1939) sec. 9929.

²⁷ *In re opinion of the Justices*, 211 Mass. 620, 99 N. E. 294 (1912); *Central Lumber Co. v. State of South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164 (1912), aff'g. 24 S. D. 136, 123 N. W. 504 (1911).

²⁸ *James v. Oklahoma Natural Gas Co.*, 72 Pac. (2d) 495 (1937); *Western Lumber Co. v. State*, 189 Pac. 868 (1920); *State v. Blatner Bros.*, 226 S. W. 253 (1920).

²⁹ *Fairmont Creamery Co. v. State of Minnesota*, 274 U. S. 1, 43 Sup. Ct. 506 71 L. Ed. 893 (1927). See comments *supra*.

³⁰ *State v. North American Creamery Co.*, 55 N. D. 489, 214 N. W. 503 (1927)

³¹ 23 Fed. Supp. 70 (1938). See comments *supra*.

ment in the statute that a discriminatory practice has the effect of injuring or destroying competition is not sufficient. The court also found fault with the statute because it made no allowance for differences in prices derived from variations in selling costs between stores, resulting in the enforcement of price uniformity between all units operated by a company irrespective of size and cost of operations. The validity of those statutes in which intention is not a necessary element to violation would, therefore, seem to be conjectural as far as the Federal courts are concerned.

Finally, it is interesting to note that the Wisconsin statute states the legislative intent to be the safeguarding of the public against the creation or perpetuation of monopolies and to foster and encourage competition. It is further stated that the statute is to be liberally construed.²² While intent is a prerequisite to violation of this statute, it will be interesting to observe whether or not the courts will follow the mandate of the legislature with respect to liberal construction. No cases construing the act have, however, arisen.

STATE ANTIDISCRIMINATION LEGISLATION

This table does not include the antidiscrimination provisions contained in the antitrust laws.

(For text of statutes, see *infra*)

GENERAL

<i>State</i>	<i>Citation</i>
ARKANSAS.....	Dig. Stat. (Pope, 1937) secs. 14297, 14311, 14317.
CALIFORNIA.....	Gen. Laws (Deering, 1937) Act 8781 as amended by L. 1939, c. 175.
COLORADO.....	L. 1937, c. 261, sec. 1.
DELAWARE.....	Rev. Code (1935) sec. 3124.
FLORIDA.....	Comp. Gen. Laws Ann. (Skillman, 1927) sec. 3939.
IDAHO.....	L. 1937, c. 229.
IOWA.....	Code (1939) secs. 9885, 9886.
KANSAS.....	Gen. Stat. Ann. (Corrick, 1935) sec. 50-149.
KENTUCKY.....	Stat. Ann. (Baldwin's Carroll, 1936) sec. 4748h-1.
LOUISIANA.....	Gen. Stat. Ann. (Dart, 1939) sec. 4932.
MASSACHUSETTS.....	Ann. Laws (1933) c. 93, sec. 8.
MINNESOTA.....	Stat. (Mason, Supp. 1940) sec. 3976-38.
MISSISSIPPI.....	Code Ann. (1930) sec. 3437.
MISSOURI.....	Stat. Ann. (1932) c. 47, sec. 8717.
MONTANA.....	Rev. Codes Ann. (Anderson & McFarland, 1935) sec. 10904; Rev. Codes Ann. (Anderson & McFarland, Supp. 1939) sec. 3946.1.
NEBRASKA.....	Comp. Stat. (Kyle, Supp. 1939) sec. 59-523.
NEW YORK.....	Penal Law (McKinney) sec. 515.

²² Wisconsin Rev. Stat. (1937) secs. 133.17-133.27.

LXIV PRICE CONTROL LEGISLATION

to hog cholera serum in Minnesota,²⁴ and biological products in Iowa.²⁵

Several States have enacted special antidiscrimination legislation directed at newsgathering services. Such statutes make unlawful the refusal to furnish a regular system of news reports to any newspaper upon demand and proffer of the usual charge. They also provide for uniform rates to be charged therefor. Iowa has an unusual statute which establishes a committee consisting of the Governor and the attorney general, and this committee has full power and authority to protect the State against the practice in the steel trade commonly known as the "Pittsburgh-plus" plan, and other similar trade practices.²⁶

It may be noted that special antidiscrimination acts are frequently characterized by the fact that the power of investigation and prosecution is in the hands of an administrative agency. The agency charged with the enforcement of a particular type of legislation such as that pertaining to the dairy industry usually investigates and prosecutes violations of these special or distinctive statutes. In those cases where the agency passes judgment, there is always a right of appeal to a court of competent jurisdiction.

Relatively few cases are available in which the validity of anti-discrimination legislation as such is involved. The statutes in these few cases have usually been upheld as valid exercises of the police power. The courts are inclined to the view that a statute which requires an intent to injure or destroy competition before there is a violation constitutes due process and is within the equal protection clause.²⁷ However, the facts of the case must clearly show an intent to suppress competition.²⁸ The *Fairmont case*²⁹ seemed to establish quite clearly the principle that intent is a requisite element to the validity of the statute.³⁰

*Great Atlantic & Pacific Tea Co. v. Ervin*³¹ is one of the most important cases to date and invalidated a part of the Minnesota Unfair Trade Practice Act. The court followed the *Fairmont case* in holding that intent is a requisite element and that a mere state-

²⁴ Minnesota Stat. (Mason, 1927) secs. 5453-5454.

²⁵ Iowa Code (1939) secs. 2741, 2717, 2743.

²⁶ Iowa Code (1939) sec. 9929.

²⁷ In re opinion of the Justices, 211 Mass. 620, 99 N. E. 294 (1912); *Central Lumber Co. v. State of South Dakota*, 226 U. S. 157, 33 Sup. Ct. 68, 57 L. Ed. 164 (1912), aff'g. 24 S. D. 136, 123 N. W. 504 (1911).

²⁸ *James v. Oklahoma Natural Gas Co.*, 72 Pac. (2d) 495 (1937); *Western Lumber Co. v. State*, 189 Pac. 868 (1920); *State v. Blattner Bros.*, 226 S. W. 253 (1920).

²⁹ *Fairmont Creamery Co. v. State of Minnesota*, 274 U. S. 1, 43 Sup. Ct. 506 71 L. Ed. 893 (1927). See comments *supra*.

³⁰ *State v. North American Creamery Co.*, 55 N. D. 489, 214 N. W. 508 (1927).

³¹ 23 Fed. Supp. 70 (1938). See comments *supra*.

ment in the statute that a discriminatory practice has the effect of injuring or destroying competition is not sufficient. The court also found fault with the statute because it made no allowance for differences in prices derived from variations in selling costs between stores, resulting in the enforcement of price uniformity between all units operated by a company irrespective of size and cost of operations. The validity of those statutes in which intention is not a necessary element to violation would, therefore, seem to be conjectural as far as the Federal courts are concerned.

Finally, it is interesting to note that the Wisconsin statute states the legislative intent to be the safeguarding of the public against the creation or perpetuation of monopolies and to foster and encourage competition. It is further stated that the statute is to be liberally construed.²² While intent is a prerequisite to violation of this statute, it will be interesting to observe whether or not the courts will follow the mandate of the legislature with respect to liberal construction. No cases construing the act have, however, arisen.

STATE ANTIDISCRIMINATION LEGISLATION

This table does not include the antidiscrimination provisions contained in the antitrust laws.

(For text of statutes, see *infra*)

GENERAL

<i>State</i>	<i>Citation</i>
ARKANSAS.....	Dig. Stat. (Pope, 1937) secs. 14297, 14311, 14317.
CALIFORNIA.....	Gen. Laws (Deering, 1937) Act 8781 as amended by L. 1939, c. 175.
COLORADO.....	L. 1937, c. 261, sec. 1.
DELAWARE.....	Rev. Code (1935) sec. 3124.
FLORIDA.....	Comp. Gen. Laws Ann. (Skillman, 1927) sec. 3939.
IDAHO.....	L. 1937, c. 229.
IOWA.....	Code (1939) secs. 9885, 9886.
KANSAS.....	Gen. Stat. Ann. (Corrick, 1935) sec. 50-149.
KENTUCKY.....	Stat. Ann. (Baldwin's Carroll, 1936) sec. 4748h-1.
LOUISIANA.....	Gen. Stat. Ann. (Dart, 1939) sec. 4932.
MASSACHUSETTS.....	Ann. Laws (1933) c. 93, sec. 8.
MINNESOTA.....	Stat. (Mason, Supp. 1940) sec. 3976-38.
MISSISSIPPI.....	Code Ann. (1930) sec. 3437.
MISSOURI.....	Stat. Ann. (1932) c. 47, sec. 8717.
MONTANA.....	Rev. Codes Ann. (Anderson & McFarland, 1935) sec. 10904; Rev. Codes Ann. (Anderson & McFarland, Supp. 1939) sec. 3946.1.
NEBRASKA.....	Comp. Stat. (Kyle, Supp. 1939) sec. 59-523.
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A

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C

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LXIV PRICE CONTROL LEGISLATION

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Relatively few cases are available in which the validity of anti-discrimination legislation as such is involved. The statutes in these few cases have usually been upheld as valid exercises of the police power. The courts are inclined to the view that a statute which requires an intent to injure or destroy competition before there is a violation constitutes due process and is within the equal protection clause.²⁷ However, the facts of the case must clearly show an intent to suppress competition.²⁸ The *Fairmont case*²⁹ seemed to establish quite clearly the principle that intent is a requisite element to the validity of the statute.³⁰

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NEBRASKA.....	Comp. Stat. (Kyle, Supp. 1939) sec. 59-523.
NEW YORK.....	Penal Law (McKinney) sec. 515.

³² Wisconsin Rev. Stat. (1937) secs. 133.17-133.27.

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<i>State</i>	<i>Citation</i>
NORTH CAROLINA-----	Code Ann. (Michie, 1935) sec. 2563 (5).
NORTH DAKOTA-----	Comp. Laws Ann. (Supp. 1925) sec. 3048.
OKLAHOMA-----	Const. art. IX, sec. 45; Stat. Ann. (1936) tit. 79, secs. 2, 81.
OREGON-----	L. 1937, c. 215, as amended by L. 1939, c. 495.
SOUTH CAROLINA-----	Code (1932) sec. 6626; L. 1939, No. 267.
SOUTH DAKOTA-----	Comp. Laws (1939) secs. 13.1803, 13.1804.
UTAH-----	Rev. Stat. Ann. (Supp. 1939) 94A-2-3; Rev. Stat. Ann. (1933) sec. 103-55-2.
VIRGINIA-----	Code Ann. (Michie and Sublett, 1936) sec. 4722 (8).
WASHINGTON-----	L. 1939, c. 221.
WEST VIRGINIA-----	L. 1939, c. 151, sec. 3.
WISCONSIN-----	Rev. Stat. (1937) secs. 133.17, 133.185.
WYOMING-----	Rev. Stat. Ann. (Courtright, 1931) sec. 117-201; L. 1937, c. 73, secs. 1, 6.

SPECIAL

ARIZONA-----	Rev. Code Ann. (Supp. 1936) sec. 943z8 (dairy products).
ARKANSAS-----	Dig. Stat. (Pope, 1937) secs. 10358-61 (newspaper services); 14304 (manufactured products, coal oil, dressed beef); 14308 (dairy and poultry products, grain and cottonseed).
CALIFORNIA-----	Agric. Code (Deering, 1938) secs. 1299.1 (dairy products); 1156 (agricultural products); 1272.5 (commission merchants); Gen. Laws (Deering, 1937) Act 3796 (alcoholic beverages); Act 9310 (wool).
FLORIDA-----	Comp. Gen. Laws Ann. (Skillman, 1927) sec. 3822 fertilizer.
IDAHO-----	Code Ann. (1932) secs. 36-1101 (dairy products); 22-1201 (farm products).
INDIANA-----	Stat. Ann. (Burns, 1933) secs. 40-107 (coal, ore and other minerals); 23-128 (dairy products).
IOWA-----	Code (1939) secs. 2741 (biological products); 3112 (eggs); 9929 (steel).
KANSAS-----	Gen. Stat. Ann. (Corrick, 1935) sec. 50-201 (news services).
MICHIGAN-----	Stat. Ann. (Henderson, 1936) secs. 28.821 (dairy and poultry products); 28.822 (potatoes); 28.823, 28.71 (petroleum products).
MINNESOTA-----	Stat. (Mason, 1927) secs. 10474 (petroleum products); 5006 (grain); 3907 (dairy products); 5453 (hog cholera serum); 6248-1, 4, 5, 6, 7, Stat. (Mason, Supp. 1940) secs. 6248-2, 3, 9 (farm products).
MISSISSIPPI-----	Code Ann. (1930) secs. 4291 (dairy products); 4812 (cotton ginner).
MISSOURI-----	Stat. Ann. (1932) c. 47, sec. 8725 (dairy products).
MONTANA-----	Rev. Codes Ann. (Anderson & McFarland, 1935) secs. 4193.1, 3913.22 (petroleum products); 2620.58 (dairy products).

SCOPE NOTE

LXVII

<i>State</i>	<i>Citation</i>
NEBRASKA.....	Comp. Stat. (1929) sec. 59-509; Comp. Stat. (Kyle, Supp. 1939) secs. 59-1001 (dairy products); Comp. Stat. (Kyle, Supp. 1939) sec. 60-612 (motor-vehicle dealers).
NEW MEXICO.....	Stat. Ann. (Courtright, Supp. 1938) sec. 35-2910 (motion pictures).
NORTH DAKOTA.....	Comp. Laws Ann. (Supp. 1925) secs. 2846 (dairy products); 3043 (dairy products and grain); L. 1939, c. 8 (farm products).
OHIO.....	Code Ann. (Baldwin's Throckmorton, 1936) sec. 6402-1 (dairy products).
OKLAHOMA.....	Stat. Ann. (1936) tit. 79, sec. 6 (advertising).
OREGON.....	Code Ann. (1930) sec. 41-701 (dairy products); Code Ann. (Supp. 1935) sec. 55-1709 (gasoline).
SOUTH DAKOTA.....	Comp. Laws (1939) secs. 4.1701 (grain and flaxseed); 4.1801 (dairy products); 54.0001 (gasoline).
TENNESSEE.....	Code Ann. (Michie, 1938) secs. 6562 (dairy products); 6759 (news services).
TEXAS.....	Stat. (Vernon, 1936) art. 1505 (storage and transportation of oil, gas, and other products); Stat. (Vernon, 1936), Penal Code, art. 1646, Stat. (Vernon, 1936) art. 179 (public amusements).
UTAH.....	Rev. Stat. Ann. (1933) secs. 73-2-1 (news services); 103-55-5 (dairy products).
VERMONT.....	Rev. Pub. Laws (1933) as amended by L. 1937, art. 98, sec. 7722 (dairy products).
WISCONSIN.....	Rev. Stat. (1937) sec. 100.22 (dairy products).
WYOMING.....	Rev. Stat. Ann. (Courtright, Supp. 1934) sec. 117-302 (petroleum products).

PART ONE

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REGULATION OF PRICE COMPETITION

A

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B

Prohibition of Sales Below Cost

C

Anti Discrimination Legislation

ALABAMA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1939, No. 35

Section 1. Definitions.—The following terms, as used in this Act, are hereby defined as follows: (A) “Commodity” means any subject of commerce. (B) “Producer” means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher. (C) “Wholesaler” means any person selling a commodity other than a producer or a retailer. (D) “Retailer” means any person selling a commodity to consumers for use. (E) “Person” means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Sec. 2. Contracts relating to sales of branded articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Alabama by reason of any of the following provisions which may be contained in such contract: (A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller. (B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller. (C) That the seller will not sell such commodity: (1) to any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or (2)

2 PRICE CONTROL LEGISLATION

to any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 3. Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this Act (except to the extent authorized by the said contract): (A) The offering or giving of any article of value in connection with the sale of such commodity; (B) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or (C) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by Section 6 of this Act shall be available.

Sec. 4. Only owner of branded articles or authorized distributor to establish resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this Act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 5. Exceptions.—No contract containing any of the provisions enumerated in Section 2 of this Act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases: (A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price; (B) When the trade-mark, brand, or name, is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof; (C) When the goods are altered, secondhand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity; (D) By any officer acting under an order of court.

Sec. 6. Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract

entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 7. Exception as to application.—This Act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale price.

Sec. 8. Partial invalidity.—If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 9. Repeal.—All Acts or parts of Acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

Sec. 10. Citation.—This Act may be known and cited as the “Fair Trade Act.”

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

ARIZONA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1st Ex. 1936, c. 11

Section 1. Short title.—This act shall be known and may be cited as the "Fair Trade Act of 1936."

Sec. 2. Definitions.—For the purposes of this act, and unless otherwise required by the context:

(a) "Producer" shall mean grower, baker, maker, manufacturer, or publisher.

(b) "Commodity" shall mean any subject of commerce.

Sec. 3. What may be in contract.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

(1) that the buyer will not resell such commodity except at the price stipulated by the vendor; (2) that the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases: (1) In closing out the owner's stock for the purpose of discontinuing the delivery of any such commodity; (2) when the goods are damaged or deteriorated in quality and notice is given to the public thereof; (3) by any officer acting under the orders of any court.

Sec. 4. Unfair practice.—Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price

6 PRICE CONTROL LEGISLATION

stipulated in any contract entered into pursuant to the provisions of section 3, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 5. Whom not to apply to.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 6. Saving clause.—If any part of this act shall for any reason be adjudged by a court of competent jurisdiction to be invalid, the remainder thereof shall not thereby be invalidated, impaired, or affected.

B. PROHIBITION OF SALES BELOW COST

L. 1939, c. 39
Unfair Sales Act¹

Section 1. Short title.—This act is known and may be cited as the Unfair Sales Act of 1939.

Sec. 2. Definitions.—(a) In this act, unless the context otherwise requires:

“Cost to the retailer” means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added (1) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth; (2) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one percent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup, and, (3) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be twelve percent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup;

“Cost to the wholesaler” means the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower, less all trade discounts except cus-

¹ The Unfair Sales and Practices Act of 1937 (repealed by 1939 act) is constitutional as a valid exercise of the police power of the State, is not in violation of the due process clause and does not encourage monopoly. The intent and effect of injuring competition is a necessary element of violation and as there is no proof of this factor, an injunction is denied. *Hammond v. Bayless Markets, Inc.* (Super. Ct., 12-30-37) P.-EL 40489, 106 CCH, 25233.

tomary discounts for cash, to which shall be added (1) freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (2) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one percent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage;

"Replacement costs" means the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise;

"Cost to the retailer" and "cost to the wholesaler" mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler;

"Sell at retail," "sales at retail," and "retail sale" mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing, and include any transfer of such property where title is retained by the seller as security for the payment of the purchase price;

"Sell at wholesale," "sales at wholesale," and "wholesale sales" mean and include any transfer for a valuable consideration made in ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing, and include any transfer of such property where title is retained by the seller as security for the payment of the purchase price;

"Retailer" means and includes every person, partnership, corporation or association engaged in the business of making sales at retail within this state, except that, in the case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business;

"Wholesaler" means and includes every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state, except that, in the case of a person, partnership, corporation or association engaged in the business of

making both sales at wholesale and sales at retail, such term shall be applied only to the wholesale portion of such business.

(b) When one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purposes of this act be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions, respectively, defining "cost to the retailer" and "cost to the wholesaler."

Sec. 3. Unfair sales and competition.—It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise, or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Sec. 4. Penalties.—Any retailer who shall, in contravention of the policy of this act, advertise, offer to sell or sell at retail any item of merchandise at less than cost to the retailer as defined in this act; or any wholesaler who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler as defined in this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars. Proof of any such advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this act shall be prima facie evidence of a violation of this act.

Sec. 5. Injunctions.—In addition to the penalties provided in this act, the courts of this state are hereby invested with jurisdiction to prevent and restrain violation of this act, and it shall be the duty of the several county attorneys, in the respective counties, to institute proceedings in equity to prevent and restrain violations. Any person damaged, or who is threatened with loss or injury, by reason of a violation of this act, shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this act.

Sec. 6. Exempted sales.—The provisions of this act shall not apply to sales at retail or sales at wholesale (1) where merchandise is sold in

bona fide clearance sales, if advertised, marked, and sold as such; (2) where perishable merchandise must be sold promptly in order to forestall loss; (3) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked and sold as such; (4) where merchandise is sold upon the final liquidation of any business; (5) where merchandise is sold for charitable purposes or to relief agencies; (6) where merchandise is sold on contract to departments of the government or governmental institutions; (7) where the price of merchandise is made in good faith to meet competition; (8) where merchandise is sold by any officer acting under the order or direction of any court.

Sec. 7. Declaration of policy and purpose.—It is hereby declared that the practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression, and it is hereby declared to be the policy of this state to protect the well-being of its citizens through the prevention, suppression, and elimination of unfair methods of competition. The purpose of this act is to carry out such policy in the public interest.

Sec. 8. Severability.—If any provision of this act be held invalid, such invalidity shall not affect other provisions which can be given effect without the invalid provision, and to this end the provisions of the act are declared to be severable.

Sec. 9. Repeal.—Chapter 44, Session Laws of 1937, regular session, is repealed. This section does not negative an implied repeal of any statute which conflicts with this act.

Section 10. Emergency.—To preserve the public peace, health, and safety it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure, and shall take effect upon its passage in the manner provided by law.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Rev. Code Ann. (Supp., 1936)
Milk, Cream, Butterfat

Sec. 943z8. Destruction of competition.—No person, firm, or corporation engaged in the business of buying milk, cream, or butterfat for the purpose of manufacture, either by himself or another shall with the intention of destroying or injuring the business of a competitor or restraining in any manner an open competition in said business, discriminate between the different sections, localities, communities, or cities of this State by purchasing or offering to purchase such commodity at a higher price in any one locality than is paid or offered for the same commodity by such person, firm, or corporation in any other locality, after making due allowance for the difference, if any, in the grade or quality of the commodity or conditions locally affecting its production and in the actual cost of transportation from the place of purchase to the place of manufacture, sale or storage. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. (L. '31, c. 82, sec. 50.)

Sec. 943z3. Attorney general and county attorneys.—It shall be the duty of the attorney general and of the county attorney of each county in the State, and each of their assistants and deputies, to advise the commissioner upon request in the performance of his duties, and such mentioned officials shall institute and prosecute to conclusion all civil or eriminal actions arising under the provisions of this act when the facts justifying such civil or criminal action are brought to their attention, either by the commissioner or any other person. (L. '31, c. 82, sec. 45.)

ARKANSAS

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Dig. Stat. (Pope, 1937)

Sec. 5606. Definitions of terms.—The following terms as used in this act are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Act 92 of 1937, approved February 18, 1937, section 1.

Sec. 5607. What contracts are lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or container which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Arkansas by reason of any of the following provisions which may be contained in such contract:

- (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.
- (b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Id., sec. 2.)

Sec. 5608. Acts which are deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act except to the extent authorized by the said contract:

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever whether by the giving of coupons or otherwise, in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restrictions, for which the remedies prescribed by section 5611 shall be available. (Id., sec. 3.)

Sec. 5609. No retail price to be established except by holder of trade-mark.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Id., sec. 4.)

Sec. 5610. Exceptions as to resale of commodity.—No contract containing any of the provisions enumerated in section 5607 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out of the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided, the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice, in writing, of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court. (Id., sec. 5.)

Sec. 5611. Advertising at price less than stipulated retail price actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Id., sec. 6.)

Sec. 5612. Certain contracts not affected.—This act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (Id., sec. 6.)

Sec. 5613. Constitutionality of act.—If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby. (Id., sec. 8.)

Sec. 5614. Known as Fair Trade Act.—This act may be known and cited as the "Fair Trade Act." (Id., sec. 9.)

B. PROHIBITION OF SALES BELOW COST

Dig. Stat. (Pope, 1937)

Unfair Practices Act

Sec. 14313.¹ Sale at less than cost prohibited.—It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale, or advertise for sale any article or product, or service or output of a service trade, at less than cost thereof to such vendor, or give, offer to give, or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition,

¹For sec. 14311 dealing with destruction of competition, see *Antidiscrimination Legislation: General Prohibitory Laws, infra*. For sec. 14312 dealing with responsibility of officers and agents, see *infra*.

14. PRICE CONTROL LEGISLATION

and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor, and all overhead expenses of the producer; and as applied to the distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance, and advertising. (Act 253, Acts of 1937, approved Mar. 17, 1937, sec. 3.)

Sec. 14314. How cost established.—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale. (Id., sec. 4.)

Sec. 14315. Proof of violation.—In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. Where a particular trade or industry of which the person, firm, or corporation for whom or which he acts, or where a particular trade or industry, of which the person, firm, or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act. (Id., sec. 5.)

Sec. 14316. Exceptions.—The provisions of sections 3, 4, and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof:

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm, or corporation who performs work upon, renovates, alters, or improves any personal property belonging to another person, firm, or corporation, shall be construed to be a vendor within the meaning of this act. (Id., sec. 6.)

Sec. 14317. Secret payments deemed violation.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this act. (Id., sec. 7.)

Sec. 14312. Officers and agents responsible.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he acts.

In the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. (Id., sec. 2.)

Sec. 14318. Third violation—Penalty.—Upon the third violation of any of the provisions of sections 1 to 7, inclusive of this act by any person, firm, or corporation, it shall be the duty of the attorney general 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 to permanently enjoin it from transacting business in this State. If in such action the court shall find such corporation is violating or has violated any of the provisions of section 1 to 7, inclusive, of this act, it must enjoin said corporation from doing business in this State permanently or for such time as the court shall order, or must annul the charter or revoke the franchise of such corporation. (Id., sec. 8.)

Sec. 14319. Contracts violating act void.—Any contract, express or implied, made by any person, firms, or corporation in violation of any of the provisions of section 1 to 7, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had. (Id., sec. 9.)

Sec. 14320. Remedies; injunction and damages.—Any person, firm, private corporation, or municipal or other corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violations 1 to 7, inclusive, of this act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Any defendant in an action brought under the provisions of this section of any witness desired by the State, may be required to testify under the provisions of sections 3941, 5147, 5149, 5150, 5151, 5152, 5153, 5160, 5161, 5162, 5163, 5203, 9137 of Pope's Digest, in addition the books and records of any defendant may be brought into court and introduced, by reference, into evidence; provided, however, that no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of sections 1 to 7, inclusive, and 11 of this act. Id., sec. 10.)

Sec. 14321. Penalties.—Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of section 1 to 7, inclusive, of this act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred (\$100.00) dollars, nor more than one thousand (\$1,000.00) dollars, or by imprisonment not exceeding six

months or by both said fine and imprisonment, in the discretion of the court. (Id., sec. 11.)

Sec. 14322. Separability of act.—If any section, 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. The legislature hereby declares that it would have passed this act, and each section, sentence, clause, or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative and in addition to the remedies prescribed are cumulative and in addition to the remedies prescribed to the Public Utilities Act for discriminations by public utilities. If any conflict shall arise between this act and the Public Utilities Act, the latter shall prevail. (Id., sec. 12.)

Sec. 14323. Purpose of act.—The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved. (Id., sec. 13.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Dig. Stat. (Pope, 1937)

Sec. 14297. Unfair discrimination.—Any person, firm, company, association or corporation, foreign or domestic, doing business in the State of Arkansas, and engaged in buying any product or commodity in general use for manufacturing or other purposes; or engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of this State, in buying at a higher price or by selling such commodity at a lower rate in one section, community or city, than is paid or charged for said commodity by said party in another section, community or city, 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 buying or of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimina-

tion, which is hereby prohibited and declared unlawful. The buying at a higher price or selling at a lower price in one locality, community, or city than the party or parties pay for or sell a like commodity or article in another locality, city or community shall be prima facie evidence of intention upon the part of the person, company or corporation to unfairly discriminate between different sections. (Act May 10, 1907, p. 720, sec. 1.)

Sec. 14298. 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. (Id., sec. 2.)

Sec. 14299. Contracts void.—All contracts or agreements made in violation of any of the provisions of the two preceding sections shall be void. (Id., sec. 3.)

Sec. 14300. Duty to enforce.—It shall be the duty of the prosecuting attorneys in their counties and the attorney general to enforce the provisions of the preceding sections of this act by appropriate actions in courts of competent jurisdiction. (Id., sec. 4.)

Sec. 14301. Secretary of state to refer complaints.—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 this act, 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. (Id., sec. 5.)

Sec. 14302. Revocation of corporate charters.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to immediately revoke the charter of such corporation to do business in this State. (Id., sec. 6.)

Sec. 14303. Ouster of corporations.—If after revocation of its charter such corporation, or any other corporations not having a charter, and found guilty of having violated any of the provisions of this act, shall continue or attempt to do business in this State, it shall be the duty of the attorney general, by proper suit in the name of the State of Arkansas, to oust such corporation from all business of every kind and character in said State of Arkansas. (Act May 10, 1907, p. 720, sec. 7.)

Unfair Practices Act

Sec. 1431L. Destruction of competition prohibited.—It shall be unlawful for any person, firm, or corporation, doing business in the State of Arkansas and engaged in the production, manufacture, distribution or sale of any commodity or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service or to prevent the competition of any person, firm, private corporation or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity, and in the actual cost of transportation from the point of production, if a raw product or commodity or from the point of manufacture, if a manufactured product or commodity. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act. (Sec. 1, Act 253, Acts of 1937, approved March 17, 1937.)

For procedural and penalty provisions, see *Prohibition of Sales Below Cost, supra*.

Dig. Stat. (Pope, 1937)
Predatory Price Practices

Section 9413 provides that any person, persons, company, partnership, association, corporation, or agent engaged in the manufacture or sale or 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 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. See vol., *State Antitrust Law: General Antitrust Laws*.

2. Special Prohibitory Laws

Dig. Stat. (Pope, 1937)
Newspaper Services

Sections 10358-61 provide that companies furnishing news for publication in newspapers shall furnish all newspapers, persons, and corporations such services at uniform rates in the same manner, and without discrimination to all; no increase in rates shall apply in the State unless such increase is in conformity with uniform increased rates made for all other places wherever said company is furnishing such news services; telephone and telegraph companies transmitting news prohibited [sic] by the statute are liable to fines and for damages to persons discriminated against.

Manufactured Products, Coal, Oil, or Dressed Beef

Sec. 14304. Discrimination in manufactured products.—It shall be unlawful for any person, company, corporation or association engaged in the sale of any manufactured products, coal oil, or dressed beef to sell any such manufactured products, coal oil, or dressed beef at a greater cash price at any place in this State than such person, company, corporation, or association sells such manufactured product, coal oil, or dressed beef at other points in this State, after making due allowances for difference in cost of carriage or other necessary cost, or wilfully refuse or fail to allow to any person, corporation, or company making purchases of such manufactured product, coal oil, or dressed beef all rebates and discounts which are granted by them to other purchasers, for cash, of like quantities of such manufactured product, coal oil, or dressed beef. (Act April 29, 1903, p. 349, sec. 1.)

Sec. 14305. Penalty.—Any person, company, corporation, or association violating any of the provisions of this act shall forfeit not less than two hundred dollars nor more than one thousand dollars for every such offense, and each unlawful sale or refusal or failure to allow such rebate or discount shall constitute a separate offense; the penalty in such cases to be recovered by an action in the name

of the person, company, corporation, or association damaged by such greater price, or refusal of, or failure to allow such rebate or discount, or in the name of the State at the relation of any prosecuting attorney in this State, the moneys thus collected to be paid to the person, company, corporation, or association bringing the suit; and when such suit shall be brought in the name of the State, the moneys collected shall be paid, one-fourth to the prosecuting attorney bringing the suit and three-fourths to the permanent school fund. (Id. sec. 2.)

Sec. 14306. Venue and process.—Actions and suits under this act may be brought in any county in which the offense was committed, by action at law or suit in equity in the circuit court; and where the defendants are persons, companies, or associations, the service of summons upon such defendants in any county of this State shall be sufficient service; and where the defendant is a corporation, the service of summons upon any agent of such corporation in this State shall be a lawful service. Several offenses under this act may be joined in one action of suit. (Act April 29, 1903, sec. 3.)

Milk, Cream, and Butter

Sec. 14308. Discrimination in buying milk, cream, butter, butterfat, poultry, eggs, grain, or cottonseed.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Arkansas and engaged in the business of buying milk, cream, butter, butterfat, poultry, eggs, grain, or cottonseed 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, 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, 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 the 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 any other 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, 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. (Sec. 1, Act 616, Acts of 1923, approved March 23, 1923.)

Sec. 14309. Penalty.—Any person, firm, company, association, or corporation who shall be convicted of unfair discrimination, as defined by this act, shall be fined for each offense not less than one thousand dollars nor more than ten thousand dollars, and in addition thereto, shall be enjoined upon the application of the State of Arkansas or any person, firm, or corporation injured by such discrimination from engaging directly or indirectly in the business of purchasing in any such commodities. (Id., Sec. 2.)

Sec. 14310. Duty of attorney general.—It is hereby made the duty of the attorney general of the State of Arkansas upon being informed that any person, firm, company, association, or corporation has been convicted of unfair discrimination as defined in this act, immediately to institute suit in the name of the State of Arkansas in any chancery 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. (Id., sec. 3.)

CALIFORNIA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Gen. Laws (Deering, 1937), Act 8782

Sec. 1. Certain sale contracts declared lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Sec. 1½. Sales below contract price.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (New section added by Stats. 1933, p. 793.)

Sec. 2. Exception.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

“Producer” means grower, maker, baker, manufacturer, or publisher.

“Commodity” means any subject of commerce.

Sec. 4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Sec. 5. Short title.—This act may be known and cited as the “Fair trade act.”

Sec. 6. Sales through vending machines.—All the provisions of this act shall extend to any commodity sold through vending equipment. If such vending equipment bears the trade-mark, brand, or name of the producer or owner of such commodity and if such commodity is in fair and open competition with commodities of the same general class produced by others. (New section added by Stats. 1937, p. 2364.)

NOTE.—Stats. 1937, ch. 843, adding the foregoing section, further provided as follows:

Sec. 2. Constitutionality.—It is hereby declared to be the intent of this Legislature in adding section 6 to the Fair Trade Act that, if said section 6 should be held to be unconstitutional, the remainder of the act shall be unaffected thereby and shall continue in full force and effect. (Stats. 1937, p. 2364.)

**Gen. Laws (Deering, 1937), Act 3796
Alcoholic Beverage Control Act**

Sec. 55.5. Beverage contracts; price-fixing agreements authorized; operation of agreements; right of action for breach.—(a) No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others shall be deemed in violation of any law of this State by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such alcoholic beverage except at the price stipulated by the vendor;

(2) That the producer or vendee of the alcoholic beverage require, upon the sale thereof to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

(b) Such provisions in any contract shall be deemed to contain or imply conditions that such alcoholic beverage may be resold without references to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage; provided, however, that at the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice is given of the character of such sale as a "close out sale"; provided further, that such alcoholic beverage is first offered to the manufacturer or vendor thereof at the original invoice price at least ten days before it is offered for sale to the public;

(2) When the alcoholic beverage or container is damaged or deteriorated in quality, and notice is given to the public thereof at the place of any such sale and upon the goods sold and in any advertisement in connection therewith;

(3) By any officer acting under the orders of any court.

(c) *Right of action for breach.*—Wilfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to the provisions of this section, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

(d) This section shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (Added by Stats. 1937, p. 2173.)

See also *Administrative Price Control, infra*.

Judicial Decisions

Early History.

Prior to the enactment of the Fair Trade Act, agreements fixing the resale price of a commodity were held enforceable against contracting retailers as reasonable restraints of trade. *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912). Such a contract is expressly permitted by the anti-trust law provision permitting agreements to market commodities at a reasonable profit. *Ghirardelli Co. v. Hunsicker, supra*. In this case, it was held that a manufacturer could enforce a resale price agreement against a retailer who had contracted with a wholesaler to maintain the price restriction.

In recognizing the right of an exclusive distributor to refuse to deal with a retailer who would not agree to maintain a stipulated retail price, a court, in *Munter v. Eastman Kodak Co.*, 28 Cal. App. 660, 153 Pac. 737 (1915), stated that contracts fixing the resale prices of commodities were valid, there being no horizontal combination to fix prices and the prices fixed being reasonable.

Constitutionality of the Act.

The Fair Trade Act is constitutional as a valid exercise of the police power of the state, promoting the public convenience and general prosperity. The statute is not discriminatory, the classification of commodities bearing a trade-mark being a reasonable one. *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 Pac. (2d) 177 (1936); *Pyroil Sales Co. v. Pep Boys*, 5 Cal. (2d) 784, 55 Pac. (2d) 194 (1936); aff'd 299 U. S. 198, 57 Sup. Ct. 147, 81 L. Ed. 122 (1936).

Application of the Act.

Parties Entitled to Establish Resale Prices.

A "sole exclusive distributor" has the right to establish a resale price restriction. *Parrott & Co. v. Somerset House* (Super. Ct. 1937), 3 CCH 25026; *De Voin v. W. T. Grant Co.* (Super. Ct. 1938), 3 CCH 25106.

In a dictum in *Parrott & Co. v. Somerset House*, *supra*, the court stated "If the producer neglects to determine the price of his own commodity, then any subsequent vendor thereof may fix the price by contract with his vendee and the same shall operate as a restriction upon all others with knowledge."

Methods of Establishing Resale Prices.

While the courts have not determined this question, in *Parrott & Co. v. Somerset House*, *supra*, the plaintiff had inserted resale price restrictions in contracts made with a majority of the retailers in the State, and in *De Voin v. W. T. Grant Co.*, *supra*, resale prices had been fixed in agreements with several hundred retailers.

Relation of Price to Value.

A distributor of perfume can establish a resale price for one dram and can require that the same price be maintained in any sale of less than one dram. The resale price established need have no relation to the value of the article, as long as the commodity is in "fair and open competition" as required by statute. *De Voin v. W. T. Grant Co.*, *supra*.

Removal of Brand.

A court has stated that a retailer would not be bound by a resale price restriction if the commodity is not sold under the brand or name of the manufacturer. *De Voin v. W. T. Grant Co.*, *supra*.

Parties Bound by Resale Price Restrictions.

Under the statute originally passed in 1931 and not including section 11½, it was held that a noncontracting dealer, with notice, could sell at less than the prices fixed in a resale price agreement. *Dr. Miles California Co. v. Sontag Chain Stores Co. Ltd.*, 47 Pac. (2d) 540 (Dist. Ct. App. 1935). On appeal, after the enactment of section 11½ and the service of an amended complaint, a noncontracting dealer with notice of the restriction was held bound by it. *Id.*, 8 Cal. (2d) 178, 64 Pac. (2d) 726 (1937). In other cases noncontracting dealers with notice of resale price restrictions have also been held bound. *Max Factor v. Kunsman*, 5 Cal. (2d) 446, 55 Pac. (2d) 177 (1936); *Pyroil Sales Co. v. Pep Boys*, 5 Cal. (2d) 784, 55 Pac. (2d) 194 (1936); *Parrott & Co. v. Somerset House*, *supra*; *De Voin v. W. T. Grant Co.*, *supra*.

In *Max Factor v. Kunsman*, *supra*, the court stated that section 11½ was a statutory extension of the tort doctrine of interference with contractual relations.

Parties Entitled to Enforce Resale Price Restrictions.

A "sole exclusive distributor" establishing a resale price restriction can enforce it. *Parrott & Co. v. Somerset House*, *supra*; *De Voin v. W. T. Grant Co.*, *supra*.

A producer, owning the trade-mark, can enforce a resale price restriction established by him. *Max Factor & Co. v. Kunsman*, *supra*.

B. PROHIBITION OF SALES BELOW COST

Gen. Laws (Deering, 1937), Act 8781, as amended by Gen. Laws (Deering, Supp., 1939), Act 8781

Unfair Practices Act

Sec. 3. Sales at less than cost.—"Cost" defined: "Cost of doing business" or "overhead expense" defined: "Loss leader": Scope of prohibitions. It shall be unlawful for any person engaged in business within this State, to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, and he shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

The term "cost" as used in this act as applied to production is hereby defined as including the cost of raw materials, labor, and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower,

of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.¹

The "cost of doing business" or "overhead expense" as used in this act is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance, and advertising.

The prohibitions of this act shall be deemed among the other purposes and objects of the act to also prohibit the practice of using any article or product as a "loss leader." Loss leader, as used herein, shall mean any article or product sold at less than cost as herein defined to induce, promote or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors.

The prohibitions of this section shall embrace any scheme of special rebates, collateral contracts, or any device of any nature whereby a sale below cost is effected in violation of the spirit and intent of any provisions of this act. (Amended Stats. 1935, p. 1548; ch. 860, Laws of 1937, ch. 175, Laws of 1939.)

Sec. 4. Purchases at forced or bankrupt sales; "ordinary channels of trade."—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

"Ordinary channels of trade" shall mean those ordinary, regular, and daily transactions in the mercantile trade whereby title to an article or product, in no way damaged or deteriorated, is transferred from one person to another, and shall not include sales of bankrupt

¹ For sec. 1 dealing with unlawful practices, see *Antidiscrimination Legislation: General Prohibitory Laws, infra*.

For sec. 2 dealing with prosecution of officers and agents, see *infra*.

stocks, close-out goods, dents, sales of goods bought from a business or merchant retiring from business, fire sales, and sales of damaged or deteriorated goods, which damage or deterioration results from any cause whatsoever; provided that this last listing herein shall not be held to be all inclusive but as example only. (Amended by Stats. 1931, p. 1335; Stats. 1935, p. 1548; Stats. 1937, p. 2397.)

Sec. 5. Proof of intent; cost surveys; presumptive evidence.—In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm, or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act.

Presumptive evidence.—In all actions brought under the provisions of this act proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition. (Amended by Stats. 1931, p. 1335; Stats. 1935, p. 1548; Stats. 1937, p. 2398.)

Sec. 6. When sale at less than cost permitted.—The provisions of sections 1, 3, 4, and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, in the same locality or trade area and in the ordinary channels of trade as herein defined; or in an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade as herein defined.

Any person who performs work upon, renovates, alters or improves any personal property belonging to another person, shall be construed to be a vendor within the meaning of this act. (Amended by Stats. 1935, p. 1549; Stats. 1937, p. 2398.)

Sec. 6.1. Notice.—The notice required to be given to the public under section 6 shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold. (Added by ch. 175, Laws of 1939.)

Sec. 7. Rebates, refunds, etc.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this act. (Amended by Stats. 1935, p. 1549.)

Sec. 8. Repealed.

Sec. 9. Illegal contracts.—Any contract, express or implied, made by any person, firm, or corporation in violation of any of the provisions of sections 1 to 7, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had. (Added by Stats. 1935, p. 1549.)

Sec. 2. Officers and agents.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. (Amended by Stats. 1931, p. 1334; Stats. 1935, p. 1547.)

Sec. 10. Action to enjoin violation; witnesses; immunity from prosecution.—Any person, or any trade association, may bring and maintain an action, or actions, to enjoin and restrain any violation, or violations, of any provision, or provisions, of this act and, in addition thereto, for the recovery of damages. If it shall appear to the court upon any application for a temporary restraining order, or upon the hearing of any order to show cause why a preliminary

injunction should not be issued, or upon the hearing of any motion for a preliminary injunction, or if the court shall find, in any such action, that any defendant therein is violating, or has violated, any provision of this act, then the court must and shall enjoin such defendant from doing all acts which are prohibited by the section, or sections, of which any provision thereof is being violated, or has been violated, by such defendant; and, in addition thereto, the court may, in its discretion, include in any such injunction such other restraint as it may deem expedient in order to deter such defendant from, and insure against, his committing a future violation of any such section, or sections, hereof; and, in either event, the said injunction, whether interim or final, shall cover every article or product and not merely the particular article or product, or articles or products, involved in such action. It shall not be necessary for the plaintiff, in any such action, to provide nor file any undertaking or bond for the issuance of any such interim or final injunction.

In any such action, it shall not be necessary to allege nor prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover the amount of actual damages, if any, sustained by such plaintiff, as well as the actual damages, if any, sustained by any person who has assigned his claim for damages to such plaintiff, which said damages are the result of any violation, or violations, of any provision, or provisions, of this act.

Any party to, or any witness in, any action brought under any provision of this section may be required to testify and give his deposition as if the provisions of part IV, title III, chapter III, of the Code of Civil Procedure were applicable to said party, or witness, and to said testimony and said deposition; and, in addition, the books and records of any such party, or of any such witness, may be subpoenaed into court and introduced into evidence, or introduced, by reference, into evidence, and may be required to be produced at the taking of any such deposition and there inquired into.

Any party to any action brought under any provision of this section may, upon notice, apply to the court in which said action is pending, or to any judge thereof, for an order requiring any other party to give to the applicant, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any documents, papers, or memoranda in such party's possession or under his control containing evidence relating to the merits of any such action or any defense therein; and if a compliance with said order is refused, the court shall exclude

the entries of accounts in any such book, or any such document, paper, or memorandum from being given in evidence by such other party, or if wanted as evidence by the applicant the court shall presume them to be such as the applicant alleges them to be.

If, at any time while any such action is pending, it shall appear to the court that an extensive examination of books, papers, records, or documents is or may become material or relevant to the issues in any such action, the court may, in its discretion, upon the application of any party to said action, or upon its own motion, order a reference to be had in the manner and form provided in part II, title VIII, chapter VI, of the Code of Civil Procedure.

Provided, however, That no information obtained under any provision of this section, or under part IV, title VI, chapter II, of the Code of Civil Procedure, may be used against any such party, or any such witness, as a basis for a misdemeanor or felony prosecution in any court of this State. (Amended Stats. 1935, p. 1549; ch. 860, Laws of 1937, and ch. 175, Laws of 1939.)

Sec. 11. Violation of act a misdemeanor; punishment; presumptive evidence of cost; presumptive evidence of delivery cost.—Any person, whether as principal, agent, officer, or director, for himself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of sections 1 to 7, inclusive, of this act is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Presumptive evidence of cost.—Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, shall be presumptive evidence of cost as to each such article or product involved in any action brought under this act and involving the violation of any provisions of sections 3 and 5 of this act.

Presumptive evidence of delivery cost.—Proof of transportation tariffs when fixed and approved by the Railroad Commission of the State of California shall be presumptive evidence of delivery cost as provided in section 3 hereof. (Added by Stats. 1935, p. 1550; Amended by Stats. 1937, p. 2399.)

Sec. 12. Constitutionality.—If any section, sentence, clause, or phrase of this act is for any reason held to be unconstitu-

tional, such decision shall not affect the validity of the remaining portions of the act. The legislature hereby declares that it would have passed this act, and each section, sentence, clause, or phrase thereof, irrespective of the fact that any one or more sections, sentences, clauses, or phrases be declared unconstitutional. (Added by Stats. 1935, p. 1550; amended by Stats. 1937, p. 2399.)

Sec. 13. Purpose of act; liberal construction.—The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent, and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved. (Added by Stats. 1935, p. 1550; amended by Stats. 1937, p. 2400.)

Sec. 14. Short title.—This act shall be known and designated as the "Unfair Practices Act." (Added by Stats. 1935, p. 1550.)

Sec. 15. Evidence of prevailing wage scale; persons employed without compensation.—(a) In any action brought under the provisions of Section 3 hereof where it is alleged and shown that the person complained against is selling below his cost of doing business, and said person is including labor at less than the prevailing wage scale in the trade in which such person is engaged for the locality or vicinity in which he is doing business, evidence of such prevailing wage scale shall be admissible to prove the intent or purpose of such person to violate the provisions of this act.

In any action brought under the provisions of this act, where persons are employed or performing services for any person or in the conduct of the business wherein such person is charged with a violation of this act, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered. (Amended, ch. 175, Laws of 1939.)

Sec. 15.1. Cost of raw materials.—For the purpose of determining the cost of raw materials in any action brought against a producer or manufacturer under the provisions of this act where it is alleged that a producer or manufacturer complained against is selling below his cost as defined in section 3 hereof and said producer or manufacturer is including in said cost raw materials purchased, used, or acquired by such person upon terms or conditions whereby

the total consideration in full payment thereof is not definitely computable or determinable in money at the time of the purchase, use or acquisition by such producer or manufacturer of said raw materials, the cost of such raw materials shall be presumed to be the prevailing market price for which the same or similar raw materials were selling at the time of such purchase, use, or acquisition in the usual and ordinary channels of trade in the locality or vicinity in which such raw materials were purchased or acquired. (Added, ch. 175, Laws of 1939.)

Sec. 16. Definitions.—As used in this act, the term “person” includes any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation; the term “sell” includes selling, offering for sale or advertising for sale; the term “give” includes giving, offering to give or advertising the intent to give; the term “article or product” includes any article, product, commodity, thing of value, service, or output of a service trade. (Added by Stats. 1937, p. 2400.)

Sec. 17. Solicitation, collusion, or joint participation to violate act.—It shall be unlawful for any person to use any threat, intimidation, or boycott, to effectuate any violation of any provision of this act. It shall be unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to solicit any violation of any provision of this act. It shall be unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to jointly participate or collude with any other such person in the violation of any provision of this act. Any person who shall violate any provision of this section is guilty of a misdemeanor and upon conviction thereof shall be subject to the penalties set out in section 11 of this act. (Amended, ch. 175, Laws of 1939.)

Judicial Decisions

Application of the Common Law.

Where a complaint alleged that a wholesaler sold commodities below cost in order to injure and destroy the business of a competitor, it was held that such act was “*Damnum absque injuria*” and that in the absence of fraud or deceit or statute, injuries received in business competition are not actionable. *Katz v. Kapper*, 7 Cal. App. (2d) 1, 44 Pac. (2d) 1060 (1935).

Constitutionality of Statute.

The statute is constitutional as within the police power of the State, being reasonably related to the end sought to be accomplished, and sufficiently definite in its terms. As long as the statute is within the police power of the State, it is immaterial whether a business subject to the act is affected with a public interest or not. *Wholesale Tobacco Dealers Bureau of So. Cal. v. National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 82 Pac. (2d) 3 (1938), rev'g 74 Pac. (2d) 848 (1937) and overruling *Balzer v. Caler*, 74 Pac. (2d) 839 (1937); *People v. Kahn*, 19 Cal. App. (2d) 758, 60 Pac. (2d) 596 (1936); *Mering v. Del Paso Heights Market*, 3 CCH 25028 (Super. Ct. 1936).

While the court in *Balzer v. Caler*, *supra*, held the statute unconstitutional, the business involved not being affected with a public interest, on appeal, the Supreme Court stated that the necessary unlawful intent had not been proved and denied the injunction without passing on the validity of the statute. (*Id.*, 11 Cal. (2d) 663, 82 Pac. (2d) 19 (1938).)

Application of Statute.

Scope.

Sales to a county, the State, or the Federal Government are subject to the provisions of the statute. Op. Att'y Gen., N. S. 1347, Dec. 27, 1938, 2 P.-H., 40525.

Sales Tax as "Cost."

A 3-percent sales tax does not have to be added to the minimum selling price. Op. Att'y Gen. N. S. 103, Dec. 23, 1936, 2 P.-H., 40225.

"Cost of Doing Business."

The term "all costs of doing business" is sufficiently definite and means that the cost of each article shall include not only the initial cost but also its proportionate share of the load of carrying on the business through which it is sold. *People v. Kahn*, 19 Cal. App. (2d) 758, 60 Pac. (2d) 596 (1936); cf. *Balzer v. Caler*, *supra*.

The cost of doing business must be determined on the basis of all sales made by the vendor, and sales of milk to public institutions cannot be segregated from other sales in determining cost. Op. Att'y Gen., Sept. 1, 1936, 1 CCH 2343.

Intent to Injure.

A sale below cost is a violation of the statute only when accompanied with the intent of injuring and destroying competition. *People v. Kahn*, *supra*; *Mering v. Del Paso Heights Market*, *supra*; *Wholesale Tobacco Dealers Bureau of So. Cal. v. National Candy &*

Tobacco Co., supra; Balzer v. Caler, supra; Food & Grocery Bureau of So. Cal. v. Smith Metropolitan Market Co. (Super. Ct. 1939), 3 CCH 25247.

The court in *Balzer v. Caler, supra*, held that a sale below cost as a means of advertising to attract customers was not a violation of the statute. The court stated that loss leaders were a well-recognized method of advertising and that proof of loss leader sale was not proof of sale below cost with intent to injure.

Meeting Competition.

In answer to an allegation that the statute is discriminatory in that large stores have lower selling costs, it has been pointed out that the statute allows meeting the price of a competitor in good faith and thus prevents any discriminatory effect. *Wholesale Tobacco Dealers Bureau of So. Cal. v. National Candy & Tobacco Co., supra*.

A grocer may not sell an advertised brand of butter below cost in order to meet the prevailing price on unadvertised brands. *Op. Atty Gen., N. S. 1290, Nov. 28, 1938, 2 CCH 2343; 2 P-H., 40509.*

Cost Surveys.

Cost survey by accountants derived from account books of a majority of the membership of a trade association, is not a cost survey within the meaning of the statute unless practically all persons engaged in the industry in the locality covered by the survey are members of the association. *Op. Atty's Gen., Nov. 6, 1935, 2 CCH, 2343.*

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Gen. Laws (Deering, 1937, Act 8781 as amended by Gen. Laws (Deering, Supp. 1939) Act 8781)

Sec. 1. Unlawful practices.—It shall be unlawful for any person, engaged in the production, manufacture, distribution, or sale of any article or product of general use or consumption, with the intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person, who in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities, or cities or portions thereof, or between different locations in such sections, communities, cities, or portions thereof in this State, by selling or furnishing such article or product, at a lower price in one section, community, or city, or any portion thereof, or in one location in such section, community, or city, or any portion thereof, than in another: *Provided*, That nothing herein contained shall prevent differentials which make allowances

for differences, if any, in the grade, quality, or quantity when based and justified in the cost of manufacture, sale, or delivery, or the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity, or from the point of shipment to the point of destination: *And provided further*, That nothing herein contained shall prevent a selection of customers or a functional classification by any person of any customer as broker, jobber, wholesaler, or retailer or a differential in price for any article or product as between any customers in different functional classifications. Motion-picture films when licensed for exhibition to motion-picture houses shall not be deemed to be an article or product under this act. Neither shall anything in this act be deemed to apply to any service, article, or product for which rates are established under the jurisdiction of the Railroad Commission of the State of California and sold or furnished by any public utility corporation, or installation and repair services rendered in connection with any services, articles, or products; or to any service, article, or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Railroad Commission of the State of California if such service, article, or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles, or products.

The inhibition of this act against locality discrimination shall embrace any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this section: *Provided, however*, That nothing in this section shall be construed to prohibit the meeting in good faith of a competitive price. (Amended by Stats. 1931, p. 1333; Stats. 1935, p. 1547; Stats. 1937, p. 2395.) *

Agric. Code (Deering, 1937)

Rebates and Discounts

Sec. 1156. Contract to pay or allow brokerage charge, rebate, etc., void; exceptions; taking part in transaction, misdemeanor.— Any contract made for the purpose of injuring competitors and destroying competition under which the seller of any agricultural product agrees to pay or allow any brokerage charge, rebate, discount, or other credit, other than an allowance for variation in quality, condition, quantity, or any other form of compensation or credit by a seller to a buyer, or to an agent, employee, subsidiary, or affiliate of a buyer who buys to sell at retail and which is not paid, given, or

* For procedural and penalty provisions, see *Prohibitions of Sales Below Cost, infra*.

allowed in like circumstances to all other buyers or to the agents, employees, subsidiaries, or affiliates of other buyers, whether the same is paid or allowed directly or indirectly, is hereby declared to be against public policy and void: *Provided*, That advertising allotments or discounts by a seller to a buyer for bona fide advertising expenditures are not included. It is a misdemeanor for any person to take any part in such a transaction whether as seller, buyer, buyer's agent, employee, or subsidiary. (Added by Stats. 1935, p. 2248.)

Sec. 12725.³ Sale for less than current price or receipt of portion of price; prima facie evidence of fraud.—Any sale of farm products made by a commission merchant for less than the current market price to any person with whom he has any financial connection, directly or indirectly as owner of its corporate stock, as copartner, or otherwise, or any sale out of which said commission merchant receives, directly or indirectly, any portion of the purchase price, other than the commission allowed in section 1266, shall be prima facie evidence of fraud within the meaning of this chapter. (Added by Stats. 1933, p. 2081.) See Stats. 1933, p. 286.

Judicial Decisions

In a proceeding before the Railroad Commission for violation of Stat. 1913, p. 508, enacted prior to Act 8781, *supra*, it was held that a public utility, merely by meeting the rates of a competitor within a certain territory in order to attempt to hold its business, did not create an unjust or unlawful discrimination. The statute expressly allows a bona fide meeting of a competitive rate and recognizes that the existence of competition in one area warrants maintaining different rates in that territory from those in an area where there is no competition. *In re Pacific Gas & Electric Co.*, 36 Dec. of R. R. Commission 766 (1931).

The railroad commission has properly granted an application of a public utility to increase rates in one area in order to achieve a uniform price and thereby complying with the statute. *In re Southern California Edison Co.*, 4 R. C. D. 159 (1914).

In an action by one public utility against a competitor for violation of the statute, it was held that the railroad commission does not have jurisdiction to settle disputes arising out of violation of the statute. *Home Telephone & Telegraph Co. of Santa Barbara v. Pacific Telephone & Telegraph Co.*, 6 R. C. D. 124 (1915).

³ Another section of the same number and in substantially the same language was added by Stats. 1933, p. 1787, and repealed by Stats. 1937, p. 721.

2. Special Prohibitory Laws

Agric. Code (Deering, 1937)

Marketing of Milk and Other Dairy Products

Section 1299.2 provides that the director of agriculture shall have power to issue licenses, administer and enforce all provisions of this act, and make the necessary orders, rules, and regulations.

Sec. 1299.1. Unlawful methods and practices.—In the marketing of market milk, cream, and dairy products the following methods of doing business or trade practices are hereby declared unlawful:

(a) The payment or allowance of rebates, refunds, commissions, or unearned discounts to any customer whether in the form of money or otherwise.

(b) The giving of any milk, cream, or dairy products for the purpose of securing business provided the giving of milk, cream, or dairy products to bona fide charities is not prohibited.

(c) The extension to any purchasers of milk, cream, or dairy products of special prices, services, or privileges not extended to all purchasers upon like terms and conditions.

(d) Any false or misleading advertising of milk, cream, or dairy products as defined in section 654a of the Penal Code.

(e) Any discriminations between wholesale customers or between consumers who purchase milk, cream, or dairy products under like conditions of service as to prices at which milk, cream, or dairy products are sold thereto or any discrimination between different sections, communities, or cities, in the same sales or marketing area, or portions thereof or between different localities in such sections, communities, or cities or portions thereof by selling milk, cream or dairy products at a lower price in one section, community, or city, or any portion thereof or in one location in such section, community, or city or any portion thereof than in another after making allowance for difference, if any, in the cost of such milk, cream, or dairy products, and the actual cost of transportation of such milk, cream, or dairy products from the point of processing or manufacture.

(f) The solicitation of the business of any wholesale customer or consumer at lower prices for milk, cream, or dairy products of like quality or grade sold under like conditions of service than such wholesale customer or consumer is then paying a competitor.

(g) The sale or offer to sell, or giving of any article at less than the prevailing market price thereof to secure the milk, cream, or dairy products business of any wholesale customer or any person who buys as a consumer.

(h) The payment by distributors or manufacturers of different prices for milk purchased from producers of the same grade and

quality used for similar purposes in the same marketing or sales area provided that differences in actual cost of transportation from point of production to distributors' or manufacturers' plant shall not be construed as a violation of this section. The payment by distributors or manufacturers in any marketing or sales area of a lower price to any producer than is being paid by distributors or manufacturers for fifty-one percent of all milk used in such marketing or sales area for similar purposes.

(i) Any payment by any distributor or manufacturer to any producer for milk purchased, in the same sales or marketing area, at a lower price than that at which all milk used by such distributor or manufacturer for similar purposes is paid for.

(j) The payment by a distributor or manufacturer to any producer at a price less than the average prevailing cost of production of milk of like quality to the producer in the area as determined by the director.

(k) The sale by any distributor who produces his own milk or who produces his own milk and acquires other milk for distribution at a price less than the average prevailing cost of production and distribution in the area as determined by the director.

(l) Sale of milk, cream, or dairy products at less than cost as defined in this subsection, provided that nothing in this subsection shall prohibit the meeting of any legal price made by any competitor. For the purposes of this subsection the term "cost" is hereby defined as the price paid for such milk, cream, or dairy products at seller's place of business plus cost, if any, of processing, handling, and delivery.

(m) The buying by any distributor of any market milk, excluding cream, from producers unless a written contract is executed by buyer and seller specifying the price and terms upon which said milk is purchased by the distributor and sold by the producer, and unless said contracts or any amendments thereof are recorded with the director within five days of their execution.

(n) The engaging in business as a distributor, manufacturer, or producer, as said terms are defined in this chapter, by any person who does not hold a license or who is not registered as herein provided. (Added by Stats. 1935, p. 1448.)

Section 1299.5 provides that the director may refuse to grant any license, and after due hearing revoke or suspend any such license when he is satisfied that any applicant or licensee has violated any of the provisions of this chapter.

Sections 1299.10 to 1299.12 provide that on complaint, or on his own initiative, the director is empowered to make investigation of

violations. The party or parties complained of shall be given proper notice of hearings, and after public hearing, the director shall issue such order as is deemed essential to carry out provisions of the act. Violation of any of the provisions of the act or any order, rule, or regulation constitutes a misdemeanor punishable by fine or imprisonment. Any act of the director pursuant to the provisions of this chapter may be reviewed by any court of competent jurisdiction.

Gen. Laws (Deering, 1937), as amended by Gen. Laws (Deering, Supp., 1939), Act 3796

Alcoholic Beverage Control Act

Section 54 (h) prohibits the giving by a manufacturer or wholesaler of any alcoholic beverages as free goods as part of any sale or transaction involving alcoholic beverages.

Section 54 (i) prohibits the giving by a manufacturer or wholesaler of secret rebates, concessions, or anything of value for the purpose of encouraging the sale of alcoholic beverages manufactured or sold by the manufacturer or wholesalers.

Section 54 (j) prohibits a manufacturer or wholesaler from wilfully and knowingly discriminating in the price of any brand of distilled spirits sold to different retail licensees in the same trading area purchasing under like terms and conditions.

Section 54 (k) prohibits a manufacturer or wholesaler from paying, crediting, or compensating a retailer for advertising, display, or distribution services in connection with the advertising and sale of distilled spirits.

Section 55.7 provides that no person licensed to sell alcoholic liquor under the terms of the statute shall give any premium, gift, or free goods in connection with the sale of any alcoholic beverage. Violation of any of these sections constitutes a misdemeanor.

Gen. Laws (Deering, 1937), Act 9310

Sale of Wool

Sec. 1. Deductions forbidden.—No person, firm, corporation, company or association purchasing wool from a producer shall make a specific deduction for tags, fribs, crutchings or other off-wools, either on a basis of the percentage of the weight or percentage of the value of the wool. Any provision in a contract to purchase wool from a producer, providing for such a deduction, is hereby declared to be invalid. (Stats. 1937, p. 1407.)

Sec. 2. Violation a misdemeanor.—Violation of the above section is a misdemeanor. (Ibid.)

COLORADO

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Stat. Ann. (Michie, Supp., 1939), c. 165

Sec. 20 (1). Contracts relating to sale of trade-marked articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer of such commodity, or to the distributor, from whom the same was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof.

(c) When the goods are damaged or deteriorated in quality and plain notice of the fact is given to the public in the advertisement

and sale thereof, such notice to be conspicuously displayed in all advertisements.

(d) By any officer acting under the orders of any court. (L. '37, p. 559, sec. 1.)

Sec. 20 (2). When law does not apply.—This act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices. (Id. sec. 2.)

Sec. 20 (3). Definitions.—The following terms, as used in this act, are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a public trust, or any unincorporated organization. (Id. sec. 3.)

Sec. 20 (4). Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Id. sec. 4.)

Sec. 20 (5). Short title.—This act may be known and cited as the "Fair Trade Act." (Id. sec. 5.)

B. PROHIBITION OF SALES BELOW COST

Stat. Ann. (Michie, Supp., 1939), c. 48
Unfair Practices Act

Sec. 302 (3).¹ Sales below cost.—It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State to sell, offer for sale, or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give, or advertise the intent to give away any article or product, or service, or output of a service trade for the purpose of injur-

¹ For sec. 302 (1) dealing with unlawful practices, see *Antidiscrimination Legislation: General Prohibitory Laws, infra*. For sec. 302 (2) dealing with officers and agents, see *infra*.

ing competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.²

(a) The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor, and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

Sec. 302 (4). How cost established.—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale, outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased and the quantity of such merchandise to be sold or offered for sale.

Sec. 302 (5). Cost survey competent evidence in proving costs.—In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm, or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act.

²The act is constitutional, not being a price-fixing statute. As intent to injure competition is a necessary element of violation, the statute is a valid exercise of the police power of the State, being reasonably designed to promote the public welfare. *Jonke v. Save-A-Nickel Stores* (D. C., Denver, Nov. 20, 1937), 2 P-H, 40376; 106 CCH, 25230.

Sec. 302 (6). When provisions not applicable.—The provisions of sections 302 (3), 302 (4), 302 (5) shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm, or corporation who performs work upon, renovates, alters, or improves any personal property belonging to another person, firm, or corporation, shall be construed to be a vendor with (within) the meaning of this act.

Sec. 302 (7). Secret rebates, etc.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 302 (11) of this act.

Sec. 302 (2). Responsibility of agent.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts.

Sec. 302 (8). Duty of Attorney General to institute suits.—Upon the third violation of any of the provisions of sections 302 (1) (7), inclusive, of this subdivision by any corporation, it shall be the duty of the attorney general 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 to permanently enjoin it from transacting business in this State. If in such action the court shall

find that such corporation is violating or has violated any of the provisions of sections 302 (1) (7), inclusive, of this subdivision, it must enjoin said corporation from doing business in this State permanently or for such time as the court shall order, or must annul the charter, or revoke the franchise of such corporation.

Sec. 302 (9). Contracts made in violation of subdivision illegal.—Any contract, express or implied, made by any person, firm, or corporation in violation of any of the provisions of sections 302 (1) (7), inclusive, of this subdivision is declared to be an illegal contract and no recovery thereon shall be had, provided, no part of this act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

Sec. 302 (10). When court shall enjoin.—Any person, firm, private corporation, or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 302 (1) (7), inclusive, of this subdivision, and, if injured thereby, for the recovery of damages. If in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 302 (1) (7), inclusive, of this subdivision, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Sec. 302 (11). Violation of subdivision—Penalty.—Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of section 302 (1) (7), inclusive, of this subdivision, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars, or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Stat. Ann. (Michie, Supp.), 1939, c. 48
Unfair Practices Act

Section 302 (1). Unlawful discriminations.—It shall be unlawful for any person, firm, or corporation, doing business in the State of Colorado and engaged in the production, manufacture, distribution or

sale of any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this act. Nothing in this act contained shall be construed to affect or apply to any service or product sold, rendered or furnished by any public utility, the sale, rendition or furnishing of which is subject to regulation by the Colorado Public Utilities Commission or by any municipal regulatory body. This act shall not be construed to prohibit the meeting in good faith of a competitive rate. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.³

2. Special Prohibitory Laws

No provisions.

³ For procedure and penalty sections, see *Prohibition of Sales Below Cost*, *supra*.

CONNECTICUT

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Gen. Stat. (Supp., 1939)

Sec. 921e. Fair trade.—(a) The following terms, as used in this chapter, shall have the following meanings, unless the context shall otherwise indicate: (A) “Commodity” shall mean any subject of commerce; (B) “producer” shall mean any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher; (C) “wholesaler” shall mean any person selling a commodity other than a producer or retailer; (D) “retailer” shall mean any person selling a commodity to consumers for use, and (E) “person” shall mean an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. (b) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be construed to violate any provision of the general statutes by reason of any of the following provisions which may be contained in such contract: (A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller; (B) that the buyer will require from any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller; (C) that the seller will not sell such commodity, (1) to any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler

or retailer to whom he may resell; or (2) to any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (c) For the purpose of preventing evasion of the resale price restrictions imposed with respect to any commodity by any contract entered into pursuant to the provisions of this chapter, except to the extent authorized by such contract, (1) the offering or giving of any article of value in connection with the sale of such commodity; (2) the offering or the making of any concession of any kind, whether by the giving of coupons or otherwise, in connection with any such sale or (3) the sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by subsection (f) shall be available. (d) No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this chapter, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish such price by the owner of such trade-mark, brand, or name. (e) No contract containing any of the provisions enumerated in subsection (b) shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following-described cases: (A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity when plain notice of such fact shall have been given to the public, provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out such stock and an opportunity to purchase such stock at the original invoice price; (B) when the trade-mark, brand, or name shall have been removed or wholly obliterated from the commodity and shall not be used or directly or indirectly referred to in the advertisement or sale thereof; (C) when the goods shall be altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact shall be given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity; (D) by any officer acting under an order of court. (f) Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (g) This chapter shall not apply to any contract or agreement between or among producers or distributors or between or

among wholesalers or between or among retailers as to sale or resale prices. (h) If any provision of this chapter, or the application thereof to any person or circumstances, shall be held invalid, the remainder of the chapter and the application of such provisions to other persons or circumstances shall not be affected thereby. (L. 1937, C. 138a.)

Judicial Decisions

Constitutionality.

"That the assembly may constitutionally enact this type of legislation is a settled question" citing *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936) (see Resale Price Maintenance, Illinois, *infra*), *Broff v. Silver Liquor Stores, Inc.*, 25 Conn. L. J. 204, 5 Conn. Supp. 288 (Super. Ct. 1937).

Parties Enforcing Fair Trade Contracts.

In *Broff v. Silver Liquor Stores, Inc.*, *supra*, in an action by a contracting retailer against a competitor for violation of a resale price restriction, the court said: "Whether the act has removed only statutory infirmities of trade agreements without affording immunity from any common law attack or whether the proper party plaintiff has instituted this action must yield, upon a motion for a restraining order of temporary effect, to the superior weight of the apparent intention of the legislature * * *," the plaintiff having posted a bond indemnifying defendants against loss.

B. PROHIBITION OF SALES BELOW COST

Gen. Stat. (Supp.), 1939

Unfair Sales Practices Act

Sec. 922e. Definitions.—As used in this chapter, the following terms shall have the following meanings: (a) "Cost to the retailer" shall mean the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, (2) cartage to the retail outlet if performed or paid for by the retailer, which cartage cost shall be deemed

to be three-fourths of one percent of the cost of the merchandise to the retailer, unless such retailer shall claim and prove a lower cartage cost and (3) a mark-up to cover in part the cost of doing business, which mark-up in the absence of proof of a lower cost, shall be six percent of the total cost at the retail outlet; (b) "cost to the wholesaler" shall mean the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, and (2) cartage to the retail outlet if performed or paid for by the wholesaler, which cartage cost shall be deemed to be three-fourths of one percent of the cost of the merchandise to the wholesaler, unless such wholesaler shall claim and prove a lower cartage cost and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lower cost, shall be two percent of the total cost at the wholesale establishment; provided, (c) when two or more items shall be advertised, offered for sale or sold at a combined price, the price of each such item shall be determined in the manner set forth in subsections (a) and (b); (d) "cost to the retailer" and "cost to the wholesaler" as defined in said subsections (a) and (b) shall mean bona fide costs; sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing market conditions within this state not to be used as a basis for computing replacement costs with respect to sales by retailers and wholesalers; (e) "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer of title to tangible personal property for a valuable consideration made, in the ordinary course of trade or in the usual prosecution of the seller's business, to the purchaser for consumption or use other than resale or further processing or manufacturing; "sell at wholesale," "sale at wholesale," and "wholesale sale" shall mean and include any such transfer of title to tangible personal property for the purpose of resale or further processing or manufacturing, which terms shall include any such transfer of property when title is retained by the seller as security for the payment of the purchase price; (f) "retailer" shall mean and include each person, copartnership, corporation, or association engaged in the business of making sales at retail within this state; provided, in the case of a retailer engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business and (g) "wholesaler" shall mean and include each person, copartnership, corporation, or association engaged in the business of

making sales at wholesale within this state; provided, in the case of a wholesaler engaged in the business of making sales both at wholesale and at retail, such term shall be applied only to the wholesale portion of such business. In determining the cost to the retailer in cases in which such retailer buys at wholesale and receives the wholesalers' profits and discounts on merchandise to be sold at retail, both the wholesale mark-up of two percent and the retail mark-up of six percent shall be added to the invoice cost of such merchandise in order to cover in part the cost of doing business in the absence of proof of a lower cost by such retailer.

Sec. 923e. Sales below cost.—No retailer shall, with intent to injure competitors or destroy competition, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the retailer, and no wholesaler shall, with such intent, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the retailer, and no wholesaler shall, with such intent, advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler. Evidence of any advertisement, offer to sell, or sale of any item of merchandise by any retailer or wholesaler at less than cost to him shall be prima facie evidence of intent to injure competitors or destroy competition. Upon the complaint of any person claiming to be injured, the superior court shall have jurisdiction to enjoin any such retailer or wholesaler from the commission of any act prohibited by the provisions of this chapter.

Sec. 924e. Exceptions.—The provisions of this act shall not apply to advertising or offering to sell, or selling, at retail or at wholesale, if done with relation to (a) an isolated transaction and not in the usual course of business; (b) closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity when plain notice of such purpose shall have been given to the public, or marking down merchandise in an effort to sell the same after bona fide efforts to sell the same prior to such mark-down; (c) sale of perishable merchandise when such sale shall be required immediately in order to forestall loss; (d) advertising or offering for sale of merchandise which is imperfect or damaged, if it be advertised or offered for sale as such and marked and sold as such; (e) advertising or offering for sale or selling any business upon the final liquidation thereof; (f) advertising or offering for sale or selling merchandise for charitable purposes or to relief agencies; (g) sale of merchandise on contract to any department, board or commission of the state or of any political subdivision thereof, or to any institution maintained thereby or (h) advertising or offering for sale or sale of merchandise by any fiduciary or other officer acting under the order or direction of any court.

Gen. Stat. (Supp., 1935)
Retail Drug Control Act

Sec. 960c. Short title.—This chapter may be cited as the “Retail Drug Control Act.” The following terms shall have the following meanings, when used in this chapter, unless the context otherwise indicates: (a) “Retail drug trade” shall mean the selling to the consumer, not for the purpose of resale, of any form of drugs, medicines, cosmetics, toilet preparations, drug sundries, or allied articles, but shall not include the dispensing of drugs, medicines, and medical supplies by a physician, dentist, surgeon, or veterinary in the legitimate practice of his profession; (b) “drug retailer” shall mean any individual, firm, or corporation engaged wholly or partially in the retail drug trade; (c) “retail drug establishment” shall mean any store or department of a store engaged in the retail drug trade; (d) “drug” shall mean any substance or preparation, except soaps, intended for external or internal use in the cure, mitigation, treatment, remedy, or prevention of disease or ailment in man or any other animal, and any substance or preparation intended to affect the structure or function of the body of man or any other animal, not including food, but including medicinal or quasi-medicinal preparation; (e) “cosmetics” and “toilet preparations” shall mean toilet articles and perfumes, toilet waters, face powders, creams, lotions, rouges, shaving creams, dentifrices, bath salts, and all other similar preparations and substances, except soaps, designed and intended for application to the person for the purpose of cleansing, improving, or changing in any way the appearance of the person, or of refreshing or preserving the person; (f) “drug sundries” shall mean such articles as are used in conjunction with, but not included in, drugs, cosmetics, or toilet preparations. (L. 1935, c. 135a.)

Sec. 961c. Illegal advertising.—(a) No drug retailer shall use advertising, whether printed, radio, or display or of any other nature, which is intentionally inaccurate in any material particular or misrepresents merchandise, in respect to its use, trade mark, grade, quality, quantity, size, origin, material, content, or preparation; and no drug retailer shall use advertising or selling methods which tend to deceive or mislead the customer. (b) No drug retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies, or services. (c) No drug retailer shall use advertising which lays claim to a policy or a continuing practice of generally underselling competitors. (d) No drug retailer shall secretly give anything of value to a customer or to the employee or

agent of a customer for the purpose of influencing a sale or, in furtherance of a sale, render a bill or statement of account to the employee, agent, or customer which is inaccurate in any material particular. (e) No drug retailer shall sell or offer for sale any merchandise upon a condition which involves a lottery, gamble, or other element of chance. (f) No drug retailer shall permit any demonstrator or sales employee whose salary is wholly or partially paid by a manufacturer or distributor to work in his establishment unless such demonstrator or sales employee is clearly and openly identified as the agent of such manufacturer or distributor. (Id.)

Sec. 962c. Unfair competition.—No drug retailer shall sell any drugs, medicines, cosmetics, toilet preparations, or drug sundries at a price below the manufacturer's wholesale list price per dozen; nor, in the case of biologicals or other of the above-mentioned products which are not customarily sold in dozens or greater lots, sell such products at less than the manufacturer's wholesale list price per unit. Notwithstanding the provisions of the preceding sentence, any drug retailer may sell at less than the prices specified above, imperfect or actually damaged merchandise or bona fide discontinued lines of merchandise, if advertised, marked, and sold as such; merchandise sold upon the complete final liquidation of any business; merchandise sold or donated for charitable purposes or to unemployment relief agencies and drugs or drug sundries sold to physicians, dentists, veterinarians or hospitals, but not for the purpose of resale by them. (Id.)

Sec. 963c. Penalty.—Any person responsible for a wilful violation of the provisions of this chapter shall be fined not more than \$500. (Id.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

DELAWARE

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

No provisions.

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Rev. Code (1935)

Sec. 3124. Unlawful to discriminate; violation; penalty.—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 intentionally, for the purpose of 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, 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 after making due allowance for the difference, if any, in the grade or quality and in the 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 unlawful.

58 PRICE CONTROL LEGISLATION

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. (29 Del. Laws, ch. 213.)

2. Special Prohibitory Laws

No provisions.

FLORIDA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Comp. Gen. Laws Ann. (Skillman, Supp., 1940)

Sec. 7100 (14). Short title of act.—This act may be known and cited as the “Florida Fair Trade Act.” (L. 1937, c. 18395, sec. 10. L. 1930, c. 19201, sec. 10.)

Sec. 7100 (15). Definitions.—The following terms, as used in this act, are hereby defined as follows:

(a) “Commodity” means any subject of commerce.

(b) “Producer” means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(c) “Wholesaler” means any person selling a commodity other than a producer or retailer.

(d) “Retailer” means any person selling a commodity to consumers for use.

(e) “Person” means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (Id. sec. 1.)

Sec. 7100 (16). Contracts to govern price of sale or resale.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Florida by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Id. sec. 2.)

Sec. 7100 (17). Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract).

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 7100 (20) of this act shall be available. (Id. sec. 3.)

Sec. 7100 (18). Only owners of trade-marks to establish resale prices.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this law, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Id. sec. 4.)

Sec. 7100 (19). Exceptions.—No contract containing any of the provisions enumerated in section 7100 (16) of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and when plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the goods are altered, second-hand, damaged, defaced, or deteriorated, and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(c) By any officer acting under an order of court. (Id. sec. 5.)

Sec. 7100 (20). Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of the law, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, and whether the particular lot of such commodity so advertised, offered for sale, or sold was or was not at any time sold to a party to a contract that stipulated the price of such commodity under the provisions of this law is unfair competition and is actionable at the suit of any person damaged thereby. (Id. sec. 6.)

Sec. 7100 (21). Application.—This act shall not apply to any contract or agreement between or among producers or distributors or (except as provided in subsection (c) of section 7100 (16)) between or among wholesalers, or between or among retailers, as to sale or resale prices. (Id. sec. 7.)

Sec. 7100 (22). Partial invalidity.—If any provision of this law, or the application thereof to any person or circumstance, is held invalid, the remainder of the law, and the application of such provisions to other persons or circumstances, shall not be affected thereby. (Id. sec. 8.)

Judicial Decisions

Constitutionality.

The Fair Trade Act (Laws 1937, c. 18395; superceded by new act in 1939) is unconstitutional as being in violation of article III, section 16, of the State Constitution which provides that the title of a statute must express the contents thereof. The language of the title: “* * * Through the Use of Voluntary Contracts Establishing Minimum Resale Prices * * *” implies that the statute validates voluntary resale price contracts and is inconsistent with Section 6 of the statute which binds noncontracting parties, with notice, to enforce resale price restrictions. *Bristol-Myers Co. v. Webb's Cut Rate Drug Co., Inc.*, 137 Fla. 508, 188 So. 91 (1939).

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

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

Sec. 3939. Unfair discrimination and competition prohibited.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Florida, and engaged in the production, manufacture, sale, or distribution of any commodity in general use, that shall, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this State by selling such commodity at a lower rate in one section, community, or city, than is charged for said commodity by said party in another section, community, or city, 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 unlawful. (Ch. 6945, Acts 1915, sec. 1.)

Penalty for unfair commercial discrimination: See sec. 7871.

Sec. 3940. Duty of State attorney, etc.—It shall be the duty of State attorneys, county solicitors, and prosecuting attorneys in their counties, and the attorney general, to enforce the provisions of the preceding section by appropriate actions in courts of competent jurisdiction. (Id. sec. 3.)

Sec. 3941. Complaints made to secretary of state; duty.—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 this chapter, 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. (Id. sec. 4.)

Sec. 3942. Secretary of state to revoke permit of corporations found guilty of discrimination.—If any corporation, foreign, or domestic, authorized to do business in this State, is found guilty of unfair discrimination within the terms of this chapter, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this State. (Id. sec. 5.)

Sec. 3943. Ouster of corporation found guilty.—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 this chapter, 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 Florida, to oust such corporation from all business of every kind and character in said State of Florida. (Id. sec. 6.)

Sec. 7871. Unfair commercial discrimination prohibited.—Any person, firm, company, association, or corporation violating any of the provisions of section 3939, 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 more than five thousand dollars or be imprisoned in the county jail not to exceed one year, or suffer both penalties. (Ch. 6945, Acts 1915, sec. 2.)

2. Special Prohibitory Laws

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

Fertilizer

Sec. 3822. Sale of fertilizer to farmers in carload lots.—It shall be unlawful for any manufacturer of fertilizers in this State to charge any farmer or farmers or other user or users in this State for fertilizers sold to such farmers or users for cash by carload lots more than is charged by such manufacturer for fertilizers of the same quality to merchants or dealers in the same county; and in determining what the price charged by such manufacturer to merchants or dealers is, all rebates or drawbacks of any character shall be ignored and the amount actually received and retained by such manufacturer shall be regarded as the price charged for such fertilizers. (Ch. 7382, Acts 1917, sec. 1.)

Sec. 3823. Test for determining quality.—The test for determining the quality of such fertilizers shall be made in the same manner as is now provided by law for testing the grade or quality of fertilizers, and certificates issued by the state chemist or assistant state chemist showing results of such tests shall be competent evidence in any court of law or equity in this State. (Id. sec. 2.)

Sec. 3824. Forfeiture for violation.—For each violation of sections 3822 and 3823 the manufacturer making the sale shall forfeit and pay to the purchaser discriminated against one-half of the amount received for such fertilizers, which amount shall be recoverable from the manufacturer in a suit brought by the purchaser in the court having jurisdiction of the amount involved in the county of the residence of the purchaser. (Id. sec. 3.)

GEORGIA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code Ann. (Park, et al., Supp., 1939)

Sec. 106-401. Short title.—This chapter may be known and cited as the "Fair Trade Act." (Acts 1937, pp. 800, 804.)

Sec. 106-402. Definitions.—The following terms, as used in this chapter, are hereby defined as follows:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person selling a commodity to consumers for use.

(E) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. (Acts 1937, p. 800.)

Sec. 106-403. Contracts fixing minimum price; prohibiting resale except at minimum price; limiting sales to consumers only, etc.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Georgia by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(C) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and not at less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Acts 1937, pp. 800, 801.)

Sec. 106-404. Evasion of resale price restrictions; unfair competition.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this chapter (except to the extent authorized by the said contract):

(A) The offering or giving of any article of value in connection with the sale of such commodity;

(B) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(C) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 106-407 shall be available. (Acts 1937, pp. 800, 802.)

Sec. 106-405. No minimum resale price fixed except by owner of trade-mark.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this chapter, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Acts 1937, pp. 800, 802.)

Sec. 106-406. Resales below contract minimum price, when permitted.—No contract containing any of the provisions enumerated in section 106-403 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, The owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(B) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(C) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(D) By any officer acting under an order of court. (Acts 1937, pp. 800, 802.)

Sec. 106-407. Advertising or selling below minimum price, unfair competition; actionable.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Acts 1937, pp. 800, 803.)

Sec. 106-408. Chapter not applicable to certain contracts.—This chapter shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (Acts 1937, pp. 800, 803.)

Sec. 106-409. Effect of partial invalidity of chapter.—If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provisions to other persons or circumstances, shall not be affected thereby. (Acts 1937, pp. 800, 803.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

IDAHO

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1937, c. 240

Section 1. Definitions.—The following terms for the purposes of this act are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grocer, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means the plural as well as the singular and shall include an individual, partnership, association, a joint stock company, business trust, an incorporated as well as an unincorporated organization.
- (f) "Distributor" means any person authorized by the producers or manufacturer of a commodity to sell the same at wholesale or retail.

Sec. 2. Contracts relating to sale of trade-marked articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Idaho by reason of any of the following provisions which may be contained in such contract:

- (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.
- (b) That the buyer will require of any person to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity—

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 3. Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such retail price restriction, for which the remedies prescribed by section 6 of this act shall be available.

Sec. 4. Only owners of trade-marks to establish resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 5. Exceptions.—No contract containing any of the provisions enumerated in section 2 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, That such stock is first offered to the manufacturer thereof at the original invoiced price at least ten days before such stock shall be offered for sale to the public.

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity.

(d) By any officer acting under an order of court.

Sec. 6. Unfair competition defined and made actionable.—Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable either in law or in equity at the suit of any person damaged thereby.

Sec. 7. Contracts not affected.—This act shall not apply to any contract or agreement between or among producers or between or among distributors or between or among wholesalers or between or among retailers as to sale or resale prices.

Sec. 8. Constitutionality.—If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 9. Inconsistent acts repealed.—All acts or parts of acts inconsistent herewith are repealed to the extent of such inconsistency.

Sec. 10. Short title.—This act may be known and cited as the "Fair Trade Act."

B. PROHIBITION OF SALES BELOW COST

L. 1939, c. 209

Unfair Sales Act

Section 1. Title.—This act shall be known and designated, and may be cited, as the "Unfair Sales Act."

Sec. 2. Sales below cost.—The practice of selling certain items of merchandise below cost in order to attract patronage is a deceptive form of advertising and an unfair method of competition. Such practice misleads the consumer, works back against the farmer, obstructs commerce, and diverts business from dealers who maintain a fair price policy, with the result of unemployment, underpayment of employees, excessive working hours, nonpayment of taxes, and an inevitable train of undesirable consequences including economic depression. This act is designed to make illegal such practice and to promote the general welfare of the State of Idaho.

Sec. 3. Definitions.—(a) When used in this act, the term "cost to the retailer" shall mean the invoice cost of the merchandise to the

retailer, or the replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added:

(1) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) Cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost; shall be deemed to be three-fourths ($\frac{3}{4}$) of one percent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and mark-up, and

(3) A mark-up to cover a proportionate part of the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be six (6%) percent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a mark-up.

(b) When used in this act, the term "cost to the wholesaler" shall mean the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added:

(1) Freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) Cartage to the retail outlet in the absence of proof of a lesser cost, shall be deemed to be three-fourths ($\frac{3}{4}$) of one percent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage and mark-up and

(3) A mark-up to cover a proportionate cost of doing business which mark-up in the absence of proof of a lesser cost, shall be two (2%) percent of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto the mark-up.

(c) When used in this act the term "replacement costs" shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty (30) days prior to the date of sale or of the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise.

(d) When used in this Act "invoice costs" shall mean the cost per unit at which the merchandise sold or offered for sale was bought by the seller at any time within sixty (60) days prior to the date of sale or the date upon which it is offered for sale by the seller and the cost per unit at which the merchandise sold or offered for sale

was bought by the seller at more than sixty days prior to the date upon which it is offered for sale by the seller shall not be used in determining "invoice cost," but "replacement costs" as defined in this act shall be used.

(e) When one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purpose of this act be deemed to be advertised, offered for sale, or sold, and the price of each item named be governed by the provisions of subsections (a) and (b) of section 3 respectively.

(f) The terms "cost to the retailer" and "cost to the wholesaler" as defined in subsections (a) and (b) of this section shall mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this State shall not be used in determining cost to the retailer, and cost to the wholesaler.

(g) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(h) The terms "sell at wholesale," "sales at wholesale," and "wholesale sales" shall mean and include any transfer for a valuable consideration made in the ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(i) The term "retailer" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at retail within this State: *Provided*, That in the case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business.

(j) The term "wholesaler" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state: *Provided*, That in the case of a person, partnership, corporation, or association engaged in the

business of making both sales at wholesale and sales at retail, such term shall be applied only to the wholesale portion of such business.

(k) The term "freight charges" as used in this act, shall mean minimum rates or charges contained in the lawfully filed tariff of any carriers holding authority from the Public Utilities Commission of Idaho and/or the Interstate Commerce Commission which tariff is on file with the said public utilities commission and/or Interstate Commerce Commission.

Sec. 4. Unfair competition.—It is hereby declared that any advertising, offer to sell, or sale of any merchandise by a retailer at less than cost to the retailer, as herein defined, or that any advertising, offer to sell, or sale of any merchandise by a wholesaler at less than cost to the wholesaler, as herein defined, is unfair competition and contrary to public policy and to the policy of this act, and tends to deceive the purchasers, or prospective purchasers and tends to create a monopoly in commerce.

Sec. 5. Penalties.—Any retailer who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the retailer as defined in this act, or any wholesaler who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler as defined in this act, shall be guilty of a misdemeanor. Proof of any such advertising, offer to sell, or sale of any retailer or wholesaler in contravention of the policy of this act shall be prima facie evidence of a violation of this act.

Sec. 6. Injunctive relief.—In addition to the penalties provided in this act the courts of this State are hereby invested with jurisdiction to prevent and restrain violations of this act and it shall be the duty of the prosecuting attorneys in their respective counties to institute proceedings in equity to prevent and restrain violations. Any person damaged, or who is threatened with loss or injury by reason of a violation of this act shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction for any damage or threatened loss or injury by reason of any violation of this act.

Sec. 7. Exemptions.—The provisions of this act shall not apply to sales at retail or sales at wholesale:

(a) Where perishable merchandise must be sold promptly in order to forestall loss;

(b) Where merchandise is imperfect or damaged or is being discontinued and is advertised, marked, or sold as such;

(c) Where merchandise is sold upon the final liquidation of any business;

(d) Where merchandise is sold for charitable purposes or to relief agencies;

(e) Where merchandise is sold on contract to departments of the government or governmental agencies;

(f) Where merchandise is sold by any officer acting under the order or direction of any court.

Sec. 8. Severability.—If any section, sentence, clause, or provision of this act shall for any account be held invalid or unconstitutional the validity of the remaining parts thereof shall not be affected.

C. ANTIDISCRIMINATION LEGISLATION

L. General Prohibitory Laws

L. 1937, c. 229

Section 1. Definitions.—The following terms for the purposes of this act are hereby defined as follows:

(a) "Person" means the plural as well as the singular and shall include an individual, partnership, association, a joint stock company, business trust, and an incorporated as well as an unincorporated organization.

(b) The term "price" as used herein shall mean the net price to the buyer after deduction of all discounts, rebates or other price concessions paid or allowed by the seller.

(c) The term "commerce" means trade or commerce within this State.

Sec. 2. Discriminations.—(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality or to discriminate in price between different sections, communities or cities or portions thereof or between different locations in such sections, communities, cities, or portions thereof in this State, where the effect of such discriminations may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time

to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, in any suit or other proceeding in which any violation of this act may be at issue, that there has been discrimination in price, or in services or facilities furnished, or in payment for services or facilities to be rendered, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with such violation: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price, or the payment for or furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise: *Provided, however,* That in all such transactions of sale and purchase it shall be unlawful for either party to such transaction to pay or grant anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, to the other party to the transaction or to any agent, representative, or other intermediary therein, where such agent, representative, or other intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of the said other party to such transaction.

(d) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in favor of one pur-

chaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Sec. 3. Cooperative associations.—Nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Sec. 4. Injunctive relief.—(a) Any person injured by any violation, or who will suffer injury from any threatened violation, of this act, may maintain an action, in any court of competent jurisdiction of this state, to prevent, restrain, or enjoin such violation or threatened violation. If in such action, a violation or threatened violation of this act shall be established, the court shall enjoin and restrain or otherwise prohibit such violation or threatened violation, and the plaintiff in said action shall be entitled to recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

(b) In the event no injunctive relief is sought or required, any person injured by any violation of this act, may maintain an action for damages alone in any court of competent jurisdiction in this state, and the measure of damages in such action shall be the same as that prescribed by subsection (a) of this section.

(c) In any proceedings instituted or action brought in pursuance of the provisions of subsections (a) and (b) of this section, the plaintiff, upon proof that he has been unlawfully discriminated against by the defendant, shall be conclusively presumed to have sustained damages equal to the monetary amount or equivalent of the unlawful discrimination; and in addition thereto, may establish such further damages, if any, as he may have sustained as a result of such discrimination.

(d) Where a particular trade or industry of which the person, firm, or corporation complained against is a member, has an established cost survey for the localities and vicinities in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act.

(e) Any contract, express or implied, made by any person in violation of any of the provisions of this act, is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 5. Title.—This act shall be known and designated as the “Anti Price Discrimination Act” and its inhibitions against discrimination shall embrace any scheme of special concessions or rebates, any collateral contracts or agreements or any device of any nature whereby discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

Sec. 6. Constitutionality.—If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected hereby.

Sec. 7. Inconsistent acts repealed.—All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

2. Special Prohibitory Laws

Code Ann. (1932)

Dairy Products

Sec. 36-1101. Discrimination by buying at higher price—Prima facie evidence—Grades of cream.—a. Any person, firm, corporation, or other organization, foreign or domestic, engaged in the business of buying milk, cream, or butterfat for the purpose of manufacture, that shall discriminate between different sections, communities, towns, villages, or cities of this State, by buying such commodity at a higher price or rate in one section, community, town, village, or city, than is paid for the same commodity by said firm, person, corporation, or other organization in another section, community, town, village, or city, after making due allowance for the difference, if any, in the actual cost of transportation from the point of purchase to the locality of manufacture, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

b. Proof of the buying of any such commodity for the purpose of manufacture, by any person, firm, corporation, or other organization at a higher price or rate in one section, community, town, village, or city of this State than is paid for the same commodity by the said person, firm, corporation, or other organization in another section, community, town, village, or city in this State after making due allowance for the difference, if any, in the actual cost of transportation from the point of purchase to the locality of manufacture, shall constitute prima facie evidence of a violation of this section.

c. Two grades of cream shall be recognized in the enforcement of this chapter: to be designated as sweet cream and sour cream. Sweet cream within the meaning of this chapter shall be cream having a clean flavor, not more than two-tenths percent acidity, and not less than twenty-five percent butterfat. Sour cream within the meaning of this chapter shall be cream showing more than two-tenths percent acidity or less than twenty-five percent butterfat.

Hist. S. L. 1923, ch. 121, sec. 1; S. L. 1925, ch. 78, sec. 1.

Sec. 2 of S. L. 1925, ch. 78, declared an emergency.

Sec. 36-1102. Discrimination by selling at lower price—Unfair discrimination defined.—Any person, firm, corporation, or other organization, foreign or domestic, doing business in this state and engaged in the manufacture or distribution of any dairy product, that shall intentionally, for the purpose of 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, towns, villages, or cities of this state, by selling such commodity at a lower rate in one section, community, town, village, or city, or any portion thereof, than such person, firm, corporation, or other organization, foreign or domestic, charges for such commodity in another section, community, town, village or city, after making due allowance for the difference, if any, in the cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful. Any person, firm, corporation, or other organization, foreign or domestic, doing business in this state and engaged in the purchase, sale, manufacture, or distribution of any dairy product, that shall pay a price for any dairy product or do any act with the intention or for the purpose of creating a monopoly, or destroying the business of a competitor in any locality, or restraining trade or preventing, stifling, or limiting competition by any person in such business or who in good faith intends or attempts to engage in such business, shall be guilty of unfair discrimination which is hereby prohibited and declared unlawful.

Hist. S. L. 1923, ch. 121, sec. 2; S. L. 1927, ch. 221, sec. 1.

Sec. 2 of S. L. 1927, ch. 221, declared an emergency.

Sec. 36-1103. Special rebates, collateral contracts, and other devices.—The inhibition of this chapter against locality discrimination shall embrace any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this chapter.

Hist. S. L. 1923, ch. 121, sec. 3.

Sec. 36-1104. Penalties.—a. Any person, firm, corporation, or other organization, foreign or domestic, and any officer, agent, or receiver of any firm, corporation, or other organization, or any member of the same, or any individual, violating any of the provisions of this chapter, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100.00 nor more than \$1,000 for each offense, or be imprisoned in the county jail not to exceed six months, or by both such fine and imprisonment, and, if a corporation, may have its charter or permit to do business in this state forfeited.

b. Any person who, either as officer, director, or agent of any firm, corporation or other organization or as agent of any person, violating the provisions hereof, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, corporation, or other organization for whom or which he acts. In the prosecution of any person or officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, corporation or other organization for whom or which he acts.

Hist. S. L. 1923, ch. 121, sec. 4.

Sec. 36-1105. Duty of commissioner of agriculture.—a. Whenever the commissioner of agriculture is credibly informed that this chapter has been violated, he shall make investigations and if the evidence justifies it he shall report the results of his investigation to the proper county attorney. He shall cooperate with such county attorney in the securing of evidence of violations of this chapter.

b. All the books, papers, and other records of every person, firm, corporation or other organization engaged in the business of buying or selling dairy products, shall be subject to inspection by the commissioner of agriculture of this state or by his deputy, if it shall appear to the commissioner of agriculture that there are reasonable grounds to believe that there has been a violation of this chapter, and such person, firm, corporation or other organization shall, at such times as he shall prescribe, make such further verified returns having a bearing on the provisions of this chapter as the commissioner of agriculture may prescribe.

Hist. S. L. 1923, ch. 121, sec. 5.

Sec. 36-1106. Prosecutions.—The various county attorneys in their respective counties shall institute, manage, and direct all prosecutions for violations of this chapter. It shall be the duty of the commissioner of agriculture to cooperate with and assist the county attorney in the county in which any such prosecution may be instituted or pending.

Hist. S. L. 1923, ch. 121, sec. 6.

Sec. 36-1107. Person injured may maintain action.—Any person, firm, private corporation, or municipal or other public corporation, may maintain an action to enjoin a continuance of any act or acts in violation of any of the provisions of this chapter and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating any of the provisions of this chapter, it shall enjoin the defendant from a continuance thereof; it shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in such action shall be entitled to recover from the defendant three times the amount of the actual damage, if any, sustained.

Hist. S. L. 1923, ch. 121, sec. 7.

Sec. 36-1108. Prohibited contracts void.—All contracts or agreements made in violation of any of the provisions of this chapter shall be void.

Hist. S. L. 1923, ch. 121, sec. 8.

Sec. 36-1109. Revocation of corporate charter.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by the provisions of this chapter, 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 this chapter, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

Hist. S. L. 1923, ch. 121, sec. 9.

Sec. 36-1110. Constitutionality.—If any section, 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 such section, sentence, clause, or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses, or phrases be declared unconstitutional.

Hist. S. L. 1923, ch. 121, sec. 10.

Code Ann. (1932)

Farm Products

Sec. 22-1201. Discrimination in sale of farm products.—It is hereby made unlawful for any person, firm, company, partnership, copartnership, corporation, foreign or domestic, or association, or other organization doing business in the state of Idaho, who shall intentionally for the purpose of creating a monopoly or destroying the business of a competitor, in any locality, section, community, city, or village, to discriminate between different individuals, corporations, partnerships, copartnerships, associations, or organizations of any kind or to discriminate between different sections, localities, communities, villages, or cities of this state in the purchase, barter, exchange, or resale of farm products, either in the raw or manufactured state, when such products are purchased or sold under recognized standards and grades, as prescribed by the department of agriculture, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase in the raw state to the locality of manufacture, or from the locality of manufacture to the locality of sale, and in addition thereto allowance in the grade or quality of such products, if any.

Hist. 1917, ch. 23, sec. 1, p. 62, reen. C. L. 79:31; am. 1919, ch. 18, sec. 1, p. 81; C. S., sec. 2051; S. L. 1921, ch. 189, sec. 1.

Sec. 22-1202. Records subject to inspection.—All the books, papers, and other records of every person, firm, corporation, or other organization engaged in the business of buying or selling farm products, shall be subject to inspection by the department of agriculture, if it shall appear to the department that there are reasonable grounds to believe that there has been a violation of this chapter, and such person, firm, corporation, or other organization shall, at such times as the department shall prescribe, make such further verified returns having a bearing on the provisions of this article as the department may prescribe.

Hist. 1917, ch. 23, sec. 2, p. 62, reen. C. L. 79:32; C. S., sec. 2052.

Sec. 22-1203. Penalty.—Whoever shall violate any of the provisions of this chapter shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than \$100 nor more than \$1,000 for each offense, and, if a corporation, may have its charter or permit to do business in this state forfeited.

Hist. 1917, ch. 23, sec. 3, p. 62, reen. C. L. 79:33; C. S., sec. 2053.

Sec. 22-1204. Prosecution by attorney general.—If any person, firm, corporation, or other organization shall violate any of the provisions of this chapter, upon complaint thereof by the department of agriculture to the attorney general, setting forth the violations of this

chapter complained of, it shall be the duty of the attorney general to proceed in the name of the state of Idaho against such person, firm, corporation, or other organization.

Hist. 1917, ch. 23, sec. 4, p. 63, reen. C. L. 79:34; C. S., sec. 2054.

Sec. 22-1205. Penalty for disclosures.—No person shall disclose any fact or information obtained pursuant to or under the provisions of this chapter except for the purpose of prosecuting or aiding in the prosecution of persons charged with the violation of the terms of this chapter. And any person violating any of the provisions of this section shall be guilty of a misdemeanor and punished accordingly.

Hist. 1917, ch. 23, sec. 5, p. 63, reen. C. L. 79:35; C. S., sec. 2055.

Sec. 22-1206. Interpretation of law.—If any section, subsection, sentence, clause, or phrase of this chapter or as the same may be hereafter amended, is for any reason held to be unconstitutional by any court of competent jurisdiction, the validity of the remaining parts of this chapter shall thereby be affected or impaired.

Hist. 1917, ch. 23, sec. 6, p. 63, reen. C. L. 76:36; C. S., sec. 2056.

Code Ann. (1932)

Prohibiting Predatory Price Practices

Sec. 47-104. 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 \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Hist. 1911, c. 215, sec. 4, p. 689, reen. C. L. 107:4; C. S. sec. 2534.

ILLINOIS

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Rev. Stat. (Smith-Hurd, 1939), c. 121½
Fair Trade Act

Sec. 188. Contract relating to sale not invalid because of certain provisions.—*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* That such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court. (1935, July 8, L. 1935, p. 1436, sec. 1.)

Sec. 189. Advertising for sale at less than stipulated price.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1935, July 8, L. 1935, p. 1436, sec. 2.)

Sec. 190. Contract not included.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (1935, July 8, L. 1935, p. 1436, sec. 3.)

Sec. 191. Title of act.—This act may be known and cited as the "Fair Trade Act." (1935, July 8, L. 1935, p. 1436, sec. 4.)

Judicial Decisions

Application of the Antitrust Law.

A contract establishing defendant as the exclusive agent for the sale of plaintiff's dress patterns whereby the defendant agreed to sell the patterns at the prices printed on the labels thereof is not invalid under the antitrust law and is not in restraint of trade, the contract being one of agency and not of sale. *Wieboldt v. The Standard Fashion Co.*, 80 Ill. App. 67 (1898).

Constitutionality of the Act.

The Fair Trade Act is constitutional. It is not a price-fixing statute but merely permits designated private persons to contract with respect to resale prices. The nonsigners' clause is applicable only to persons who have purchased the goods with notice of a price restriction. The violation of the statute consists of the misuse of the trade-mark of the produce, and the price restriction is adopted as an appropriate means to prevent such misuse. Section 2 (sec. 189) is not a denial of due process but merely prevents abuse of the goodwill of the owner of the commodity. The classification of identified goods in the statute as distinguished from unidentified commodities is a reasonable one, there being a basic difference between the two. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936); aff'g *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936), and *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940 (1936); *Joseph Triner Corp. v. Oransky*, 365 Ill. 19, 5 N. E. (2d) 213 (1936).

Application of the Act.

A commodity bearing the trade-mark of the producer, shipped into Illinois by a retailer from outside the State for the purpose of resale within the State, is subject to the provisions of the Fair Trade Act with respect to a resale price contract, as it had ceased to be in interstate commerce and had become part of the commerce within the State. *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co.*, 287 Ill. App. 617, 4 N. E. (2d) 764 (1936) (text of opinion not printed), see 106 CCH, 25003.

A wholesale distributor can maintain an action for violation of a resale price restriction. *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co.*, 287 Ill. App. 187, 4 N. E. (2d) 658 (1936).

A noncontracting dealer who purchases the commodity with notice of a resale price restriction thereon, is bound by such restriction. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *supra*; *Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co.*, *supra*.

B. PROHIBITION OF SALES BELOW COST

No provisions.

A. ANTIDISCRIMINATION LEGISLATION**1. General Prohibitory Laws**

No provisions.

2. Special Prohibitory Laws

No provisions.

INDIANA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Stat. Ann. (Burns, Supp., 1939)

Sec. 66-301. Definitions.—The following terms, as used in this act, are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumer for use.
- (e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (Acts 1937, ch. 17, sec. 1, p. 53.)

Title of act.—An act to protect trade-mark owners, producers, distributors, and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand, or name, through the use of voluntary contracts establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed. In force June 7, 1937.

Sec. 66-302. Contracts relating to sale of trade-marked commodities—Lawful provisions.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state of Indiana by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Acts 1937, ch. 17, sec. 2, p. 53.)

Sec. 66-303. Provisions and practices in violation of contracts.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or making of any concession of any kind whatsoever (whether by giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restrictions, for which the remedies prescribed by section 6 (see 66-306) of this act shall be available. (Acts 1937, ch. 17, sec. 3, p. 53.)

Sec. 66-304. Resale price contracts—Limited to trade-mark owner.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Acts 1937, ch. 17, sec. 4, p. 53.)

Sec. 66-305. Resales not precluded by contract.—No contract containing any of the provisions enumerated in section 2 (sec. 66-302) of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase said stock at the original invoice price;

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court. (Acts 1937, ch. 17, sec. 5, p. 53.)

Sec. 66-306. Resale contracts—Unfair competition in respect to defined.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Acts 1937, ch. 17, sec. 6, p. 53.)

Sec. 66-307. Parties to whom act is inapplicable.—This act shall not apply to any contracts or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (Acts 1937, ch. 17, sec. 7, p. 53.)

Sec. 66-308. Provisions severable.—If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby. (Acts 1937, ch. 17, sec. 8, p. 53.)

Sec. 66-309. Short title.—This act may be known and cited as the "Fair Trade Act." (Acts 1937, ch. 17, sec. 10, p. 53.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Stat. Ann. (Burns, 1933)
Coal, Ore, and Other Minerals

Sec. 40-107. Sales of supplies—Price.—It shall be unlawful for any corporation, company, association, firm, or person described in section 1 [sec. 40-104¹] of this act, or the officers and agents of such, to sell, directly or indirectly, to any employee of such corporation, association, firm, or person, any merchandise or supplies at a higher price than such merchandise or supplies are sold by such corporation, company, association, firm, or person to others for cash. (Acts 1911, ch. 68, sec. 3, p. 110.)

Sec. 40-108. Sales of supplies—Penalty.—Every company, corporation, association, firm, or person who knowingly and wilfully violates any of the provisions of section three (sec. 40-107) of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not less than five (\$5.00) nor more than one hundred dollars (\$100). (Acts 1911, ch. 68, sec. 5, p. 110.)

Stat. Ann. (Burns, 1933)
Milk Products

Sec. 23-128. Milk and milk products—Competition—Prices—Discrimination.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Indiana, and engaged in the purchasing, manufacture, or distribution of milk or milk products, that shall intentionally, for the purpose of destroying the business of a competitor in any locality and creating or maintaining a monopoly, discriminate between different sections, communities, or cities of this State, by buying or selling such commodity at a lower rate in one section, community or city than is paid or charged for such commodity in another section, community, or city, after equalizing the distance from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, the actual cost of transportation, and making allowance for differences in quality, shall be deemed guilty of unfair discrimination. (Acts 1913, ch. 117, sec. 1, p. 304.)

Sec. 23-129. Milk and milk products—Penalty for violation.—Any person, firm, company, association, or corporation, violating any of the provisions of the preceding section and any officer,

¹ Sec. 40-104. Applies to every corporation, association, company, firm, or person engaged in this state in mining coal, ore, or other minerals or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading barrels, brick, tile, machinery, agricultural or mechanical implements, or any article of merchandise. (Acts 1911, ch. 68, sec. 1, p. 110.)

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 one hundred dollars (\$100) nor more than five hundred dollars (\$500), or be imprisoned in the county jail not to exceed six (6) months, or suffer both penalties. (Acts 1913, ch. 117, sec. 2, p. 304.)

Sec. 23-130. Milk and milk products—Contracts void.—All contracts and agreements made in violation of any provisions of the two preceding sections shall be void. (Acts 1913, ch. 117, section 3, p. 304.)

Sec. 23-131. Milk and milk products—Prosecuting attorney and attorney general—Duties.—It shall be the duty of the prosecuting attorneys, in their counties, and the attorney general to enforce the provisions of the preceding sections of this act by appropriate actions in courts of competent jurisdiction. (Acts 1913, ch. 117, sec. 4, p. 304.)

Sec. 23-132. Milk and milk products—Reference to attorney general.—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 this act, 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 its judgment, institute proceedings in the court against such corporations. (Acts 1913, ch. 117, sec. 5, p. 304.)

Sec. 23-133. Milk and milk products—Revocation of permit.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this State. (Acts 1913, ch. 117, sec. 6, p. 305.)

IOWA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code (1939)

Sec. 9884.1. Contracts as to selling price.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Iowa by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee. (C. 35, sec. 9884-g1.)

Sec. 9884.2. Implied exceptions.—Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court. (Id., sec. 9884-g2.) Referred to in section 9884.3.

Sec. 9884.3. Actions for damages.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of sections 9884.1 and 9884.2, whether the person so advertising, offering for sale, or selling is or is not a party to such contract,

is unfair competition and is actionable at the suit of any person damaged thereby. (Id., sec. 9884-g3.)

Sec. 9884.4. Nonapplicability.—This chapter shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (Id., sec. 9884-g4.)

Sec. 9884.5. Definitions.—The following terms, as used in this chapter, are hereby defined as follows:

“Producer” means grower, baker, maker, manufacturer, or publisher.

“Commodity” means any subject of commerce. (Id., sec. 9884-g5.)

Judicial Decisions

Common Law.

Where a contract provided for resale prices to be established by the vendor upon commodities sold to the vendee, arranged credit terms, provided for the exclusive selling of the vendor's product by the vendee, and stipulated for payments in installments by the vendee, the court in a dictum stated that at common law these restrictions were valid as security necessary to insure payment for the purchase price. *Rawleigh Medical Co. v. Osborne*, 177 Ia. 208, 158 N. W. 566 (1916).

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Code (1939)

Sec. 9885. Unfair discrimination in sales.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State, and engaged in the production, manufacture, sale, or distribution of any commodity of commerce or commercial services excepting those, the rate of which is now subject to control of cities or towns or other governmental agency, that shall, for the purpose of destroying the business of a competitor in any locality or creating a monopoly, discriminate between different sections, localities, communities, cities, or towns of this State, by selling such commodity or commercial services excepting those, the rate of which is now subject to control of cities or towns or other governmental agency at a lower price or rate in one section, locality, community,

city, or town than such commodity or commercial services excepting those, the rate of which is now subject to control of cities or towns or other governmental agency is sold for by said person, firm, association, company, or corporation, in another section, locality, community, city, or town, after making due allowance in case of telephone service for the difference in the cost of furnishing service in different localities, and in the case of commodities and commercial services other than telephone service, for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of production or purchase, if a raw product, or from the point of manufacture, if a manufactured product, to a place of sale, storage, or distribution shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city, or town shall not be in violation of this section. (S 13, sec. 5028-b; C24, 27, 31, 35, sec. 9885.)

Sec. 9886. Unfair discrimination in purchases.—Any person, firm, association, company, or corporation, foreign or domestic, doing business in the State, and engaged in the business of purchasing for manufacture, storage, sale, or distribution, any commodity of commerce that shall, for the purpose of destroying the business of a competitor or creating a monopoly, discriminate between different sections, localities, communities, cities, or towns, in this State, by purchasing such commodity at a higher rate or price in one section, locality, community, city, or town, than is paid for such commodity by such party 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, distribution, or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city, or town shall not be in violation of this section. (Id., sec. 9886.)

Sec. 9887. Violation.—Any person, firm, association, company, or corporation, or any officer, agent, or member of any such firm, company, association, or corporation, found guilty of unfair discrimination as defined in sections 9885 and 9886, shall be punished as provided in section 9888. (Id., sec. 9887.)

Sec. 9888. Penalty.—Any person, firm, company, association, or corporation violating any of the provisions of sections 9885 and 9886, 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. (Id. sec. 9888.)

Sec. 9889. Contracts or agreements.—All contracts or agreements made in violation of any of the provisions of sections 9885 and 9886 shall be void. (S13, sec. 5028-d; C24, 27, 31, sec. 9889.)

Sec. 9890. Enforcement.—It shall be the duty of the county attorneys, in their counties, and the attorney general, to enforce the provisions of sections 9885 to 9889, inclusive, by appropriate actions in courts of competent jurisdiction. (Id., sec. 9890.)

Sec. 9891. Complaint.—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 9885 and 9886, 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. (Id., sec. 9891.)

Sec. 9892. Revocation.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, within the terms of sections 9885 and 9886, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this State. (Id., sec. 9892.)

Sec. 9893. Injunctive relief.—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 9885 and 9886, 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 Iowa, to enjoin such corporation from transacting all business of every kind and character in said State. (Id., sec. 9893.)

Sec. 9894. Cumulative remedies.—Nothing in this chapter shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. (Id., sec. 9894.)

Judicial Decisions

Constitutionality.

This statute when first enacted was applicable only to the purchase of milk, cream, butterfat, poultry, grain, and eggs. The act was held constitutional as a valid exercise of the police power of the State, in *State v. Fairmont Creamery Co. of Nebraska*, 153 Ia. 702, 133 N. W. 895 (1911). The court stated that the classification of

the particular products under the statute was reasonable. In answer to the contention that the statute discriminated against merchants owning stores in more than one locality in the State, the court held that this defense was invalid and that all persons subject to the terms of the statute are treated alike under like circumstances and conditions.

Indictment.

An indictment charging violation of this statute does not have to name the competitor alleged to have been injured. The injury committed is to the public and the name of the particular competitor is immaterial. *State v. Standard Oil Co. of Ind.*, 150 Ia. 46, 129 N. W. 336 (1911).

Venue.

An indictment brought in the county where defendant is alleged to have sold goods at higher prices than elsewhere is demurrable. The offense described in the statute being the sale of commodities at a lesser price. *Ibid.*

2. Special Prohibitory Laws

Code (1939)

Biological Products

Sec. 2741. Price of virus.—Persons holding permits, either as manufacturers or dealers, shall sell all biological products at a uniform price to all persons to whom sales are made. No rebate on said price shall be given, either directly or indirectly, in any manner whatsoever. (C24, 27, 31, 35, sec. 2741.)

Sec. 2717. Revocation of permit.—Such a permit shall be automatically revoked:

1. In case of a dealer, by his failure to execute and file with the department a new and approved bond when required by law.

2. In case of a manufacturer, by his ceasing to be the holder of a United States Department of Agriculture license for the manufacture and sale of biological products.

3. In case of either a manufacturer or dealer, for discrimination in the price at which such biological products are sold, and such permit shall not in such case be renewed for one year. (*Id.*, sec. 2717.)

Sec. 2743. Violations.—Any person who violates any provision of this chapter, or any rule of the department, or who shall hinder or attempt to hinder the department or any duly authorized agent or official thereof in the discharge of his duty, shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars. (*Id.*, sec. 2743.)

Eggs

Sec. 3112. Deduction to be determined by candling.—No person shall in buying or selling eggs take or give a greater or less deduction for eggs candled out as unfit for food than the actual loss which has been determined by the careful candling of the same. (C24, 27, 31, 35, sec. 3112.)

Pittsburgh-Plus

Sec. 9929. "Pittsburgh-Plus."—There is hereby created a committee consisting of the Governor and the attorney general, which committee shall have full power and authority to protect and shall be charged with the duty of protecting the State of Iowa and the people thereof against the steel trade practice commonly known as the "Pittsburgh-Plus" and other similar trade practices, and said committee is hereby authorized to use all lawful means for the accomplishment of said purposes. (C24, 27, 31, 35, sec. 9929.)

KANSAS

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Gen. Stat. Ann. (Corrick, Supp., 1937)

Sec. 50-301. Definitions.—The following terms, as used in this act, are hereby defined as follows:

(a) "Commodity" means any subject of commerce.

(b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(c) "Wholesaler" means any person selling a commodity, other than a producer or retailer.

(d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. (L. 1937, ch. 165, sec. 1; Mar. 4.)

Sec. 50-302. Commodity sale or resale contracts valid, when.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the registered trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Kansas by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

¹ A contract fixing the resale price of tractors is invalid under the antitrust law. *Mills v. General Ordinance Co.*, 113 Kan. 479, 215 Pac. 314 (1923). A motion-picture contract whereby an exhibitor agreed with a distributor of motion pictures to charge a minimum admission price is invalid under the antitrust law as an illegal combination between the exhibitor and distributor. *United Artists Corp. v. Mills*, 135 Kans. 655, 11 Pac. (2d) 1025 (1932).

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumer for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to sell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (L. 1937, ch. 165, sec. 2; Mar. 4.)

Sec. 50-303. What deemed violation of resale price restrictions; remedies.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) the offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) the sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 6 (50-306) of this act shall be available. (L. 1937, ch. 165, sec. 3; Mar. 4.)

Sec. 50-304. Who may establish minimum resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (L. 1937, ch. 165, sec. 4; Mar. 4.)

Sec. 50-305. Resales not precluded under contract provisions enumerated in section 50-302.—No contract containing any of the provisions enumerated in section 2 (50-302) of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock

shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court. (L. 1937, ch. 165, sec. 5; Mar. 4.)

Sec. 50-306. Unfair competition; damage action.—Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (L. 1937, ch. 165, sec. 6; Mar. 4.)

Sec. 50-307. Contracts or agreements exempt.—This act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (L. 1937, ch. 165, sec. 7; Mar. 4.)

Sec. 50-308. Invalidity of part.—(L. 1937, ch. 165, sec. 8; Mar. 4.)

Sec. 50-309. Inconsistent acts.—(L. 1937, ch. 165, sec. 9; Mar. 4.)

Sec. 50-310. Title of act.—This act may be known and cited as the "Fair Trade Act." (L. 1937, ch. 165, sec. 10; Mar. 4.)

Gen. Stat. Ann. (Corrick, Supp., 1937)

Cooperative Marketing

Sec. 17-1632. Contracts fixing resale prices.—Cooperative associations or corporations created under the provisions of article 16 of chapter 17 of the General Statutes of 1935 and any amendments thereto, or cooperative associations or corporations organized under similar statutes of other States and licensed to do business in the State of Kansas, are hereby empowered to enter into contracts with other cooperative associations or corporations, corporations or persons processing, handling, or selling, at wholesale or retail, the products produced by the members of such cooperative associations or corporations setting forth the minimum or maximum, or minimum and maximum resale prices at which such products may be sold by such other cooperative association or corporation, corporation or person, and to enter

into contracts providing that any wholesaler purchasing, processing, handling, or selling such products, upon the request of the cooperative association or corporation, whose members have produced such products may refuse to sell or deliver the same to any retailer or retailers who sell or otherwise dispose of such products at prices below the resale retail prices established by such contract between such cooperative association or corporation and the wholesaler. (L. 1937, ch. 181, sec. 1; Mar. 31.)

Sec. 17-1633. Same; restrictions.—This act should not be construed as authorizing the fixing of prices by contract or otherwise in such a manner as to be arbitrary, unjustly discriminatory, or otherwise detrimental to the public interest. (L. 1937, ch. 181, sec. 2; Mar. 31.)

Sec. 17-1634. Same; construction.—No association, contract, method, or act which complies with the provisions of said article 16 of chapter 17 of the General Statutes of 1935 and any amendments thereto, or with this act shall be deemed a conspiracy or combination in restraint of trade or as creating an illegal monopoly. (L. 1937, ch. 181, sec. 3; Mar. 31.)

Sec. 17-1635. Invalidity of part.—If any clause, sentence, paragraph, or part of this act shall for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect or impair the validity of the remainder of this act. (L. 1937, ch. 181, sec. 4, Mar. 31.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Gen. Stat. Ann. (Corrick, 1935)

Sec. 50-148. Trade and person defined.—The word "trade" as used in this act means the business of buying or selling any commodity of general use within the State; and the word "person" or "persons" shall be deemed to include corporations, partnerships, and voluntary associations existing under or authorized by the State of Kansas, or the laws of any other State, Territory, or foreign country. This act shall not apply to persons whose business is under the supervision and control of the board of public utilities or the banking department. (L. 1915, ch. 368, sec. 1; April 8; R. S. 1923, sec. 50-148.)

Sec. 50-149. Unfair discriminations.—Any person, firm, or corporation, foreign or domestic, doing business in the State of Kansas,

and engaged in the production, manufacture, distribution, sale, or purchase of any commodity in general use, that shall intentionally for the purpose of destroying competition, discriminate between the different sections, communities, or cities of this State by buying at a higher rate or selling at a lower rate, any such commodity, in one section, community, or city, or any portion thereof, than is charged or paid for such commodity in other section, community, or city, after equalizing the distance from the point of production to the factory for distribution and freight rates therefrom, shall be deemed guilty of unfair discrimination. (L. 1915, ch. 368, sec. 2; April 8; R. S. 1923, sec. 50-149.)

Source or prior law: L. 1905, ch. 2, sec. 1.

Sec. 50-150. Penalty for violating sections 50-148 to 50-152; prosecution of corporations; injunction; ouster.—Any person violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed \$5,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment: *Provided*, That whenever a corporation shall violate any of the provisions of this act, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violations: *And provided further*, That a corporation and its different officers, agents, and servants may each be prosecuted separately for violation of this act, and the acquittal or conviction of one shall not abate the prosecution of the others. Violators of this act may also be enjoined or ousted from the continuing of such violations and such actions of this character may be commenced regardless of whether criminal proceedings have been instituted. (L. 1915, ch. 368, sec. 3; April 8; R. S. 1923, sec. 50-150.)

Source or prior law: L. 1905, ch. 2, sec. 4.

Sec. 50-151. Prosecutions and proceedings; duties of attorney general.—All prosecutions and proceedings brought to enforce the provisions of this act or to punish violators of this act must be brought by the attorney general, or at his direction, or at the direction of the governor. The attorney general shall have power, and it is his duty to investigate all complaints charging that this act has been violated. Whenever the attorney general is advised that there are good reasons for believing that any person has violated any of the provisions of this act, he shall notify such person of that fact and give him an opportunity to appear at some place designated by the attorney general, there to make any statement or showing that the party accused may desire to make, and after such investigation if the attorney general shall find that the violations, if any, of this act have not been willful and that the person charged, in good faith, intends to abandon the practice constituting the violation complained of, then and in that case the attorney

general may permit such person to go, without the institution of proceedings or prosecutions against him. In such cases the attorney general shall file in his office a full statement of the facts as found by him and a statement of his reasons for not instituting proceedings against the person charged. Such determination on the part of the attorney general shall not preclude the institution of proceedings at a later time if newly discovered evidence or the subsequent conduct of the person charged shall cause the attorney general to believe that proceedings should be instituted against such person, to the end that the provisions of this act be enforced: *Provided*, That upon direction of the governor or upon extraordinary occasions where the attorney general believes that a delay in the institution of prosecutions or proceedings would defeat the purposes of this act, he may proceed without first notifying the person charged as hereinbefore provided. It is declared to be the purpose and intent of this act that its provisions be enforced for the purpose of regulating trade and promoting confidence in persons engaged therein. (L. 1915, ch. 368, sec. 4; April 8; R. S. 1923, sec. 50-151.)

Sec. 50-152. Remedies cumulative.—That Laws 1905, chapter 2, sections 1 to 5, inclusive, be and the same are hereby repealed: *Provided*, That nothing in this act shall be construed as repealing any other act or part of an act aside from the sections herein designated as being repealed, but the remedies herein provided shall be cumulative to all other remedies provided by law. (L. 1915, ch. 368, sec. 5; April 8; R. S. 1923, sec. 50-152) *

2. Special Prohibitory Laws

Gen. Stat. Ann. (Corrick, 1935)
News Services

Sec. 50-201. Sale of news without discrimination.—Every person, firm, corporation, or association engaged in the business of gathering, collecting, selling, and transmitting news and news reports for newspaper use shall furnish and sell such news and news reports to every person, firm, or corporation publishing a newspaper in the State of Kansas, upon demand and proffer of payment, upon the same terms as to every other newspaper for the same service, without discrimination. (L. 1907, ch. 254, sec. 1; Mar. 12; R. S. 1923, sec. 50-201.)

Sec. 50-202. Unlawful refusal to furnish news reports.—It shall be unlawful for any person, firm, corporation, or association engaged in the business of gathering and collecting news and news reports

* For procedural and penal provisions, see *MARKETING LAWS SURVEY* vol., *State Antitrust Laws: General Antitrust Laws*.

to refuse to furnish the regular system of news reports as established by such press associations or news agencies to any daily newspaper or publisher thereof upon demand and proffer of the usual charge for like service. (L. 1907, c. 254, sec. 2; Mar. 12; R. S. 1923, sec. 50-202.)

Sec. 50-203. Violators not permitted to use facilities for transmission of news.—No persons, firm, corporation, or association that violates any of the provisions of this act shall be permitted by any telegraph or telephone company in the State of Kansas to use its wires or facilities for the transmission of news and news reports within the State of Kansas. (L. 1907 c. 254, sec. 3; Mar. 12; R. S. 1923, sec. 50-203.)

Sec. 50-204. Transmission service to be discontinued upon violation of act; procedure.—If any person, firm, corporation, or association engaged in the business of gathering news as aforesaid shall violate the provisions of this act upon complaint thereof by any person, firm, or corporation so as aforesaid refused news reports or discriminated against to the attorney general setting forth the violation of this act complained of under oath, it shall be the duty of the attorney general to immediately notify in writing the telegraph and telephone companies over which the said offending press association or news-gathering association transmits its news and news reports of the violation, by said company, of this act and further notifying such telegraph and telephone company to discontinue all service for such press association or news-gathering company. (L. 1907 c. 254, sec. 4; Mar. 12; R. S. 1923, sec. 50-204.)

Sec. 50-205. Injunction proceedings where companies fail to discontinue service.—If such telegraph and telephone companies fail to discontinue service under the terms of said notice within 30 days of the receipt of said notice, it shall be the duty of the attorney general to commence injunction proceedings in the name of the State of Kansas against such telephone and telegraph companies for the purpose of carrying out the purpose of this act. (L. 1907, c. 250, sec. 5; Mar. 12; R. S. 1923, sec. 50-205.)

Sec. 50-206. Penalty for violating sections 50-201 to 50-206; forfeiture of charter.—Any telegraph or telephone company doing business in this state or any person, firms or corporation or association which shall violate the terms of this act shall, upon conviction thereof, be fined not less than \$100 nor more than \$1,000 and if a corporation shall forfeit its charter or permit to do business in this State. (L. 1907, c. 250, sec. 6; Mar. 12; R. S. 1923, sec. 50-206.)

KENTUCKY

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Stat. Ann. (Baldwin's Carroll, Supp., 1939)

Section 4748i-1. Contracts relating to resale.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the Commonwealth of Kentucky by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell any such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* That such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered by sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court. (1936, 4th Ex. S., c. 24, P. 175, sec. 1.)

Sec. 4748i-2. Acts deemed a violation.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 4748i-1 of this act, whether the persons so advertising, offering for sale or selling is or is not a party to such agreement, is

unfair competition and is actionable at the suit of any person damaged thereby. (Id. sec. 2.)

Sec. 4748i-3. Exemptions.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (Id. sec. 3.)

Sec. 4748i-4. Partial invalidity.—If any section, sentence, or clause of this act shall for any reason be held invalid or unconstitutional, such decision shall not affect the validity of the remaining parts hereof. (Id. sec. 4.)

Sec. 4748i-5. Title of act.—This act may be known and cited as the "Fair Trade Act." (Id. sec. 5.)

Judicial Decisions

Under Antitrust Law.

Where a manufacturer alone regulates and controls resale prices on goods sold by him to jobbers by requiring the jobbers not to resell the goods at prices less than those fixed by him, the transaction is not in violation of the antitrust law, in the absence of horizontal price fixing between manufacturers. *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427 (1901).

B. PROHIBITION OF SALES BELOW COST

Stat. Ann. (Baldwin's Carroll, 1936)*

Sec. 4748h-3. Sales at less than cost.¹—It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale, or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 4748h-11 of this act for any such act. The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article

¹ For section 4748h-1 dealing with unlawful practices, see *Antidiscrimination Legislation: General Prohibitory Laws, infra*. For section 2 dealing with officers and agents, see *infra*.

or product to the distributor and vendor plus the cost of doing business by said distributor and vendor. The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance, and advertising. (1936, c. 109, sec. 3.)

Sec. 4748h-4. Bankrupt sales.—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or produce is advertised and sold as merchandise purchased at a forced bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale. (Id., sec. 4.)

Sec. 4748h-5. Cost surveys.—In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm, or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act. (Id., sec. 5.)

Sec. 4748h-6. Closing-out sales, etc.—The provisions of sections 4748h-3, 4748h-4 and 4748h-5 shall not apply to any sale made: (a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonable goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof; (b) When the goods are damaged or deteriorated in quality and notice is given to the public thereof; (c) By an officer acting under the orders of any court; (d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or

service or output of a service trade, in the same locality or trade area. Any person, firm, or corporation who performs work upon, renovates, alters, or improves any personal property belonging to another person, firm, or corporation, shall be construed to be a vendor within the meaning of this act. (Id., sec. 6.)

Sec. 4748h-7. Rebates, refunds, etc.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor, and where such payment or allowance tends to destroy competition, is an unfair trade practice, and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this act. (Id., sec. 7.)

Sec. 4748h-2. Officers and agents.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person violating the provisions of this act assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he acts. In the prosecution of any person as officer, director, or agent it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. (Id., sec. 2.)

Sec. 4748h-8. Attorney general to prosecute.—Upon the third violation of any of the provisions of sections 4748h-1 to 4748h-7, inclusive, of this act, by any corporation, it shall be the duty of the attorney general 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 to permanently enjoin it from transacting business in this State. If in such action the court shall find that such corporation is violating or has violated any of the provisions of sections 4748h-1 to 4748h-7, inclusive, of this act, it must enjoin said corporation from doing business in this State permanently or for such time as the court shall order, or must annul the charter, or revoke the franchise of such corporation. (Id., sec. 8.)

Sec. 4748h-9. Illegal contracts.—Any contract, express or implied, made by any person, firm, or corporation in violation of the provisions of sections 4748h-1 to 4748h-7, inclusive, of this act, is declared to be an illegal contract and no recovery thereon shall be had. (Id., sec. 9.)

Sec. 4748-10. Injunctive relief.—Any person, firm, private corporation, or municipal, or other public corporation, or trade associa-

tion, may maintain an action to enjoin a continuance of any act or acts in violation of sections 4748h-1 to 4748h-7, inclusive, of this act, and if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 4748h-1 to 4748h-7, inclusive, of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiffs be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained. Any defendant in an action brought under the provisions of this section may be required to testify; in addition, the books and records of any such defendant may be brought into court and introduced, by reference, into evidence: *Provided, however,* That no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of sections 4748h-1 to 4748h-7, inclusive, and 4748h-11, of this act. (Id., sec. 10.)

Sec. 4748h-11. Penalties.—Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation who or which shall violate any of the provisions of sections 4748h-1 to 4748h-7, inclusive, of this act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred (\$100) dollars nor more than one thousand (\$1,000) dollars, or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court. (Id., sec. 11.)

Sec. 4748h-12. Constitutionality.—If any section, 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, sentence, clause, or phrase thereof, irrespective of the fact that any or more other sections, sentences, clauses, or phrases be declared unconstitutional. The remedies herein prescribed are cumulative. (Id., sec. 12.)

Sec. 4748h-13. Purpose.—The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved. (Id., sec. 13.)

Sec. 4748h-14. Title.—This act shall be known and designated as the "Unfair Practices Act." (Id., sec. 14.)

C. ANTIDISCRIMINATION LEGISLATION**1. General Prohibitory Laws**

Stat. Ann. (Baldwin's Carroll, 1936)
Unfair Practices Act

Sec. 4748h-1. Unlawful practices.²—It shall be unlawful for any person, firm, or corporation, doing business in the State of Kentucky and engaged in the production, manufacture, distribution, or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product, or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community, or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof than in another after making allowance for 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 commodity, or from the point of manufacture, if a manufactured product or commodity. Motion-picture films when delivered and under a lease to motion-picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this act. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

2. Special Prohibitory Laws

No provisions.

² For procedural and penalty provisions, see *Prohibition of Sales Below Cost*, *supra*.

LOUISIANA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Gen. Stat. Ann. (Dart, 1939)

Sec. 9809.1. Contracts relating to sale of articles.—*Be it enacted by the legislature of Louisiana,* That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bear, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court. (Acts 1936, No. 13 sec. 1.)

Sec. 9809.2. Acts deemed a violation.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising,

offering for sale or selling is or is not party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Id. sec. 2.)

Sec. 9809.3. Exception.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (Id., sec. 3.)

Sec. 9809.4. Definitions.—The following terms, as used in this act, are hereby defined as follows:

“Producer” means grower, baker, maker, manufacturer or publisher.

“Commodity” means any subject of commerce. (Id. sec. 4.)

Sec. 9809.5. Invalidity of part.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. (Id. sec. 5.)

Sec. 9809.6. Citation.—This act may be known and cited as “Fair Trade Act.” (Id. sec. 6.)

B. PROHIBITION OF SALES BELOW COST

Gen. Stat. Ann. (Dart. 1939)

Drugs and Cosmetics—Fair Practice Act

Sec. 3316.1. Definitions.—*Be it enacted by the legislature of Louisiana,* That for the purpose of this act:

(a) “Retail Drug Trade” shall mean the selling to the consumer, not for the purpose of resale, of any form of drugs, medicines, cosmetics, toilet preparations, drug sundries, or allied articles, but shall not include the sale of damaged merchandise if advertised, marked, and sold as such, nor merchandise sold during the final liquidation of any business, or sold, or donated for charitable purposes or to unemployment relief agencies, or to physicians, dentists, veterinarians, or hospitals.

(b) “Drug Retailer” shall mean any individual, firm, or corporation engaged wholly or partially in the retail drug trade;

(c) “Retail Drug Establishment” shall mean any store or department of a store engaged in the retail drug trade;

(d) “Cost” shall mean the manufacturer’s wholesale list price per dozen or per customary unit plus a percentage to be arrived at arbitrarily, as hereinafter provided and to be subject to amendment from time to time as dictated by accumulating experience.

(e) “Drug” shall mean any substance or preparation intended for external or internal use in the care, mitigation, treatment, remedy, or prevention of disease or ailment in man or any other animal, and any substance or preparation intended to affect the structure or

function of the body of man or any other animal, not including food, but including medicinal or quasimedical preparations;

(f) "Cosmetics" and "Toilet Preparations" shall mean toilet articles and perfumes, toilet waters, face powders, creams, lotions, rouges, shaving creams, dentifrices, bath salts, and all other similar preparations and substances, designed and intended for application to the person for the purpose of cleansing, improving, or changing in any way the appearance of the person, or of refreshing or preserving the person;

(g) "Drug Sundries" shall mean such articles as are used in conjunction with, but not included in, drugs, cosmetics, or toilet preparations. (Act 1936, No. 152, sec. 1.)

Sec. 3316.2. False or deceptive advertising prohibited—prohibited acts of dealers.—(a) No drug retailer shall use advertising whether printed, radio, or display, or of any other nature which is intentionally inaccurate in any material particular or misrepresents merchandise in respect to its use, trade-mark, grade, quality, quantity, size, origin, material, content, or preparation; nor use advertising or selling methods which tend to deceive or mislead the customer, or which refers inaccurately, in any material particular to any competitor or his merchandise, prices, values, credit terms, policies, or services; nor use advertising which lays claim to a policy or a continuing practice of generally underselling competitors.

(b) No drug retailer shall secretly give anything of value to a customer or to the employee or agent of a customer for the purpose of influencing a sale or, in furtherance of a sale, render a bill or statement of account to the employee, agent, or customer which is inaccurate in any material particular; nor sell or offer for sale any merchandise at less than cost or upon a condition which involves a lottery, gamble, or other element of chance; nor permit any demonstrator or sales employee whose salary is wholly or partially paid by a manufacturer or distributor to work in his establishment, unless such demonstrator or sales employee is clearly and openly identified as the agent of such manufacturer or distributor. (Id., sec. 2.)

Sec. 3316.3. Enforcement—Rules and regulations.—The Louisiana State Board of Pharmacy is authorized and empowered to supervise, adjust, arbitrate, and enforce the provisions of this act and to make and publish reasonable rules and regulations not inconsistent with this act or other laws or the Constitution of this State or of the United States. (Id., sec. 3.)

Sec. 3316.4. Penalty for violation.—Willful violation of this act shall be a misdemeanor, punishable upon conviction by a fine of not less than ten (\$10.00) dollars, nor more than five hundred (\$500.00) dollars. (Id., sec. 4.)

Sec. 3316.5. Short title.—This act may be known and cited as the "Fair Practice Act." (Id., sec. 5.)

Sec. 3316.6. Constitutionality—Repealing clause.—If any provision of this act is declared unconstitutional, it is the intent of the legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect. All laws or parts of laws in conflict herewith are hereby repealed. (Id., sec. 6.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Gen. Stat. Ann. (Dart, 1939)

Sec. 4932. Unfair discrimination.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Louisiana, and engaged in the production, manufacture, or distribution of any commodity in general use, that shall, intentionally, for the purpose of injuring or destroying the business of a competitor in any locality, discriminating between different sections, communities, cities, or localities in the State of Louisiana, by selling such commodity at a lower rate in one section, community, city, or locality, than is charged for such commodity by said person, firm, company, association, or corporation in another section, community, city, or locality, after making due allowance for the difference, if any, in the grade or quality of such commodity and in the actual cost of transportation of same from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful and to be a misdemeanor; and all sales so made shall be taken and considered as prima facie evidence of unfair discrimination. (Acts 1908, No. 128, sec. 1.)

Sec. 4933. Penalties.—Any person, firm, company, association, or corporation violating any of the provisions of the preceding section, 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 (\$500.00), nor more than five thousand dollars (\$5,000.00), or be imprisoned in the parish jail for not less than one year, nor more than two years, or both, at the discretion of the court. (Id. sec. 2.)

Sec. 4934. Contracts in violation of act void.—All contracts or agreements made in violation of any of the provisions of the two preceding sections shall be void.. (Id. sec. 3.)

Sec. 4395. Enforcement.—It shall be the duty of the district attorneys, in their several judicial districts, throughout the State, to enforce the provisions of the preceding sections of this act, by appropriate actions and prosecutions in the several courts of the State of competent criminal jurisdiction, and of the attorney general, in all such cases, when carried by appeal or otherwise to the supreme court of this State, or to any other court of this State or of the United States; and that it shall also be the duty of the attorney general of the State, whether requested or directed to do so by the Governor or by the general assembly of the State or not, to enforce all the foregoing provisions of this act by appropriate actions and proceedings of a civil nature in such court or courts of the State as may have jurisdiction in such cases, and as is hereinafter provided. (Id. sec. 4.)

Sec. 4936. Complaints.—If any complaint 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 this act, it shall be the duty of the secretary of state to refer the matter to the attorney general who shall examine into said complaint and if the facts justify it, in his judgment, shall institute proceedings in the courts against such corporation. (Id. sec. 5.)

Sec. 4937. Revocation of permit.—If any corporation, foreign or domestic, authorized to do business in this State, or any officer, agent, or receiver, of any such corporation, is found guilty of unfair discrimination as defined by this act, it shall be the duty of the secretary of state immediately to revoke the permit or license of such corporation to do business in this State. (Id. sec. 6.)

Sec. 4938. Ouster.—In all cases where a corporation may have been convicted of the violation of the provisions of this act, and it shall continue or attempt to do business thereafter in this State, it shall be the duty of the attorney general of the State, by a proper suit, in the name of the State, to oust such corporation from all business of every kind and character in the State of Louisiana. (Id. sec. 7.)

Sec. 4939. Penalties cumulative.—The remedies and penalties provided in this act shall be cumulative to each other and to all other remedies and penalties provided by law. (Id. sec. 8.)¹

2. Special Prohibitory Laws

No provisions.

¹ Acts 1908, No. 128, sec. 9 provides for the repeal of all laws or parts of laws in conflict therewith.

MAINE

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1937, c. 204

Sec. 1. Certain contracts not invalid.—A. No contract, relating to the sale or resale 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),¹ the trade-mark, brand, or name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell such commodity at less than the minimum price stipulated by such producer or vendee.

B. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* That such stock is first offered to the manufacturer of such stock at the original invoice price, at least 10 days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) When any officer is acting under the orders of any court.

¹ Amended to include vending equipment, L. 1939, c. 83, sec. 52.

Sec. 2. Unfair competition defined.—Wilfully and knowingly advertising, offering for sale, selling or disposing of any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1, whether the person so advertising, offering for sale, selling, or disposing of is or is not a party to such contract, is unfair competition and is actionable at the suit of any person injured thereby.

Sec. 3. Limitation.—This act shall not apply to any contract or agreement between producers or between wholesalers, or between retailers as to sale or resale prices.

Sec. 4. Injunction and recovery of damages provided for.—Any person, firm, corporation, or incorporated trade association may maintain an action in the supreme judicial or superior court to enjoin a continuance of any act or acts in violation of section 2 of this act, and, if injured thereby, for the recovery of damages. If, in such action the court shall find that the defendant is violating or has violated any of the provisions of section 2 of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the such plaintiff shall be entitled to recover from the defendant 3 times the amount of the actual damages, if any, sustained.

Sec. 5. Title.—This act may be known and cited as the “Fair Trade Act.”

B. PROHIBITION OF SALES BELOW COST

L. 1939, c. 240

Unfair Practices Act

Section 1. Definitions.—(a) The term “cost to the retailer” shall mean the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or the replacement cost of the merchandise to the retailer within 30 days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, (2) cartage to the retail outlet if performed or paid for by the retailer, which cartage cost shall be deemed to be $\frac{3}{4}$ of 1 percent of the cost of the merchandise to the retailer, unless said retailer claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up in the absence of proof of a lesser cost, shall be 6 percent of the total cost at the retail outlet;

(b) The term "cost to the wholesaler" shall mean the invoice cost of the merchandise to the wholesaler within 30 days prior to the date of sale, or the replacement cost of the merchandise to the wholesaler within 30 days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, and (2) cartage to the retail outlet if performed or paid for by the wholesaler, which cartage cost shall be deemed to be $\frac{3}{4}$ of 1 percent of the cost of the merchandise to the wholesaler, unless said wholesaler claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up in the absence of proof of a lesser cost, shall be 2 percent of the total cost at the wholesale establishment;

(c) Where two or more items are advertised, offered for sale, or sold at a combined price, the price of each such item shall be determined in the manner set forth in paragraphs (a) and (b);

(d) The terms "cost to the retailer" and "cost to the wholesaler" as defined in said paragraphs (a) and (b) shall mean bona fide costs; and sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing market conditions within this State shall not be used as a basis for computing replacement costs with respect to sales by retailers and wholesalers;

(e) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer of title to tangible personal property for a valuable consideration made, in the ordinary course of trade or in the usual prosecution of the seller's business, to the purchaser for consumption or use other than resale or further processing or manufacturing. The terms "sell at wholesale," "sales at wholesale," and "wholesale sale" shall mean and include any such transfer of title to tangible personal property for the purpose of resale or further processing or manufacturing. In this and in the preceding paragraph the above terms shall include any such transfer of property where title is retained by the seller as security for the payment of the purchase price;

(f) The term "retailer" shall mean and include every person, copartnership, corporation, or association engaged in the business of making sales at retail within this State: *Provided*, That in the case of a retailer engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business; and

(g) The term "wholesaler" shall mean and include every person, copartnership, corporation, or association engaged in the business of

making sales at wholesale within this State: *Provided*, That in the case of a wholesaler engaged in the business of making sales both at wholesale and at retail, such term shall be applied only to the wholesale portion of such business;

(h) Where a retailer sells at retail any merchandise which is the product of his or its own manufacture or which has been purchased by him or it at the purchase price or prices available to wholesalers, in the absence of proof of a lesser cost both the wholesale mark-up of 2 percent and the retail mark-up of 6 percent to cover in part the cost of doing business, as provided in paragraphs (a) and (b), shall be added in determining the "cost to the retailer" of such merchandise.

Sec. 2. Penalty.—Any retailer who, with intent to injure competitors or destroy competition, advertises, offers to sell, or sells at retail any item of merchandise at less than cost to the retailer, or any wholesaler who, with intent as aforesaid, advertises, offers to sell, or sells at wholesale any item of merchandise at less than cost to the wholesaler, shall, if the offender is an individual, be punished by a fine of not more than \$500.

Sec. 3. Exceptions.—Sections 1 and 2 and sections 4 to 7, inclusive, shall not apply with respect to advertising or offering to sell, or selling, at retail or at wholesale, as the case may be, if done (a) in an isolated transaction and not in the usual course of business; (b) where merchandise is sold in bona fide clearance sales, if advertised or offered for sale as such or marked and sold as such, or where merchandise is marked down in an effort to sell the same after bona fide efforts to sell the same prior to such mark-down; (c) where perishable merchandise must be sold promptly in order to forestall loss; (d) where merchandise is imperfect or damaged or its sale is being discontinued, if advertised or offered for sale as such or marked and sold as such; (e) where merchandise is advertised or offered for sale or sold upon the final liquidation of any business; (f) where merchandise is advertised or offered for sale or sold for charitable purposes or to relief agencies; (g) where merchandise is sold on contract to any department, board, or commission, of the State or of any political subdivision thereof, or to any institution maintained thereby; (h) where the price of merchandise is made in good faith to meet legal competition; or (i) where merchandise is advertised or offered for sale or sold by any fiduciary or other officer acting under the order or direction of any court.

Sec. 4. Bill in equity.—(a) Any person injured by any violation or who shall suffer injury because of any threatened violation of this act, may bring a bill in equity in the supreme judicial court or the superior court, in term time or vacation, in the county where he resides, to prevent, restrain, or enjoin such violation or threatened

violation. If in such action a violation or threatened violation of this act shall be established, the court may enjoin and restrain or otherwise prohibit such violation or threatened violation. In such action it shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of actual damages by him sustained and the costs of suit including reasonable attorneys' fees.

(b) In the event no injunctive relief is sought or required, any person injured by a violation of this act may maintain an action for damages alone in the superior court in the county where he resides and the measure of damages in such action shall be the same as prescribed in subsection (a) of this section.

Sec. 5. Application.—Whenever the application of any provision of any other law of this State conflicts with the application of any provision of sections 1 to 7, inclusive, said sections shall prevail.

Sec. 6. Validity.—If any provision of said sections 1 to 7, inclusive, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of said sections, or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 7. Title.—Sections 1 to 7, inclusive, shall be known, and may be cited, as the "Unfair Sales Act."

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

MARYLAND

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

L. 1937, c. 239

Section 1. Repeal.—*Be it enacted by the General Assembly of Maryland,* That chapter 212 of the Acts of 1935, codified as sections 105, 106, 107, 108, 109, and 110, respectively, of article 83 of Flack's 1935 Supplement to the Annotated Code of Public General Laws of Maryland, title "Sales and Notices", subtitle "Fair Trade Act", be, and the same is hereby, repealed.

Sec. 2. *And be it further enacted,* That ten (10) new sections be, and the same are hereby, added to article 83 of Flack's 1935 Supplement to the Annotated Code of Public General Laws of Maryland, title "Sales and Notices", subtitle "Fair Trade Act", to follow immediately after section 104, and to be known as sections 105, 106, 107, 108, 109, 110, 111, 112, 113, and 114, respectively, said new sections to read as follows:

Sec. 105. Definitions.—The following terms, as used in this act, are hereby defined as follows:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

¹The Fair Trade Act was held constitutional under the authority of *Old Dearborn Distributing Co. v. Scagram-Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936). (See *Resale Price Maintenance*, Illinois, *supra.*) *Goldsmith v. Mead, Johnson & Co.*, 7 Atl. (2d) 176 (Ct. App. 1939).

The burden of proving lack of knowledge of the price reduction at the time of acquisition of the goods should be placed upon the retailer "as a matter of convenience in facilitating enforcement." (*Goldsmith v. Mead, Johnson & Co.*, *supra.*)

(D) "Retailer" means any person selling a commodity to consumers for use.

(E) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Sec. 106. Contracts relating to sale of trade-marked articles.—

No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Maryland by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(C) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 107. Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 110 of this act shall be available.

Sec. 108. Only owners of trade-marks to establish retail prices.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 109. Bankrupt and closing-out sale.—No contract containing any of the provisions enumerated in section 106 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(B) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(C) By any officer acting under an order of court.

Sec. 110. Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling, is, or is not, a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 111. Contracts not affected.—This act shall not apply to any contract or agreement between or among producers or distributors or, except as provided in subdivision (C) of section 106 of this act between or among wholesalers, or between or among retailers, as to sale or resale prices.

Sec. 112. Severability.—If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 113. Repeal.—All acts or part of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

Sec. 114. Title.—This act may be known and cited as the "Fair Trade Act."

B. PROHIBITION OF SALES BELOW COST

L. 1937, c. 211, as amended by L. 1939, c. 248
Unfair Practices Act¹

Sec. 115. Definitions.²—(a) When used in this act, the term “cost to the retailer” shall mean the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, (2) cartage to retail outlet if done or paid for by the retailer, which cartage cost shall be deemed to be three-fourths ($\frac{3}{4}$) of one percent of the cost of the merchandise to the retailer as herein defined, unless said retailer claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be six (6) percent of the total cost at retail outlet.

(b) When used in this act, the term “cost to the wholesaler” shall mean the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, and (2) cartage to the retail outlet if done or paid for by the wholesaler, which cartage shall be deemed to be three-fourths ($\frac{3}{4}$) of one percent of the cost of the merchandise to the wholesaler as herein defined, unless said wholesaler claims and proves a lower cartage cost.

(c) Where two or more items are advertised, offered for sale or sold at a combined price, the price of each item named shall be governed by the provisions of paragraphs (a) or (b), respectively, of this section.

¹The 1939 amendment, L. 1939, c. 248, prohibiting wholesalers and retailers from selling below cost was declared by the court of appeals to be invalid as a violation of the State due process clause (art. 23 of the Declaration of Rights). *Loughran Co., Inc., v. Lord Baltimore Candy and Tobacco Co., Inc.*, reported in 8 U. S. Law Week, 629 (Apr. 4, 1940). The court believed that the effect of the act was to prevent any dealer from conducting his business with any degree of certainty that he is not violating the law, whenever, in his own business discretion, he sells a commodity below cost, without first complying with unnecessary and burdensome regulations placed upon him for the purpose of bringing the transaction within the exemptions of the act. An act so vague and indefinite that a dealer cannot conduct his business with any degree of certainty that he is not violating the law contravenes the state constitution.

²SEC. 1. Amendment to art. 83 of Code.—*Be it enacted by the General Assembly of Maryland*, That secs. 115 to 121, inclusive, of art. 83 of the Annotated Code of Maryland (1935 Supplement), title “Sales and Notices,” subtitle “Fair Trade Act,” as said sections were enacted by ch. 211 of the acts of 1937, be and they are hereby repealed, and that six new sections, to be known as secs. 115 to 120, inclusive, be enacted in lieu thereof, to read as follows:

(d) The terms "cost to the retailer" and "cost to the wholesaler" as defined in paragraphs (a) and (b) shall mean bona fide costs; and sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing market conditions within this State shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers.

(e) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of such purchase price.

(f) The terms "sell at wholesale," "sales at wholesale," and "wholesale sales" shall mean and include any transfer for a valuable consideration made in the ordinary course of trade or the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. The above terms shall include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

(g) The term "retailer" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at retail within this State; *Provided, That*, in the case of a person, partnership, corporation, or association engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business.

(h) The term "wholesaler" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this State; *Provided, That*, in the case of a person, partnership, corporation, or association engaged in the business of making sales both at wholesale and at retail, such term shall be applied only to the wholesale portion of such business.

Sec. 116. Sales below cost.—It is hereby declared that advertisement, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, or giving, offering to give, or advertising the intent of giving away of any merchandise, either by retailers or wholesalers, or the advertising by retailers or wholesalers of brands or types of merchandise they are not prepared to supply, with the intent, effect, or result of unfairly diverting trade from or otherwise injuring a competitor, or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade, or tending to

create a monopoly in any line of commerce, is an unfair method of competition, contrary to public policy, and in contravention of the policy of this act.

Sec. 117. Violations.—Any retailer who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the retailer as defined in this act; or any wholesaler who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the wholesaler as defined in this act; or any retailer or wholesaler who shall, in contravention of the policy of this act, give, offer to give, or advertise the intent to give away any merchandise for the purpose of injuring competitors and destroying competition, or to advertise brands or types of merchandise they are not prepared to supply, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$500.00. Proof of any such advertisement, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this act shall be prima facie evidence of a violation of this act: *Provided, however,* That nothing herein shall preclude any retailer or wholesaler from offering merchandise "Free," in combination with merchandise sold, but in such case the cost of the "Free" merchandise shall be considered as a part of the cost of the merchandise sold.

Sec. 118. Injunctive relief.—In addition to the penalties provided in this act, the courts of this State are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several state's attorneys, in their respective districts, to institute proceedings in equity to prevent and restrain violations. Any person injured by any violation, or who may be threatened with loss or injury by reason of a violation of this act, shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction, to prevent, restrain, and enjoin such violation or threatened violation. If in such action a violation or threatened violation of this act shall be established, the court shall enjoin and restrain or otherwise prohibit such violation or threatened violation.

Sec. 119. Bankrupt sales.—The provisions of this act shall not apply to sales at retail or sales at wholesale (a) where merchandise has been purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade and is kept separate from merchandise purchased in the ordinary channels of trade, and advertised, marked and sold as such, and the advertisement shall state the quantity of such merchandise to be sold or offered for sale; (b) where merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such and the advertisement shall state the quantity of such merchandise to be sold or offered for sale; (c) where perishable

merchandise must be sold promptly in order to forestall loss; (d) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked and sold as such and the advertisement shall state the quantity of such merchandise to be sold or offered for sale; (e) where merchandise is sold upon the final liquidation of any business; (f) where merchandise is sold for charitable purposes or to relief agencies; (g) where merchandise is sold on contract to departments of the government or governmental institutions; (h) where the price of merchandise is made in good faith to meet competition; (i) where merchandise is sold by any officer acting under the order or direction of any court.

Sec. 120. Constitutionality.—If any section, sentence, clause, or provision of this act shall for any reason be held invalid or unconstitutional, the validity of the remaining parts hereof shall not be affected thereby.

Sec. 2. In effect.—*And be it further enacted,* That this act shall take effect June 1, 1939.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

MASSACHUSETTS

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Ann. Laws (Supp. 1939), c. 93

Sec. 14A. Certain sales contracts declared lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which said commodity is sold to consumers bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the Commonwealth by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided*, That such stock is first offered to the manufacturer of such stock at the original in-

¹ A contract between the manufacturer of a secret compound and a retailer, fixing the resale price of the commodity, is valid and not in restraint of trade. *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174 (1900); *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839 (1905). But such a contract is not binding on a sub-vendee not a party to the contract, the price restriction not following the article through successive sales which severally pass title. *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

voice stock price, at least ten days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court. (L. 1937, c. 398, as amended May 18, 1939, c. 231.)

Sec. 14B. Sales below contract price.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the preceding section, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby. Any person advertising, offering for sale, or selling any commodity as aforesaid shall in addition, forfeit through civil process to the Commonwealth the sum of fifty dollars. (L. 1937, c. 398, as amended L. 1939, c. 93.)

Sec. 14C. Exception.—The two preceding sections shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (L. 1937, c. 398.)

Sec. 14D. Short title.—Sections 14A to 14C, inclusive, may be known and cited as the "Fair Trade Law." (L. 1937, c. 398.)

B. PROHIBITION OF SALES BELOW COST

Ann. Laws (Supp., 1939), c. 93 Unfair Sales Act

Sec. 14E. Definitions.—When used in sections 14E to 14K, inclusive:

(a) The term "cost to the retailer" shall mean the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or the replacement cost of the merchandise to the retailer within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, (2) cartage to the retail outlet if performed or paid for by the retailer, which cartage cost shall be deemed to be three-fourths of one percent of the cost of the merchandise to the retailer, unless said retailer claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be six percent of the total cost at the retail outlet;

(b) The term "cost to the wholesaler" shall mean the invoice cost of the merchandise to the wholesaler within 30 days prior to the date of sale, or the replacement cost of the merchandise to the wholesaler within thirty days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, and (2) cartage to the retail outlet if performed or paid for by the wholesaler, which cartage cost shall be deemed to be three-fourths of one percent of the cost of the merchandise to the wholesaler, unless said wholesaler claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be two percent of the total cost at the wholesale establishment;

(c) Where two or more items are advertised, offered for sale, or sold at a combined price, the price of each such item shall be determined in the manner set forth in paragraphs (a) and (b);

(d) The terms "cost to the retailer" and "cost to the wholesaler" as defined in said paragraphs (a) and (b) shall mean bona fide costs; and sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing market conditions within this Commonwealth shall not be used as a basis for computing replacement costs with respect to sales by retailers and wholesalers;

(e) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer of title to tangible personal property for a valuable consideration made, in the ordinary course of trade or in the usual prosecution of the seller's business, to the purchaser for consumption or use other than resale or further processing or manufacturing. The terms "sell at wholesale," "sales at wholesale," and "wholesale sale" shall mean and include any such transfer of title to tangible personal property for the purpose of resale or further processing or manufacturing. In this and in the preceding paragraph the above terms shall include any such transfer of property where title is retained by the seller as security for the payment of the purchase price;

(f) The term "retailer" shall mean and include every person, copartnership, corporation, or association engaged in the business of making sales at retail within this Commonwealth; provided, that, in the case of a retailer engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business; and

(g) The term "wholesaler" shall mean and include every person, copartnership, corporation, or association engaged in the business of

making sales at wholesale within this Commonwealth; provided, that, in the case of a wholesaler engaged in the business of making sales both at wholesale and at retail, such term shall be applied only to the wholesale portion of such business. (1938, 410, sec. 1, approved June 14, 1938.)

(*h*) Whenever any person, copartnership, corporation, or association subject to this chapter, in the course of doing business, performs the functions of both wholesaler and retailer without actually being engaged in the business of making sales at wholesale, the term "wholesaler" shall mean and include that function of the business of preparation for sale at the retail outlet, and the term "retailer" shall be applied only to the retail portion of such business. (Amended May 10, 1939, by ch. 189, regular session, 1939.)

Sec. 14F. Penalties.—Any retailer who, with intent to injure competitors or destroy competition, advertises, offers to sell, or sells at retail any item of merchandise at less than cost to the retailer, or any wholesaler who, with intent as aforesaid, advertises, offers to sell, or sells at wholesale any item of merchandise at less than cost to the wholesaler, shall, if the offender is an individual, be punished by a fine of not more than five hundred 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. Evidence of any advertisement, offer to sell, or sale of any item of merchandise by any retailer or wholesaler at less than cost to him shall be prima facie evidence of intent to injure competitors or destroy competition. (1938, 410, sec. 1, approved June 14, 1938.)

Sec. 14G. Certain sales, etc., excepted.—Sections 14E and 14F and sections 14H to 14K, inclusive, shall not apply with respect to advertising or offering to sell, or selling, at retail or at wholesale, as the case may be, if done (*a*) in an isolated transaction and not in the usual course of business; (*b*) where merchandise is sold in bona fide clearance sales, if advertised or offered for sale as such or marked and sold as such, or where merchandise is marked down in an effort to sell the same after bona fide efforts to sell the same prior to such mark-down; (*c*) where perishable merchandise must be sold promptly in order to forestall loss; (*d*) where merchandise is imperfect or damaged or its sale is being discontinued, if advertised or offered for sale as such or marked and sold as such; (*e*) where merchandise is advertised or offered for sale or sold upon the final liquidation of any business; (*f*) where merchandise is advertised or offered for sale or sold for charitable purposes or to relief agencies; (*g*) where merchandise is sold on contract to any department, board, or commission of the Commonwealth, or of any political subdivision thereof, or

to any institution maintained thereby; (*h*) where the price of merchandise is made in good faith to meet competition; or (*i*) where merchandise is advertised or offered for sale or sold by any fiduciary or other officer acting under the order or direction of any court. (1938, 410 sec. 1, approved June 14, 1938.)

Sec. 14H. Injunction.—Upon complaint of any person, the superior court shall have jurisdiction to restrain and enjoin any act forbidden or declared illegal by any provision of sections 14E to 14K, inclusive; and it shall be the duty of the several district attorneys, in their respective districts, to enforce, and restrain the violation of, said sections. (1938, 410, sec. 1, approved June 14, 1938.)

Sec. 14I. Conflicting laws.—Whenever the application of any provision of any other law of this Commonwealth conflicts with the application of any provision of sections 14E to 14K, inclusive, said sections shall prevail. (1938, 410, sec. 1, approved June 14, 1938.)

Sec. 14J. Effect of partial invalidity.—If any provision of said sections 14E to 14K, inclusive, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of said sections, or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (1938, 410, sec. 1, approved June 14, 1938.)

Sec. 14K. Cited as Unfair Sales Act.—Sections 14E to 14K, inclusive, shall be known, and may be cited, as the "Unfair Sales Act." (1938, 410, sec. 1, approved June 14, 1938.)

C. ANTIDISCRIMINATION LEGISLATION

I. General Prohibitory Laws

Ann. Laws (1933), c. 93

Sec. 8. Discrimination in sale of commodities prohibited.²—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

² *Constitutionality.*—Chapter 93, section 8, is constitutional as a valid exercise of the police power of the State, it being designed to prevent malicious acts to injure another and to prevent monopoly. *In re Opinion of The Justices*, 211 Mass. 620, 99 N. E. 294 (1912).

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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. This section and the four following sections shall not apply with respect to any sale of merchandise in any particular locality at a lower rate than elsewhere where the price is made in good faith in accordance with section 14G. (1912, 651, secs. 1 and 5; 1938, 410, sec. 2.)^a

2. Special Prohibitory Laws

No provisions.

^aFor procedural and penal provisions see *MARKETING LAWS SURVEY* vol. *State Antitrust Laws: General Antitrust Laws*.

MICHIGAN

REGULATION OF PRICE COMPETITION

A. RE SALE PRICE MAINTENANCE¹

Stat. Ann. (Henderson, Supp., 1939)

Sec. 19.321. Contracts fixing resale price of commodities under trade-mark, brand, or name; provisions allowed, when inapplicable.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Michigan by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity at less than the price stipulated by the vendor.

2. That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell at less than the price stipulated by such producer or vendee.

¹A system of marketing whereby a manufacturer of medicinal tablets under a secret process sold them to wholesalers under an agreement to sell to licensed retailers only who were bound by their licenses to observe a stipulated resale price was held invalid at common law as an act in restraint of trade. A retailer who obtained the commodity without being "licensed" was not bound by the stipulated price for the reason that, even if the manufacturer's contracts were valid, they bound only the parties to them. The court stated that the natural result of the plan would be the lessening of competition at the various distributive levels and thus a combination of manufacturers, wholesalers, and retailers to maintain prices would be effected. *Hill Co. v. Gray & Worcester*, 163 Mich. 12, 127 N. W. 803 (1910).

For the reasons stated in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936) (See Resale Price Maintenance, Illinois, *supra*), the Fair Trade Act is constitutional. *Weco Products Co. v. Sam's Cut Rate Inc. & Randolph Drug Co.* (C. C. 1937), P-H 40392.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. When closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* That such stock is first offered to the manufacturer of such stock, or his duly authorized agent, at the prevailing invoice stock price, at least ten days before such stock shall be offered for sale to the public.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court. (L. 1937, Act 50, sec. 1.)

Sec. 19.322. Same; unfair competition; injunction.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby, and may be enjoined by a court of competent jurisdiction. (Id., sec. 2.)

19.323. Inapplicability of act to certain contracts or agreements; patronage dividends.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. The payment of patronage dividends by farmers' cooperative associations or companies on the basis of sales of commodities sold under the provisions of this act shall not be construed as a violation of the provisions of this act. (Id., sec. 3.)

Sec. 19.324. Definitions.—The following terms, as used in this act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer, or publisher.

"Commodity" means any subject of commerce bearing a trade-mark, brand, or name.

"Trade-mark," "brand," or "name" means any form, symbol, or name appropriated by any person, as herein defined, who produces or owns or in any manner deals in a commodity, to designate the origin of ownership thereof.

"Person" includes individuals, partnerships, corporations, and any other business unit, or receiver, trustee, or assignee of such business units.

"Retailer" means any person selling a commodity at retail. (Id., sec. 4.)

Sec. 19.325. Severing clause.—If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby. (Id., sec. 5.)

B. PROHIBITION OF SALES BELOW COST

Stat. Ann. (Henderson, Supp., 1939)
Bakery and Petroleum Industries

Sec. 28.78 (1) Definitions.—The word “person” as used in this act shall mean and include the plural as well as the singular, and any corporation, partnership, or unincorporated or voluntary association, unless the context shall require a different construction. The word “commodity” shall mean and include any tangible personal property, article, or product of general use or consumption. (L. 1937, Act 282, sec. 1.)

Sec. 28.78 (2). Unfair discrimination; practices prohibited.—Any person, doing business in this state and engaged in the production, manufacture, distribution, or sale of bakery products or petroleum products, who shall, with the intent to injure or destroy the business of a competitor in any locality, discriminate between different sections, communities, or cities of this State by selling such products at a lower price in one section, community, or city than is charged for such products by such person in another section, community, or city, after making due allowance for the difference, if any, in the grade or quality or quantity of such products and in the actual cost of transportation from the place of production, or from the place of manufacture, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful. (Id., sec. 2.)

Sec 28.78 (3). Same; proof, acts deemed prima facie evidence.—Proof that any person has been discriminating between different sections, communities, and cities of this State by selling bakery products or petroleum products at a lower rate in one (1) section, community, or city, than is charged for said products by said person in another section, community, or city, after making an allowance for the difference, if any, in the grade or quality or quantity and in the actual cost of the transportation from the place of production, or from the place of manufacture, shall be prima facie evidence that the party so discriminating is guilty of unfair discrimination. (Id., sec. 3.)

Sec. 28.78 (4). Unfair methods of competition; sales at less than cost prohibited.—Any person doing business in this State and engaged in the production, manufacture, distribution, or sale of bakery products or petroleum products, who shall sell, offer for sale, or advertise for sale such products at less than the cost thereof to any person, with the intent to injure or destroy the business of a competitor, shall be deemed guilty of an unfair method of competition, which is hereby prohibited and declared to be unlawful. (Id., sec. 4.)

Sec. 28.78 (5). Same; "cost"; certain sales exempted.—The term "cost" as applied to production or manufacture is hereby defined as including the cost of raw materials, labor, and all necessary overhead expense of the producer or manufacturer; and as applied to distribution "cost" shall mean the cost of such product to the distributor or vendor, plus the overhead expense of the distributor or vendor: *Provided, however,* This act shall not apply to any sale made: (1) In closing out in good faith the owner's stock or any part thereof, for the purpose of discontinuing his trade in any such stock or commodity, (2) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (3) by an officer acting under the orders of any court, (4) sales made in good faith for the purpose of meeting prices of a competitor selling the same article in the same locality or trade area. (Id., 5.)

Sec. 28.78 (6). Destructive trade practices; gifts of other commodities.²—Any person, doing business in this State and engaged in the production, manufacture, distribution, or sale of bakery products or petroleum products, who shall, with the intent to injure or destroy a competitor, give, offer to give, or advertise the intent to give away any commodity for the purpose of promoting the sale of any other commodity, shall be deemed guilty of a destructive trade practice, which is hereby prohibited and declared to be unlawful. (Id., sec. 6.)

Sec. 28.78 (7). Special service or privileges.—Any person, doing business in this State and engaged in the production, manufacture, distribution, or sale of bakery products or petroleum products, who shall, with the intent to injure or destroy the business of a competitor, extend to certain purchasers special service or privileges not extended to all purchasers of the same class by means of secret payments, rebates, refunds, commissions, or unearned discounts, either

² Section 6 (sec. 28.78 (6)) of the statute is unconstitutional under article II, section 16, of the State constitution as not reasonably related to the protection of the public welfare and is an invalid exercise of the police power of the State. The defendant, a gasoline retailer, gave a premium of a five-cent drinking glass with each sale of five gallons of gasoline. The court held that such a practice does not injure competition and, regardless of the legislative declaration, the issuance of such a premium is not a destructive trade practice. *People v. Victor*, 287 Mich. 506, 283 N. W. 666 (1939); *Sperry & Hutchinson Co. v. Prosecuting Attorney of Kent County*, 287 Mich. 555, 283 N. W. 688 (1939).

in the form of money or otherwise, shall be deemed guilty of unfair discrimination. (Id., sec. 7.)

Sec. 28.78 (8). Established cost survey, use in evidence.—Where a particular trade or industry, in which the person complained against is engaged, has an established cost survey for the locality and vicinity in which the offense is committed, such cost survey shall be deemed competent evidence to be used in proving the cost to such person. (Id., sec. 8.)

Sec. 28.78 (9). Injunctive relief; damages, amount; information, use as evidence in prosecution.—Any person, public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of this act, and if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained. The books and records of any such defendant may be brought into court and introduced, by reference, into evidence: *Provided*, That no information so obtained may be used against said defendant as a basis for a prosecution for the violation of this act. (Id., sec. 9.)

Sec. 28.78 (10). Forfeitures; duty of attorney general; violations, injunctions.—It shall be the duty of the attorney general, upon the third conviction for violation of any of the provisions of this act, by any corporation, to institute a proceeding in the nature of a quo warranto, in the name of the State, for a forfeiture of the articles of incorporation, rights, franchises, privileges, and powers exercised by such corporation and to permanently enjoin it from transacting business in this State. If in such proceeding, the court shall find such corporation is violating or has violated any of the provisions of this act, it shall enjoin such corporation from doing business in this State permanently, or for such time as the court shall order, or shall annul the charter or revoke the franchise of such corporation. (Id., sec. 10.)

Sec. 28.78 (11). Persons deemed liable under act.—Any person, who, either as director, officer, or agent of any firm or corporation, or as agent of any person, violating the provisions of this act, knowingly assists or aids, directly or indirectly in such violation, shall be responsible therefor equally with the person, firm, or corporation for whom he acts. (Id., sec. 11.)

Sec. 28.78 (12). Same; penalty.—Any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the

county jail for not to exceed one (1) year, or by a fine of not more than five thousand (5,000) dollars, or by both such fine and imprisonment in the discretion of the court. (Id., sec. 12.)

Sec. 28.78 (13). Severing clause.—Should any provision, section, or portion of a section of this act be held to be invalid for any reason, such holding shall not be construed as affecting the validity of any remaining portion of such section of this act, it being the legislative intent that this act shall stand notwithstanding the invalidity of any such provision or section. (Id., sec. 13.)

Sec. 28.78 (14). Construction of act.—Nothing in this act shall be construed as repealing any other law or part thereof, but the remedies herein provided shall be cumulative to all other remedies provided by law. (Id., sec. 14.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Stat. Ann. (Henderson, 1938)

Poultry—Dairy Products

Sec. 28.821. Unfair discrimination in the purchase of poultry, eggs, milk, cream, and butterfat.—Any person engaged in the business of buying poultry, eggs, milk, cream, or butterfat for the purpose of manufacture, who shall with the intention of creating a monopoly or destroying the business of a competitor, discriminate between different sections, localities, communities, or cities of this State by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person in any other locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, 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. (Pub. Acts 1913, No. 103, eff. Aug. 14, C. L. '15, sec. 15040, C. L. '29, sec. 16681.)

Potatoes

Sec. 28.822. Unfair discrimination in the purchase of potatoes, grain, or beans.—Any person engaged in the business of buying potatoes, grain, or beans, for the purpose of resale, who shall with the intention of creating a monopoly or destroying the busi-

ness of a competitor, discriminate between different sections, localities, communities, or cities of this State, by purchasing such potatoes, grain, or beans at a higher rate or price in one locality than is paid for potatoes, grain, or beans of like grade and quality by said person in any other locality, after making due allowance for the difference, if any, in the actual cost of transportation, 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. (Pub. Acts 1923, No. 208, eff. Aug. 30, C. L. '29, sec. 16682.)

Petroleum Products

Sec. 28.823. Unfair discrimination in sale of petroleum products.—Any person doing business in the State, and engaged in the production, manufacture, or distribution of any petroleum products, who shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this State, by selling such commodity at a lower rate in one section, community, or city, than is charged for said commodity by said party in another section, community, or city, 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 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. (Pub. Acts 1913, No. 135, eff. Aug. 14, C. L. '15, sec. 15042, C. L. '29, sec. 16684.)

Sec. 28.71. Unfair discrimination; acts deemed, unlawfulness.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State, and engaged in the production, manufacture, or distribution of any petroleum products, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this State, by selling such commodity at a lower rate in one (1) section, community, or city, than is charged for said commodity by said party in another section, community, or city, 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 unlawful. (C. L. '29, sec. 16683; C. L. '15, sec. 15041.)

(A second section of the same act was repealed by Pub. Acts 1931, No. 328.)

Sec. 28.72. Contracts in violation of act; invalidity.—All contracts or agreements made in violation of any of the provisions of the two (2) preceding sections shall be void. (C. L. '29, sec. 16685; C. L. '15, sec. 15043.)

Sec. 28.73. Enforcement; duty of prosecutors and attorney general.—It shall be the duty of the county prosecuting attorneys in their counties, and the attorney general of the State, to enforce the provisions of the preceding sections of this act by appropriate actions in courts of competent jurisdiction. (C. L. '29, sec. 16686; C. L. '15, sec. 15044.)

Sec. 28.74. Violation of act by corporation; duty of secretary of state and attorney general.—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 this act, it shall be the duty of the secretary of state to refer the matter to the attorney general, who shall, if the facts justify it in his judgment, institute proceedings in the courts against such corporation. (C. L. '29, sec. 16687; C. L. '15, sec. 15045.)

Sec. 28.75. Same; revocation of permit to do business.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination within the terms of this act, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this State. (C. L. '29, sec. 16688; C. L. '15, sec. 15046.)

Sec. 28.76. Same; ouster from business.—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 this act, 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, to oust such corporation from all business of every kind and character in said State. (C. L. '29, sec. 16689; C. L. '15, sec. 15047.)

Sec. 28.77. Construction of act.—Nothing in this act shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. (C. L. '29, sec. 16690; C. L. '15, sec. 15048.)

See also *Prohibition of Sales Below Cost, supra.*

MINNESOTA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Stat. (Mason, Supp., 1940)

Sec. 3976-51. Definitions.—The following terms, as used in this act, are hereby defined as follows:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person selling a commodity to consumers for use.

(E) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. (Mar. 30, 1937, c. 117, sec. 1.)

Sec. 3976-52. Certain contracts not to be in violation of law.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Minnesota by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(C) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree

not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Mar. 30, 1937, c. 117, sec. 2.)

Sec. 3976-53. What are violations.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 6 of this act shall be available. (Mar. 30, 1937, c. 117, sec. 3.)

Sec. 3976-54. Who may fix minimum prices.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this Act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name. (Mar. 30, 1937, c. 117, sec. 4.)

Sec. 3976-55. Application of act.—No contract containing any of the provisions enumerated in section 2 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(B) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(C) By any officer acting under an order of court. (Mar. 30, 1937, c. 117, sec. 5.)

Sec. 3976-56. Unfair competition.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Mar. 30, 1937, c. 117, sec. 6.)

Sec. 3976-57. Application of act.—This act shall not apply to any contract or agreement between or among producers or distributors or, except as provided in section 2, subdivision (C) of this act between or among wholesalers or between or among retailers as to sale or resale prices. (Mar. 30, 1937, c. 116, sec. 7.)

Sec. 3976-58. Provisions severable.—If any provision of this act, or the application thereof to any person or circumstance is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected. (Mar. 30, 1937, c. 117, sec. 8.)

Sec. 3976-59. Inconsistent acts repealed.—All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency. (Mar. 30, 1937, c. 117, sec. 9.)

Sec. 3976-60. To be known as "Fair Trade Act."—This act may be known and cited as the "Fair Trade Act". (Mar. 30, 1937, c. 117, sec. 10.)

Section 11 of Act March 30, 1937, cited, provides that the act shall take effect from its passage.

B. PROHIBITION OF SALES BELOW COST

Stat. (Mason, Supp., 1940)

Unfair Practices Act¹

Sec. 3976-41. Not to sell below cost.—Any retailer or wholesaler, engaged in business within this State, which sells, offers for sale, or advertises for sale, any commodity, article, goods, wares, or merchandise, at less than the cost thereof to such vendor, or gives, offers to give, or advertises the intent to give away any commodity, article, goods, wares, or merchandise, for the purpose or with the effect of injuring competitors and destroying competition, shall be guilty of

¹ Various provisions of the Unfair Practices Act prior to its amendment were declared unconstitutional in *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 Fed. Supp. 70 (1938) upon the ground that they were vague, arbitrary, or discriminatory: (1) The provision of paragraph 2 of section 3976-41, prohibiting locality

unfair discrimination, and upon conviction shall be subject to the penalty therefor provided herein.

Any retailer or wholesaler who sells goods in any part of the State of Minnesota at prices lower than those exacted by said person elsewhere in the State of Minnesota for like quantities and grades and where the effect of such lower prices may be substantially to lessen competition or tend to create a monopoly in any line of business, or to injure, destroy, or prevent competition with the person selling at such lower prices, shall be guilty of unfair competition and subject to the penalties of this act: *Provided*, That nothing shall prevent differentials in prices in different localities which make only due allowances for differences in "cost of doing business" or "overhead expense" and in costs of delivery for such goods to different localities; nor differences in price made in good faith to meet local competition of any other person in such locality.

discrimination in price, which does not require the intent but only the effect of lessening competition, fails to allow for differences in selling costs which would justify differences in price. Hence this provision was held arbitrary and discriminatory as applied to merchants owning more than one store in more than one locality. (Cf. *Antidiscrimination Legislation, General Prohibitory Laws, infra*.)

(2) The definition of cost as "manufacturer's list price * * *" was held arbitrary. "List price" may not be the actual cost to the person buying the article. A provision that list price shall be prima facie evidence of actual cost would not be unreasonable. (See. sec. 3976-42 as amended.)

(3) The definition of "cost of doing business" or "overhead expense" in section 3976-42 was held arbitrary and unreasonable. The "average of all costs of doing business during the immediately preceding calendar year * * *" failed to take account of many circumstances which might lower current selling costs. Had the statute specified only prima facie evidence of current costs it probably would not have been unreasonable. (Cf. section 3976-42 (2) as amended.)

(4) The provision in section 3976-42 that any sale at less than 10 percent above the published list price or, in the absence of a list price, at less than 10 percent above current delivered invoice or replacement cost should be prima facie violation of the act, was held unconstitutional. A violation includes (1) a sale below cost and (2) intent to injure competition and destroy competition. There is a reasonable relation between sales below cost and sales at less than 10 percent above actual cost and a fair inference as to the former arises from the latter. However, there is no similar relation between a sale at less than 10 percent above actual cost and injurious intent. There are many purposes for which a merchant might make a profitless sale. Moreover, the disadvantage to the merchant of the presumption of guilt outweighs its advantage to the State and it was held unreasonable upon that ground. (Cf. sec. 3976-42 as amended.)

(5) The paragraphs charging with guilt any person who as agent aids in a violation and presuming his guilty intent from the guilty intent of his principal—were held clearly violative of the due process and equal protection clauses. It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. Without the presumption clause, the aiding and abetting provision would be unobjectionable. (Cf. sec. 3976-46 as amended.)

(6) The section providing for the admission of cost surveys as presumptive evidence of cost (sec. 3976-44, repealed, Laws 1939, c. 403) was held to be too indefinite and vague to stand. The court propounded the following questions: "What is a cost survey? By whom made? Who is to say whether or not it is fair?" and stated that there might easily be an inconsistency between "cost" as derived from a cost survey and "cost" based on the manufacturer's list price.

The inhibition against sales below cost or locality discrimination shall embrace any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act, together with all amendments thereto. (L. 1937, amended L. 1939.)

Sec. 3976-42. Definitions.—The term “retailer” as used herein shall mean any person, partnership, firm, corporation, or association, foreign or domestic, selling any commodity, article, goods, wares, or merchandise to the consumer and not for the purpose of resale in any form.

The term “wholesaler” as used herein shall mean any person, firm or corporation, partnership, association, business trust, or any unincorporated organization, selling or supplying any commodity, article, goods, wares, or merchandise to retailers, industrial buyers, restaurants, institutions, or the selling on the part of one wholesaler to another wholesaler; creameries, canneries, and other processors of agricultural products are defined to be manufacturers or producers and not included within the meaning of the term “wholesaler” as defined in this act.

The term “cost” as applied to the wholesaler or retail vendor shall mean:

1. The actual current delivered invoice or replacement cost whichever is lower plus the cost of doing business at said location by said vendor;

2. Where a manufacturer publishes a list price and discounts, in determining such “cost” said manufacturer’s published list price and discounts then currently in effect plus the cost of doing business by said vendor shall be prima facie evidence of “cost.”

The “cost of doing business” or “overhead expense” is defined as all current costs of doing business incurred in the conduct of such business, and must include without limitation the following items of expense:

Labor (including salaries and bonuses of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising, and other fixed and incidental expenses.

The “cost of doing business,” including without limitation the aforesaid items of expense, incurred in the conduct of such business during the calendar year or the 12 months immediately preceding any alleged violation of this act, or in the event that any retailer or wholesaler shall have been engaged in business within the State for a shorter period of time, then such cost for such period of time immediately preceding any alleged violation of this act shall be prima facie evidence of “cost” as herein defined.

Any sale made by the retail vendor at less than 10 percent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price, or in the absence of such a list price, at less than 10 percent above the actual current delivered invoice or replacement cost, for the purpose or with the effect of injuring competitors or destroying competition, shall be prima facie evidence of the violation of this act: *Provided, however.* That no prosecution shall be had or any action at law for damages or injunctive relief shall lie where the vendor sells at a price not less than 15 percent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price, or in the absence of such a list price, at not less than 15 percent above the current delivered invoice or replacement cost.

Any sale made by a wholesale vendor at less than 2 percent above the manufacturer's published list price, less his published discounts, where the manufacturer publishes a list price, or in the absence of such a list price, at less than 2 percent above the actual current delivered invoice or replacement cost, for the purpose or with the effect of injuring competitors or destroying competition, shall be prima facie evidence of the violation of this act. (Ibid.)

Sec. 3976-43. Bankrupt sales.—In establishing the cost of a given article, goods, wares, or merchandise to the vendor, the invoice cost of said article, goods, wares, or merchandise purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article, goods, wares, or merchandise replaced through the ordinary channels of trade, unless said article, goods, wares, or merchandise is kept separate from goods purchased in the ordinary channels of trade and unless said article, goods, wares, or merchandise is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale. (L. 1937.)

Sec. 3976-44.²

Sec. 3976-45. Exceptions.—The provisions of sections 3976-41, 3976-42, and 3976-43 of the 1938 Supplement to Mason's Minnesota Statutes of 1927, of this act shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in case of the sale of seasonal goods or merchan-

² Repealed, L. 1939, c. 403, sec. 7.

dise where style is the paramount feature or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof—

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof—

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the local prices of a competitor as herein defined selling the same commodity, articles, goods, wares, or merchandise in the same locality or trade area. (L. 1937, amended L. 1939.)

Sec. 3976-46. Penalties.—Any person, firm, or corporation, whether as principal, agent, officer, or director for himself, or itself, or for another person, firm, or corporation, wilfully violating the provisions of sections 3976-41, 3976-42, or 3976-43 of the 1938 Supplement to Mason's Minnesota Statutes of 1927, shall, upon conviction thereof, be fined not less than \$200, nor more than \$1,000, for each offense; or, in default of the payment of such fine, by imprisonment in the county jail for not less than three months nor more than one year.

Any person who either as director, officer, or agent of any firm or corporation or as agent of any person violating the provisions of sections 3976-41, 3976-42, and 3976-43 of the 1938 Supplement to Mason's Minnesota Statutes of 1927 knowingly assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he acts. (L. 1937, amended L. 1939.)

Sec. 3976-47. Who may maintain action.—(a) In addition to the penalties provided in this act, the courts of this State are hereby vested with jurisdiction to prevent and restrain violations of this act. Any person, partnership, corporation, or association damaged or who is threatened with loss or injury by reason of a violation of this act shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this act and for the amount of the actual damage to him if any. In order to obtain such injunctive relief it shall not be necessary to allege or prove that an adequate remedy at law does not exist.

(b) A party to the record of any civil action or proceeding, instituted or brought in pursuance of the provisions of this act, may be required to testify under the provisions of Mason's Minnesota Statutes of 1927, section 9816: *Provided, however,* That no information so obtained may be used against the party as the basis for a criminal prosecution under the provisions of this act or any other criminal statute. (L. 1937, amended L. 1939.)

Sec. 3976-48. Remedies cumulative.—Nothing in this act shall be construed as repealing any act other than Laws 1921, chapter 413, and such parts of Laws 1937, chapter 116, as amended by Laws 1937, chapter 456, as are inconsistent herewith, but the remedies herein provided shall be cumulative to all other remedies provided by law. (L. 1937, amended L. 1939.)

Sec. 3976-49. Severability.—The provisions of this act are hereby declared to be severable. If one provision hereof shall be found by the decision of a court of competent jurisdiction to be invalid such decision shall not affect the validity of the other provisions of this act. (L. 1937.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Stat. (Mason, Supp., 1940)

Sec. 3976-37. Application of act.—The following sections of this act, constituting part 1 thereof shall apply only to the manufacture, production, or distribution of any commodity, article, goods, wares, or merchandise in general use or consumption. (Mar. 30, 1937, c. 116, pt. 1, sec. 1.)

Sec. 3976-38. Discrimination unlawful.²—Any person, partnership, firm, or corporation, foreign or domestic, doing business in the State of Minnesota, and engaged in the production, manufacture, distribution of any printed or mimeographed matter, commodity, article, goods, wares, or merchandise in general use or consumption, that intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity, article, goods, wares, or merchandise, or to prevent the competition of any person, firm, or corporation who or which, in good faith, intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this State by selling or furnishing such commodity, article, goods, wares, or merchandise at a lower price or rate in one section, community, or city, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such commodity, article, goods, wares, or merchandise in another section, community, or city, or any portion thereof, after making allowance for difference, if any, in the grade, quality, or quantity, after equalizing the distance from the point of production, manu-

² Section 3976-38 is constitutional. Since the statute requires the intent to destroy competition as an element of violation, it is reasonably designed to effectuate the purpose of the legislature to prevent monopolies. *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 Fed. Supp. 70 (1938).

facture, or distribution and freight rates therefrom, shall be guilty of unfair discrimination: *Provided*, That this act shall not prevent any person, firm, or corporation from, in good faith, meeting local competition within any one section, community, village, or city. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act, together with all amendments thereof. (Mar. 30, 1937, c. 116, pt. 1, sec. 2.)⁴

Sec. 3976-39. Law repealed.—Chapter 413 of the Laws of 1921, being sections 10464-7, inclusive, of Mason's Minnesota Statutes, 1927, are hereby repealed (Mar. 30, 1937, c. 116, pt. 1, sec. 3).

2. Special Prohibitory Laws

Stat. (Mason, 1927)

Petroleum

Sec. 10474. Petroleum—Discrimination between different localities prohibited.⁵—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Minnesota and engaged in the production, manufacture, or distribution of petroleum or any of its products that shall intentionally, or otherwise, for the purpose of destroying the business of a competitor or creating a monopoly in any locality, discriminate between different sections, communities or cities of this State, by selling such commodity at a lower rate in one section, community, or city than is charged for such commodity by said party in another section, community, or city after making due allowance for the difference, if any, in the test 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. ('07, c. 269, sec. 1.) [8980.]

Sec. 10475. 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 indi-

⁴ For procedural and penalty provisions, see *Prohibitions of Sales Below Cost*, *supra*.

⁵ Section 10474 is constitutional as a reasonable regulation of competitive practices. The court, after considering the peculiar conditions surrounding the distribution of petroleum, held that the selection of petroleum products for regulation establishes a reasonable classification. *State v. Standard Oil Co.*, 111 Minn. 65, 126 N. W. 527 (1910).

vidual found guilty of violation thereof, shall be guilty of a gross misdemeanor and shall be fined not more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. ('07, c. 269, sec. 2.) [8981.]

Sec. 10476. Contracts void—Recovery.—All contracts or agreements made in violation of any provisions of the two preceding sections shall be void and any money or property paid or transferred for any such commodity under any such agreement shall be paid back within ten days after demand therefor, and on failure to so repay, then the purchasers may recover back in a civil action any such money or property, together with reasonable attorneys' fees not less than twenty-five dollars. ('07, c. 269, sec. 3.) [8982.]

Sec. 10477. Duty of county attorney.—It shall be the duty of the county attorneys in their counties and the attorney general, to enforce the provisions of the preceding sections of this act by appropriate actions in courts of competent jurisdictions. (L., 1907, ch. 269, sec. 4.) (8983)

Sec. 10478. 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 this act, 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. (L. 1907, ch. 269, sec 5.) (8984.)

Sec. 10479. Revocation of permit.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this state. ('07 c. 269, sec. 6.) [8985.]

Sec. 10480. Continuance in business—Ouster.—If after the 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 this act), 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 Minnesota, to oust such corporation from all business of every kind and character in said State of Minnesota. ('07 c. 269, sec. 7.) [8986.]

Procedure for revocation of license not exclusive (111-85, 126 + 527).

Sec. 10481. 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 by law. (L. 1907, ch. 269, sec. 8.) [8987.]

Stat. (Mason, 1927)

Grain

Sec. 5096. Unlawful discrimination in sale, or purchase of grain prohibited.—Any person, firm, copartnership, or corporation engaged in the business of buying grain, either for himself or others, who shall with the intention of creating a monopoly or destroying the business of a competitor, discriminate between different sections, localities, communities, or cities of this State, by purchasing such grain at a higher price or rate in one locality than is paid for grain of same grade and condition by said purchaser in another locality after making due allowance for the difference, if any, in actual cost of transportation from the locality of purchase, to the locality of manufacture, use, or distribution, shall be deemed guilty of unfair discrimination and upon conviction thereof shall be punished by a fine not exceeding \$500.00, or by imprisonment in the county jail not to exceed six months. ('17 c. 377, sec. 1.)

Sec. 5097. Railroad and warehouse commission to enforce provisions of act.—The State railroad and warehouse commission shall enforce the provisions of this act, and in so doing shall have and exercise all the powers heretofore conferred upon them by law. ('17 c. 377, sec. 2.)

Stat. (Mason, 1927) as amended by Stat. (Mason, 1940)

Farm Products

Sec. 6248-1. Terms and phrases.—The following words, terms, and phrases shall, for the purpose of this act, be given the meanings hereinafter subjoined to them. ('27, c. 252, sec. 1.)

Sec. 6248-2. Definitions.—(a) The term "person" means an individual, firm, copartnership, corporation, or association.

(b) The term "farm products" as used in this act shall mean and include butter, milk, cream, butterfat, cheese, and other dairy products, honey, eggs, poultry, and all livestock and products of livestock such as wool, mohair, hides, and meats.

(c) The term "bona fide competitor" means a duly licensed dealer in farm products maintaining a place of business in the same trade territory. (As amended Apr. 24, 1937, c. 420, sec. 1.)

Sec. 6248-3. Discrimination prohibited.—Any person engaged in the business of buying any such farm products for manufacture or sale thereof, who shall discriminate between different sections, localities, communities, cities, or villages, or between persons in the same community, of this State, by purchasing any such farm products at a higher price or rate in one locality or from one person than is paid

for such farm products of the same kind, quality and grade by such person in another section, locality, community, city or village, or than is paid to another person of the same community, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or sale, or who shall fail to deduct full transportation costs from the purchase price paid; or who shall fail to deduct the actual costs of hauling when such products are gathered by wagon or truck; or who shall pay or offer to pay in trade or in exchange for goods, wares, or merchandise a higher price for such farm products than the cash price paid or offered to be paid for such farm products, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful: *Provided, however,* That wherever the transportation costs actually charged for hauling cream shall be two cents or more per pound for butterfat therein contained, and 15 cents per 100 pounds for transportation of whole milk, such charge shall be deemed a compliance with the terms of this act. It shall not be unfair discrimination for any person to pay, in any section, locality, community, city, or village, a price equal to that actually paid on the same day by any bona fide competitor in such place for farm products of the same kind and grade, provided such price is paid in good faith effort to meet such competition, and the burden of proving such facts shall be upon the defendant.* (As amended Apr. 24, 1937, c. 420, sec. 2.)

Sec. 6248-4. Prima facie evidence of discrimination.—Proof that any person has paid a higher price for any such farm products in one section, locality, community, village, or city than in another, after due allowance for the cost of transportation has been made, shall be upon the defendant.* (As amended Apr. 24, 1937, c. 420, sec. 4.)

Sec. 6248-5. Enforcement of law by commissioner, etc.—The commissioner of agriculture, his deputy, assistants, inspectors, agents, and employees shall enforce the provisions of this act and in so doing shall have all the powers conferred upon them and each of them by the provisions of chapter 21A, General Statutes, 1923, and all other laws heretofore enacted. (27, c. 252, sec. 5.)

Sec. 6248-6. Complaints—Investigations—Prosecutions—Forfeiture of corporate charters—Injunctions.—If complaint shall be

*The requirement in sec. 6248-3 that the "actual cost of hauling * * * by wagon or truck" be deducted from the purchase price of farm products is vague and uncertain and therefore violates due process of law. Actual cost has no common-law significance and the statute, without specification of the items such as repairs, depreciation, and wages of drivers, which are to be computed in determining cost, is too indefinite to be enforced. *State v. Northwest Poultry & Egg Co.*, 203 Minn. 438, 281 N. W. 753 (Minn. 1938).

made to the commissioner of agriculture that any person is guilty of unfair discrimination defined by this act, he shall investigate such complaint and the commissioner of agriculture may also upon his own initiative investigate whether or not this statute has been violated, and in either event for that purpose he may subpoena witnesses, administer oaths, take testimony, and if in his opinion sufficient ground exists therefor he may prosecute an action in the name of the State, in the proper court, to annul the act of incorporation or the existence of a corporation engaged in such business practice. If any corporation is adjudged by any court guilty of unfair discrimination as defined by this act such court may vacate the charter or revoke the authority of such corporation to do business in this State and may permanently enjoin it from transacting business in this State. (27, c. 252, sec. 6.)

Sec. 6248-7. Violations of law—Penalty.—Any person violating the provisions of section 3 of this act shall, upon conviction thereof, be fined not less than \$50 for each offense, or, in default of the payment of such fine, by imprisonment in the county jail for not less than three months nor more than one year. (27, c. 252, sec. 7.)

Sec. 6248-8. Prosecutions instituted by persons other than commissioner.—The authority hereby extended to the commissioner of agriculture shall be considered as duties only and shall not be construed to preclude any prosecuting officer or any party interested from instituting proceedings, civil or criminal, for the enforcement of any of the provisions of this act. (27, c. 252, sec. 8.)

Sec. 6248-9. Construction of act.—Nothing in this act shall be construed as repealing any other act or part of any other act, unless inconsistent herewith, but the remedies herein provided shall be cumulative to all other remedies provided by law. If any section, subdivision, sentence, or clause in this act shall, for any reason, be held to be unconstitutional or void, such judgment shall not affect the validity of any other portion of this act. (As amended Apr. 24, 1937, c. 420, sec. 3.)

Stat. (Mason, 1927)

Milk, Cheese, Butter

Sec. 3907. Discrimination.¹—Any person, firm, copartnership, or corporation engaged in the business of buying milk, cream, or butterfat for manufacture or for sale of such milk, cream, or butterfat, who

¹Section 3907 is unconstitutional. *Fairmont Creamery Co. v. State of Minnesota*, 274 U. S. 1, 47 Sup. Ct. 506, 71 L. Ed. 833 (1927) rev'g. 168 Minn. 378, 210 N. W. 163 (1926), 162 Minn. 146, 202 N. W. 714 (1925). The court held that since the prohibition of the statute applies irrespective of results or intent, it

shall discriminate between different sections, localities, communities, or cities of this State, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, copartnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream, or butterfat, shall be deemed guilty of unfair discrimination, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for not exceeding 90 days. ('21, c. 305, sec. 1, amended '23, c. 120, sec. 1.)⁸

Sec. 3908. Higher price.—Proof that any person, firm, copartnership, or corporation has paid a higher price for milk or cream in one locality than in another, after due allowance for the cost of transportation has been made, shall be prima facie evidence of the violation of this act. ('21, c. 305, sec. 2.)⁸

Sec. 3909. Dairy commissioner to enforce provisions.—The state dairy and food commissioner, his assistant, inspectors, agents and employees shall enforce the provisions of this act, and in so doing shall have all the powers conferred upon them, and each of them, by the provisions of chapter 21, Revised Laws of 1905. ('21, c. 305, sec. 3.)⁸

EXPLANATORY NOTE: Ch. 21, R. L. 1905, mentioned above, is set forth in this chapter in its amended form.

Sec. 3910. Repeal.—The following laws are hereby expressly repealed, to wit:

Chapter 468 of the General Laws of 1909.

Chapter 230 of the General Laws of 1913.

Chapter 337 of the General Laws of 1917.

Provided, however, That the express or implied repeal by the provisions of this act of any law not in force shall not affect any action or proceeding now pending in any court. ('21, c. 305, sec. 4.)

impairs normal freedom of contract and has no relation to the prevention of monopoly or of restraints upon competition.

Section 3907 prior to the amendment of 1923 required an intent to suppress competition as an element of violation and in that form was held constitutional. The court stated that circumstances in the dairy industry might reasonably be taken to justify singling it out for regulation. *State v. Bridgeman & Russell Co.*, 117 Minn. 186, 134 N. W. 496 (1912).

Since section 3907 forbids discrimination by buying at a higher rate, an indictment properly lies in the county where the higher price was paid. *State v. Fairmont Creamery Co.*, 162 Minn. 146, 202 N. W. 714 (1925).

⁸ Secs. 3907, 3908, and 3909, declared unconstitutional, are identical with secs. 10482, 10483, and 10484. See *Fairmont Creamery Co. v. State of Minnesota*, *supra*.

Stat. (Mason, 1927)

Hog Cholera Serum

Sec. 5453. Must not discriminate.—Manufacturers and dealers shall sell hog cholera serum and virus to all permit holders without discrimination as to price or otherwise subject to the rules and regulations of the board. (23, c. 112, sec. 22.)

Sec. 5454. Violations and penalties.—It shall be unlawful for any person authorized under this act to manufacture, sell or distribute serum or virulent blood or virus, to grant any rebate, either directly or indirectly, to any person or to sell said products at any other than a uniform price to all persons, and any person violating the provisions of this section shall forfeit his license to manufacture or sell such products and the same shall not be renewed for a period of one year. (23, c. 112, sec. 23.)

MISSISSIPPI

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code Ann. (Supp., 1938)

Section 478.1. Certain sales contracts declared lawful.—*Be it enacted by the legislature of the State of Mississippi,* That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Mississippi by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Sec. 478.2. Sales below contract price prohibited.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any prior existing contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale, or selling is or is not a

party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 478.3. Exception.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 478.4. Definitions.—The following terms, as used in this act, are hereby defined as follows:

“Producer” means grower, baker, maker, manufacturer, or publisher.

“Commodity” means any subject of commerce.

Sec. 478.5. Constitutionality.—If any provisions of this act are declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. (1938, ch. 48.)

Sec. 478.6. Short title.—This act may be known and cited as “Fair Trade Act.” (1938, ch. 348.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Code Ann. (1930)

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 shall 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.)¹

2. Special Prohibitory Laws

Code Ann. (1930)

Dairies and Creameries

Sec. 4291. Unfair discrimination—Penalty.—(a) Any person doing business in the State of Mississippi and engaged in the production, manufacture, sale, or distribution of any dairy products, that shall, for the purpose of destroying the business of a competitor, in any locality, or creating a monopoly, discriminate between different sections, localities, communities, cities or towns of the State, by selling such commodity at a lower rate or price in one section, locality, community, city, or town, than such commodity is sold by such person in any other 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 the transportation from the point of production or purchase, if a raw product, to the place of sale, storage or distribution, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful; *Provided, however,* That prices made to meet competition in such section, locality, community, city, or town shall not be in violation of this section.

(b) Any person doing business in the State of Mississippi, and engaged in the business of purchasing for manufacture, storage, sale or distribution, any dairy product, that shall for the purpose of destroying the business of a competitor or creating a monopoly, discriminate between different sections, localities, communities, cities

¹ See LVH MARKETING LAWS SURVEY vol.: *State Antitrust Laws: General Antitrust Laws.*

or towns in the State, by purchasing such commodity at a higher rate or price in one section, locality, community, city, or town, than is paid for such commodity by such person in any other 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 distribution or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such locality, section, community, city, or town shall not be a violation hereof.

(c) Any person convicted of a violation of this section, shall be fined not less than \$500.00 nor more than \$5,000.00 or be imprisoned in jail not more than twelve months, or both. (1928, ch. 296.)

Cotton Ginners

Sec. 4812. Certain combinations of cotton ginners in restraint of trade prohibited.—It shall be unlawful for chain operators of cotton gins, operating gins in two or more places within the State of Mississippi, to discriminate in prices paid for cottonseed or in the prices charged for ginning services; the necessary operating expenses, freight rates, and other proper elements affecting prices being considered, and the effect of which would be to destroy or attempt to destroy competition at either or any of said places in which said gins shall be operated: *Provided, however,* That a reduction in the charge for the service herein mentioned made in any locality for the purpose of meeting legitimate competition, or a higher price paid for seed in any locality, when such higher price paid for seed is paid in meeting legitimate competition, shall not constitute a violation of this chapter. And it shall be sufficient to make out a prima facie case of a violation to show a lower charge for the service herein mentioned in one locality than another, or to show a higher price paid for said seed in one locality than another, differences of freight and other necessary expenses of operating business considered. (1928, ch. 305.)

Sec. 4813. Penalties.—On conviction of violating next preceding section such operator of chain gins shall be fined in the sum of \$100.00 per bale for the first five bales, and \$10.00 for each successive bale ginned a day in pursuance of such discriminatory practices; or the said penalty may be recovered by appropriate proceedings in the name of the State, instituted by the attorney general or any district attorney, with the consent of the attorney general, in either the chancery or the circuit courts of the State, and relief may be granted

by injunction in the name of the State, as in case of violation of other antitrust legislation of the State, and each day's operations shall constitute a separate offense. (Id.)

Sec. 4814. Liquidated damages.—Any person, natural or artificial, being injured or damaged by a violation of the provisions of second preceding section, whether said damages be direct or indirect, may recover as liquidated damages in any appropriate action or suit in the circuit or chancery courts, the sum of \$100.00 per bale for the first five bales, and the sum of \$10.00 for each successive bale thereafter ginned a day by the unlawful combination in competition with the plaintiff and any person, natural or artificial, being injured by said unlawful combination, may have the relief of injunction in any appropriate proceeding in addition to the recovery of said damages, and each day's operations shall constitute a separate offense. (Id.)²

² See *MARKETING LAWS SURVEY* vol. *State Antitrust Laws; Special Antitrust Laws, Special Industry Antitrust Acts.*

MISSOURI

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

No provisions.¹

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Stat. Ann. (1932), c. 47

Sec. 8717. Unfair discrimination.—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

¹ A manufacturer offered rebates to a dealer on a purchase price of plaintiff's trade-marked spool cotton if defendant sold a given quantity of this article in 6 months and strictly maintained the trade price established by the manufacturer. In a common-law action by the plaintiff for the price of goods sold, defendant counter-claimed for a rebate alleged to have been due to him under this agreement. In answer to plaintiff's allegation that the defendant had not maintained the trade price established, the defendant stated that the commodities sold at lower prices had been purchased, not from plaintiff but from other dealers. The court gave judgment to the plaintiff. In a dictum it was stated that the defendant was bound by the prices fixed, even as to the commodities purchased from other dealers. The court further stated that there was "no force" in the contention that the contract was void as in restraint of trade. *Clark v. Frank*, 17 Mo. App. 602 (1885).

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 article 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.)²

2. Special Prohibitory Laws

Stat. Ann. (1932), c. 47

Dairy Products

Sec. 8725. Deemed guilty of unfair discrimination, when.³—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,

²For procedural and penal provisions, see vol. *State Antitrust Laws: General Antitrust Laws*.

³Where a corporation engaged in the business of purchasing eggs established a 10 percent higher price in one locality than in another locality, these facts were held not to show an intent on the part of the defendant to suppress competition, since the purpose of these different prices was to increase the business of the defendant and was a normal business transaction. *State Ex. Inf. McAlister v. Blattner Bros.*, Mo. 226 S. W. 253 (1920).

The attorney general having found that a corporation had been guilty of a violation of this statute can bring quo warranto proceedings, notwithstanding the fact that the defendant had not been convicted of unlawful discrimination. *Ibid.*

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.)

MONTANA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Rev. Codes Ann. (Anderson and McFarland, Supp. 1939)

Section 4292.1. Definitions.—The following terms, as used in this act, are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization

Sec. 4292.2. Contracts relating to purchase and sale of commodities.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Montana by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

¹ A lease of a gasoline station upon agreement that the lessee would purchase gasoline from the lessor and sell it at the prices charged by the lessor in its other gasoline stations is not invalid under the antitrust law (Rev. Code, sec. 10001). The court stated that the object of the contract was not to suppress competition but to lease the station and that the price provision was merely incidental thereto. *Quintiva v. Brown Oil Co.*, 96 Mont. 147, 29 Pac. (2d) 374 (1934).

(c) That the seller will not sell such commodity:

1. To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will, in turn, agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

2. To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 4292.3. Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 6 of this act shall be available.

Sec. 4292.4. Only owners of trade marks to establish resale prices.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 4292.5. Closing out sales, etc.—No contract containing any of the provisions enumerated in section 4292.2 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court.

Sec. 4292.6. Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the stipulated price in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 4292.7. Contracts not affected.—This act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices.

B. PROHIBITION OF SALES BELOW COST

Rev. Codes Ann. (Anderson and McFarland, Supp. 1939)

Unfair Practices Act¹

Sec. 3946.3. Sales at less than cost.—It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale, or advertise for sale any article or product, or service or out-

¹ CONSTITUTIONALITY.—The Unfair Practices Act is constitutional as a valid exercise of the police power of the State, the statute being related to the protection of the public welfare in that it attempts to prevent destructive competition and the means employed are adapted to accomplish the purpose. *Associated Merchants of Montana v. Ormesher*, 107 Mont. 530, 86 Pac. (2d) 1031 (1939). In answer to the contention that the terms of the statute were vague, indefinite and arbitrary, the court laid down the following interpretations:

1. The provision making cost surveys admissible as evidence is valid. It does not prescribe the weight to be given to them but merely makes them competent evidence.

2. "Cost of doing business" means what businessmen generally mean, the approximate cost arrived at by a reasonable rule.

All sales below cost, regardless of whether they are made to individuals or to the State, when made to destroy competition, are unlawful, and the State is not exempt from the operations of the Laws of 1937, c. 80; Rev. Codes Ann. (Anderson and McFarland, supp., 1935), secs. 3946.3 et seq., *supra*. The Unfair Practices Act does not amend sec. 233.3, Code 1935, requiring the State to award contracts to the lowest bidder, nor does it indicate a legislative intent to exempt sales to the State from such act. *Helena Automobile Dealers Assn. v. Anderson*, 88 Pac. (2d) 371 (1940).

put of a service trade, at less than the cost thereof to such vendor, or give, offer to give, or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor, and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include, without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance, and advertising.

Sec. 3946.4. Forced or bankrupt sales.—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Sec. 3946.5. Proof of intent—Cost surveys.—In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm, or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act.

Sec. 3946.6. Determining fair prices for agricultural products.—The following method shall be used in determining fair prices for agricultural products sold on local markets, in any trade area, district or city in which the major portion of any agricultural commodity or product is produced within or adjacent to said trade area, city or district.

Whenever 75 percent of producers of any agricultural product or commodity marketing said products or commodities within any trade area, district, or city shall determine what is a fair price based upon competitive and other factors for their product or commodity, it shall be deemed the fair price for such product or commodity under the terms of this act.

Such producers through their regular constituted agents shall file with the Montana trade commission such fair price and request a hearing for the establishment of fair prices to jobbers, wholesalers, retailers, and consumers of said agricultural products or commodities. Any organization representing consumers shall not be denied representation at such a meeting.

After the establishment of such a schedule of fair prices for said agricultural products or commodities, it shall be a violation of this act for any producer, jobber, wholesaler, or retailer to sell or buy any agricultural commodity or product below such price as established by the Montana trade commission and such action shall be deemed a violation of this act and punishable under the terms provided in this act.

Sec. 3946.7. Exceptions.—The provisions of sections 3946.3, 3946.4, 3946.5 shall not apply to any sale made:

(a) In closing out in good faith, the owner's stock or any part thereof, for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm, or corporation who performs work upon, renovates, alters, or improves any personal property belonging to another person, firm, or corporation shall be construed to be a vendor within the meaning of this act.

Section 3946.8 Rebates.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the

form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 3946.12 of this act. *Provided, however,* That nothing in this act shall prevent a cooperative association, organized and operating on a true cooperative basis, from returning to the members, producers, or consumers the whole or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the association.

Sec. 3946.2. Directors, officers, and agents.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he acts.

In the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts.

Sec. 3946.9. Forfeiture of charter.—Upon the third violation of any of the provisions of sections 3946.1 to 3946.8, inclusive, of this act by any corporation, it shall be the duty of the attorney general 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 to permanently enjoin it from transacting business in this State. If in such action the court shall find that such corporation is violating or has violated any of the provisions of sections 3946.1 to 3946.8, inclusive, of this act, it must enjoin said corporation from doing business in this state permanently or for such time as the court shall order, or must annul the charter, or revoke the franchise of such corporation.

Sec. 3946.10. Illegal contracts.—Any contract, express or implied, made by any person, firm, or corporation in violation of any of the provisions of sections 3946.1 to 3946.8, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 3946.11. Action to enjoin.—Any person, firm, private corporation, or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 3946.1 to 3946.8, inclusive, of this act and, if injured thereby, for the recovery of damages. If, in such action, the

court shall find that the defendant is violating or has violated any of the provisions of sections 3946.1 to 3946.8, inclusive, of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Any defendant in an action brought under the provisions of this section may be required to testify under the provisions of the code of civil procedure of this State, in addition the books and records of any such defendant may be brought into court and introduced, by reference, into evidence: *Provided, however,* That no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of sections 3946.1 to 3946.8, inclusive, and 3946.12 of this act.

Sec. 3946.12. Violation misdemeanors.—Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of sections 3946.1 to 3946.8, inclusive, of this act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Sec. 3946.13. Administration.—The Montana Trade Commission shall have the administration of this act; and the members thereof shall not receive any additional compensation for their services other than their salaries prescribed by law.

Said commission is empowered and directed to prevent any person, firm, or corporation from violating any of the provisions of this chapter.

Whenever the commission shall have reason to believe that any such person, firm, or corporation has been or is engaging in any course of conduct or doing any act or acts in violation of the provisions of this chapter and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, firm or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed not less than five days after the service of said complaint. Any such complaint may be amended by the Commission in its discretion at any time five days prior to the issuance of an order based thereon. The person, firm, or corporation so complained of

shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, firm, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, firm, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the act or conduct in question is prohibited by this chapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, firm, or corporation an order requiring such person, firm, or corporation to cease and desist from such acts or conduct. Until a transcript of the record in such hearing shall have been filed in a district court, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Any person, firm, or corporation required by an order of the commission to cease and desist from any such act or conduct may obtain a review of such order in any district court of the State of Montana within any district where the act or conduct in question was done or carried on, or where such person, firm, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission as to the facts, if supported by sufficient evidence, shall be conclusive. To the extent that the order of the commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such

order of the commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by sufficient evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon appeal as in other cases of judgments of such courts: *Provided, however,* That said appeal shall be taken within thirty days from the date of the entry of such judgment or decree.

Such proceedings in the district court shall be given precedence over other civil cases pending therein, and shall be in every way expedited. Complaints, orders, and other processes of the commission under this section may be served by any one duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business or [of] such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office, or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

An order of the commission to cease and desist shall become final (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; (2) upon the expiration of the time allowed for filing a notice of appeal to the supreme court, if the order of the commission has been affirmed, or the petition for review dismissed by the district court and no notice of appeal to the supreme court has been duly filed, or (3) upon the expiration of thirty days from the date of issuance of

the remittitur of the supreme court, if such court directs that the order of the commission be affirmed or the petition for review dismissed.

If the supreme court directs that the order of the commission be modified or set aside, the order of the commission rendered in accordance with the mandate of the supreme court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission shall become final when so corrected.

If the order of the commission is modified or set aside by the district court and if (1) the time allowed for filing a notice of appeal to the supreme court has expired and no such notice of appeal has been duly filed or (2) the decision of the district court has been affirmed by the supreme court, then the order of the commission rendered in accordance with the mandate of the district court shall become final on the expiration of thirty days from the time such order of the commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission shall become final when so corrected.

If the supreme court orders a rehearing; or if the case is remanded by the district court to the commission for a rehearing, and if (1) the time for filing a notice of appeal to the supreme court has expired and no such notice of appeal has been duly filed, or (2) the decision of the court has been affirmed by the supreme court, then the order of the commission rendered upon such rehearing shall become final in the same manner as though no prior order of the commission had been rendered.

Any person, firm, or corporation who violates an order of the commission to cease and desist after it has become final, and while such order is in effect shall forfeit and pay to the State of Montana a penalty of not more than one thousand dollars (\$1,000.00) for each violation, which shall accrue to the State of Montana and may be recovered in a civil action brought by the State of Montana.

The remedies and method of enforcement of this chapter provided for in this section shall be deemed concurrent and in addition to the other remedies provided in this chapter. (Amended by ch. 50, Laws of 1939, approved Feb. 22, 1939, effective July 1, 1939.)

Sec. 3946.14. The Montana Trade Commission is hereby empowered and directed whenever application therefor shall have been made by ten or more persons, firm or corporations within any particular

retail trade or business to establish the cost survey provided for in section 3946.5. When petition for such cost survey has been so presented to the commission, the commission shall, as soon as possible, fix a time for a public hearing upon the question of whether such cost survey should be established. Such hearing shall be held at the office of said commission and upon such notice as the commission may by rule require: *Provided, however,* That notice of such hearing shall be published for at least two successive weeks in such daily newspaper or newspapers as the commission may designate as most commonly circulated in the counties to be affected by such cost survey. Said notice shall further state the locality or area in respect to which said cost survey is proposed to be established and the particular retail trade or business to be affected thereby.

At the time fixed in said notice any person, firm or corporation shall be entitled to appear and be heard by the commission upon all questions to be determined by it as provided in this section. If the commission shall determine that a cost survey shall be established, it shall at the same hearing proceed to classify and define the particular retail trade or business, or parts thereof, to be affected thereby, determine and delimit the particular area within which such retail trade or business shall be so affected, and find and determine the probable "cost of doing business" or "overhead expense," stated in percentage or percentages of invoice or replacement cost which would probably be incurred by the most efficient person, firm or corporation within such retail trade or business within such area.

The percentage or percentages so fixed and determined shall be presumed to be the actual "cost of doing business" and "overhead expense" of any person, firm, or corporation in such retail trade or business and within the area affected by such cost survey. (Added by ch. 50, Laws of 1939, approved Feb. 22, 1939, effective July 1, 1939.)

Sec. 3946.15. The Montana Trade Commission for the purpose of conducting hearings and investigations which, in the opinion of the commission, are necessary and proper for the exercise of the powers vested in it by this chapter shall have the following powers:

The commission, or its duly authorized agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the commission shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the commission, or before its

duly authorized agent conducting the investigation. Any member of the commission or any agent, duly authorized by the commission for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place within the State of Montana at any designated place of hearing.

In any case of contumacy or refusal to obey a subpoena issued to any person, any district court of the State of Montana, within any district where the inquiry is carried on or where a person guilty of contumacy or refusal to obey is found, or resides, or transacts business, upon application by the commission shall have jurisdiction to issue to such person, an order requiring such person to appear before the commission, or its duly authorized agent, and there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. (Added by ch. 50, Laws of 1939, approved Feb. 22, 1939, effective July 1, 1939.)

Sec. 3946.16. It shall be unlawful for any person, partnership, firm, corporation, joint stock company or other association, as defined in section 3946.3, to change, alter, substitute, or falsify any invoice where such practice tends to injure a competitor or to destroy competition or to mislead any court or commission. Said practice is unfair trade practice and any person, firm, partnership, corporation or association resorting to such trade practice shall be guilty of a misdemeanor and, on conviction, shall be subject to the penalties provided in section 3946.12. (Added by ch. 50, Laws of 1939, approved Feb. 22, 1939, effective July 1, 1939.)

Sec. 3946.17. Constitutionality.—If any section, 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. The legislature hereby declares that it would have passed this act, and each section, sentence, clause, or phrase thereof, irre-

spective of the fact that any one or more other sections, sentences, clauses, or phrases be declared unconstitutional.

Sec. 3946.18. Purpose.—The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

Sec. 3946.19. Short title.—This act shall be known and designated as the "Unfair Practices Act."

Sec. 3946.20 Urgency.—This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health, and safety, and shall therefore go into immediate effect. The facts constituting the necessity are as follows:

The sale at less than cost of goods obtained at forced, bankrupted, close-out, and other sales outside of the ordinary channels or [of] trade is destroying healthy competition. If such practices are not immediately stopped, many more businesses will be forced into bankruptcy. In order to prevent such occurrences, it is necessary that this Act go into effect immediately.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Rev. Codes Ann. (Anderson & McFarland, 1935)

Sec. 10904. Unfair discrimination in purchase price of commodities.—Any person, firm, company, association, or corporation, either domestic or foreign, doing business in the State of Montana, and engaged in the business of buying, selling, producing, manufacturing, or distributing any commodity or product in general use, that shall, for the purpose of creating a monopoly or destroying the business of a regularly established dealer in such commodity or product, or to prevent the competition of any person, firm, company, association, or corporation who in good faith intends or attempts to become such dealer, shall discriminate between different persons, sections, communities, or portion thereof, or parts of the State of Montana, by purchasing any commodity or product in general use at a higher rate or price in one section, city, or community, or any portion thereof, than such person, firm, company, association, or corporation pays for such commodity or product in another section, city, or community, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point

of manufacture, sale, storage, or distribution, and for the difference in the grade and quality of such commodity, or product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful.

Proof that any person, firm, company, association, or corporation has paid a higher rate or price for any such commodity or product in one section, city, or community, or any portion thereof, than such person, firm, company, association, or corporation paid for such commodity or product in another section, city, or community, or portion thereof, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution, and for the difference in the grade and quality of such commodity, or product, shall be prima facie evidence of the violation of this act: *Provided, however,* That the payment of such higher rate or price in one section, city, or community, or any portion thereof, than each person, firm, company, association, or corporation pays for such commodity or product in another section, city, or community, after making such allowance as above provided, shall not be deemed to be unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such section, city, or community, but the burden of proof of such fact shall be upon the person, firm, company, association, or corporation charged with unfair discrimination.

History: En. sec. 1, ch. 8, L. 1913; amd. sec. 1, ch. 80, L. 1917; re-en. sec. 10904, R. C. M. 1921; amd. sec. 1, ch. 131, L. 1925.

Sec. 10905. Prosecution by attorney general.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall 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 shall 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.

History: En, sec. 2, ch. 8, L. 1913; amd. sec. 2, ch. 80, L. 1917; re-en. sec. 10905, R. C. M. 1921.

Sec. 10906. Penalty for violation of law.—Any person, firm, or corporation violating the provisions of section 10904 of this code,

whether as principal or agent, shall, upon conviction thereof, be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

History: En. sec. 3, ch. 8, L. 1913; amd. sec. 3, ch. 80, L. 1917; re-en. sec. 10906, R. C. M. 1921.

Sec. 10907. Act is 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.

History: En. sec. 4, ch. 80, L. 1917; re-en. sec. 10907, R. C. M. 1921.

Sec. 10908. What constitutes unfair competition or discrimination in sale of commodities.—Any person, firm, or corporation, foreign or domestic, doing business in the State of Montana, and engaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regularly established dealer in such commodity, or to prevent the competition of any person, firm, or corporation who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or parts of this State, by selling such commodity at a lower rate or price in one section, city, or community, 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.

History: En. sec. 1, ch. 7, L. 1913; re-en. sec. 10908, R. C. M. 1921.

Sec. 10909. Prosecutions by attorney general.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall 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 shall 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.

History: En. sec. 2, ch. 7, L. 1913; re-en. sec. 10909, R. C. M. 1921.

Sec. 10910. Penalty for violation of law.—Any person, firm, or corporation violating the provisions of section 10908 of this code,

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whether as principal or agent, shall, upon conviction thereof, be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

History: En. sec. 3, ch. 7, L. 1913; re-en. sec. 10910, R. C. M. 1921.

Sec. 10911. Act is 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.

History: En. sec. 4, ch. 7, L. 1913; re-en. sec. 10911, R. C. M. 1921.

Rev. Codes Ann. (Anderson and McFarland Supp., 1939)

Unfair Practices Act

Sec 3946.1 Unlawful practices.—It shall be unlawful for any person, firm, or corporation, doing business in the State of Montana and engaged in the production, manufacture, distribution, or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities, or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community, or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether

the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.*

2. Special Prohibitory Laws

Rev. Codes Ann. (Anderson and McFarland, 1935)

Petroleum Products

Sec. 4193. 1. Discrimination in price petroleum products, penalty for—Defenses—Vendor to prove justification of price.—Any person, firm, company, association, or corporation, either domestic or foreign, doing business in the State of Montana, and engaged in the selling of any standard petroleum product, that shall demand or collect from any person or customer a higher price for any standard petroleum product in one part of the State of Montana than the price being demanded or collected at substantially the same time by such person, firm, company, association, or corporation, from other persons or customers in another part of the State of Montana or in the nearest adjoining State for a like article of standard petroleum product shall be guilty of discrimination which is hereby declared to be a fraud, and the agents or officers of such person, firm, company, association, or corporation participating, guilty of a misdemeanor, provided, however, in the trial of an action under the provisions of this act, in the determination of the justification of the price demanded or collected by a person, firm, company, association, or corporation, charged with a violation of the provisions of this act, transportation, quantity of sales, emergencies, cost of doing business, or similar differences under the respective conditions may be offered as a matter of defense or justification for the differences in price demanded or collected. When competent evidence is offered, in the trial of any action under this act, of a demand for or the receipt of a higher price for any standard petroleum product in the State of Montana by any person, firm, company, association, or corporation, than such person, firm, company, association, or corporation demanded, collected, or received at substantially the same time for the same or a similar article of standard petroleum product in another part of the State of Montana or in the nearest adjoining State, the burden of proof shall then be upon such person, firm, company, association, or corporation, or agents or officers, on trial to prove that the difference in the price demanded or collected was justified.

History: En. sec. 1, ch. 111, L. 1935.

* For procedural and penalty provisions see *Prohibition of Sales Below Cost*, *supra*.

Sec. 4193.2. "Standard petroleum product" defined.—The term "Standard Petroleum Product" as used herein refers to and includes gasoline, fuel oil, distillates, greases, and lubricating oils.*

History: En. sec. 2, ch. 111, L. 1935.

Sec. 4193.3. Purpose of act—Construction.—This act is intended to compel persons, firms, companies, associations, and corporations doing business in the State of Montana, and engaged in the selling of and dealing in standard petroleum products, to treat all customers in one part of the State of Montana on an equal with all customers in other parts of the State of Montana or in the nearest adjoining State, and to promote the uniform application of the law of the State of Montana providing a tax on all gasoline used by motor vehicles when traveling over the public highways, and this act shall be liberally construed to accomplish those purposes.

History: En. sec. 3, ch. 111, L. 1935.

Sec. 4193.4. Investigation of complaints—Revocation of license for violations.—If complaint shall be made to the attorney general that any person, firm, company, association, or corporation is guilty of discrimination as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall 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 shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit or license of such person, firm, company, association, or corporations as the case may be, and to permanently enjoin such person, firm, company, association or corporation from doing business in this State, and, if, in such action, the court shall find that such person, firm, company, association or corporation is guilty of discrimination as defined by this act, such court shall annul the charter or revoke the permit or license of such person, firm, company, association or corporation, and may permanently enjoin it or them from transacting business in this State.

History: En. sec. 4, ch. 111, L. 1935.

Sec. 4193.5. County attorney to prosecute reported violations or explain failure.—If any person shall present to the county attorney of any county in the State of Montana, in which county such discriminatory acts of any person, firm, company, association, or corporation shall have been committed, a sworn written statement of the price paid, the date and the parties selling and buying, and reasonably reliable information of the price demanded or collected by such person, firm, company, association, or corporation, for a corresponding or similar article of standard petroleum product sold or

offered for sale in another part of the State of Montana or in the nearest adjoining State by such person, firm, company, association, or corporation, then it shall be the duty of such county attorney to promptly investigate and either commence and prosecute an action or furnish the informant with a written statement of his reasons for not commencing and prosecuting an action under this act.

History: En. sec. 4-A, ch. 111, L. 1935.

Sec. 4193.6. Penalty for violations.—Any person, firm, company, association, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punishable by a fine of not exceeding five hundred dollars (\$500.00).

History: En. sec. 5, ch. 111, L. 1935.

Sec. 4193.7. Liability of violators for civil and exemplary damages.—In addition to the penalty above prescribed, any customer of such person, firm, company, association, or corporation may bring a civil action in any county in which such offending person, firm, company, association or corporation may be doing business, and recover therein not only actual damages for violations of this act, but also exemplary damages for such reasonable sum as the jury may deem proper punishment for the unlawful practice of discrimination as herein defined.

History: En. sec. 6, ch. 111, L. 1935.

Rev. Codes Ann. (Anderson and McFarland, 1935)

Petroleum Dealers

Sec. 3913.22. Revocation of license of petroleum dealers for unreasonable or discriminatory prices—Procedure.—The public service commission of the State of Montana is hereby vested with authority to revoke the license to engage in the business of selling gasoline and other petroleum products within the State of Montana, issued by such commission to any person, firm, partnership, association, or corporation, where such person, firm, partnership, association, or corporation is by such commission found guilty of charging an exorbitant or unreasonable price for gasoline sold within the State to residents of the State, or of discriminating between individuals or localities within the State in the prices charged for gasoline, or of discriminating between citizens of this State and citizens of adjoining States, to the disadvantage of the former, in the prices charged for gasoline. Anybody aggrieved by the action of such person, firm, partnership, association, or corporation in so charging an exorbitant or unreasonable price for gasoline or in so discriminating between individuals or localities or in so discriminating between citizens of this State and citizens of adjoining States

may file written charges with such commission against such person, firm, partnership, association, or corporation, and thereupon the commission shall issue a citation to such person, firm, partnership, association, or corporation to show cause before the commission within twenty days thereafter why his, their, or its license should not be revoked. Such person, firm, partnership, association, or corporation may appear by counsel at the hearing and contest the charge. If the charge be established by a preponderance of the evidence the commission shall make an order revoking the license, otherwise the charge shall be dismissed. Within thirty days after the order of revocation is made such person, firm, partnership, association, or corporation may appeal therefrom to the district court of the county in which the hearing was had. The appeal must be tried in the district court upon the record made before the commission, but it shall not of itself result in staying the order of revocation. Nothing provided in this act is intended to interfere with or regulate commerce between States, the legislature in passing the same being actuated solely by a desire to protect the citizens of Montana against imposition.

History: En. sec. 1, ch. 147, L. 1935.

Sec. 3913.23. Effect of partial invalidity of act—Construction.—If any clause, sentence or provision in this act shall be declared invalid, such invalidity shall not affect any other part or parts of this act. Any provision of this act is not intended to nor shall it be construed as modifying or repealing any of the provisions of sections 2420.1 to 2420.11, inclusive, of these codes (dealing with issuance of licenses).

History: En. sec. 2, ch. 147, L. 1935.

Dairy Products

Sec. 2620.58. Antimonopoly statutes made applicable to producers of dairy products.—The provisions of sections 10904 to 10911, inclusive, relating to monopoly in the purchase or sale of commodities and products in general use, are hereby expressly made applicable to all persons, firms, copartnerships, and corporations engaged in the business of buying milk, cream, or butterfat for the purpose of manufacture, who shall violate any of the provisions of said sections or any of them. All milk, cream, butterfat, butter, cheese, ice cream, and other dairy products are hereby declared to be commodities and products in general use within the meaning of the sections aforesaid.

History: En. sec. 53, ch. 93, L. 1929.

See *General Prohibitory Laws, supra*.

NEBRASKA

REGULATION OF PRICE COMPETITION

A. RESELL PRICE MAINTENANCE

Comp. Stat. (Kyle, Supp. 1939)

Section 59-1101. Definitions.—The following terms, as used in this act, are hereby defined as follows: (A) "Commodity" means any subject of commerce. (B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher. (C) "Wholesaler" means any person selling or distributing a commodity other than a producer or retailer. (D) "Retailer" means any person selling a commodity to consumers for use. (E) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Sec. 59-1102. Acts deemed a violation.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or wholesaler of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Nebraska by reason of any of the following provisions which may be contained in such contract: (A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller. (B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller. (C) That the seller will not sell such commodity: (1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such

other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or (2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 59-1103. Only owners of trade-marks to establish resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or a wholesaler specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 59-1104. Exceptions.—No contract containing any of the provisions enumerated in section 59-1102 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases: (A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer of such commodity, or to the wholesaler from whom the commodity was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price; (B) when the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof; (C) when the goods are defaced, altered, second-hand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity; (D) by any officer acting under an order of court.

Sec. 59-1105. Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 59-1106. Refusal to sell.—Any producer or wholesaler of any commodity or commodities bearing a distinguishing trade-mark, brand, or name, may refuse to sell any such commodity or commodities to any buyer who shall fail or refuse either (A) to execute a contract establishing minimum resale prices on such commodity or commodities or (B) to observe the minimum resale prices established in any such contract entered into by and between such producer or wholesaler and such buyer.

Sec. 59-1107. Contracts not affected.—This act shall not apply to any contract or agreement between or among producers or except as provided in subdivision (C) of section 2 of this act, between or among wholesalers or between or among retailers as to sale or resale prices.

Sec. 59-1108. Severability.—If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 59-1109. Repeal.—All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

Sec. 59-1110. Title.—This act may be known and cited as the "Fair Trade Act."

B. PROHIBITION OF SALES BELOW COST

No statutory provisions.

C. ANTIDISCRIMINATION LEGISLATION

I. General Prohibitory Laws

Comp. Stat. (Kyle, Supp. 1939)

Sec. 59-523. Unlawful discriminations.—Any person, firm, or company, association, or corporation, foreign or domestic, doing business in the State of Nebraska and engaged in the production, manufacture, or distribution of any commodity in general use,¹ that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this State by selling such commodity at lower rate in one section, community, or city, than is charged for said commodity by said party in another section, community, or city, 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 unlawful.

¹The production, sale, and distribution of electricity is within the contemplation of the term "any commodity in general use" and subject to the provisions of the statute. *State v. Interstate Power Co.*, 118 Neb. 756, 226 N. W. 427 (1929).

Where a public utility company by the multiplicity of corporate forms under a single "control" established different rates in different parts of the State, the low rate fixed being inadequate and noncompensatory, a violation of the statute is effected. *State v. Interstate Power Co.*, *supra*.

Proof that any person, firm, company, association, or corporation has been discriminating between different sections, communities, and cities of this State by selling a commodity at a lower rate in one section, community, or city, than is charged for said commodity by said party, in another section, community, or city, after making an 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 material, and from the point of manufacture, if a manufactured product, shall be prima facie evidence that the party so discriminating is guilty of unfair discrimination. Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Nebraska, 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 of a competitor in any locality, discriminate between the different sections, communities, or cities of 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 than is paid for the same kind of product, commodity, or property by said party in another section, community, or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of the transportation from the point where the same is purchased to the market where it is sold, or intended to be sold, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful. Proof that any person, firm, company, association, or corporation has been discriminating between different sections, communities, and cities by buying any product, commodity, or property of any kind, and paying therefor a higher rate or price in one section, community, or city than is paid for the same kind of product, commodity, or property by said party in another section, community, or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point where the same is purchased to the market where same is sold or intended to be sold shall be prima facie evidence that the party so discriminating is guilty of unfair discrimination.

Sec. 59-524. Penalties.—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, violating any of the provisions of the preceding section, shall be deemed guilty of a misdemeanor, and, upon conviction 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 both.

Sec. 59-525. Contracts void.—All contracts or agreements made in violation of any of the provisions of the two next preceding sections shall be void.

Sec. 59-526. Enforcement.—It shall be the duty of the county attorneys, in their counties, and the attorney general to enforce the provisions of this act.

Sec. 59-527. Investigations—Revocation of charter.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this act, he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony, and require the production of books and other documents, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the State of Nebraska 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 article, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this State.

Sec. 59-528. Forfeiture of rights.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, such finding shall cause a forfeiture of all the privileges and rights conferred by the laws of this State upon corporations, and shall bar its right to do business in this State.

Sec. 59-529. Ouster of corporation.—If any corporation, having been found guilty of a violation of any of the provisions of this act, shall continue or attempt to do business in this State, it shall be the duty of the attorney general, by a proper action in the name of the State of Nebraska, to oust such corporation from all business of every kind and character in this State.

Sec. 59-530. Remedies cumulative.—Nothing in this article shall be construed as repealing any other law or part thereof not designated in section 9 of this act, but the remedies herein provided shall be cumulative to all other remedies provided by law not herein expressly repealed.

Comp. Stat. (1929)

Predatory Price Practices

Sec. 59-806. Predatory practices.—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 therefore 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

2. Special Prohibitory Laws

Comp. Stat. (1929)
Milk, Cream, Butterfat

Sec. 59-509. Milk, cream, or butterfat, unfair discrimination in purchase, penalty.—Any person, firm, copartnership, association, or corporation, foreign or domestic, doing business in the State of Nebraska and engaged in the business of buying milk, cream, or butterfat, either through independent agents or by direct shippers for the purpose of manufacture or for the sale of such milk, cream, or butterfat, who shall discriminate between different sections, localities, communities, cities, or villages of this State by purchasing such commodities at a higher price or rate in one locality than is paid for the same commodity by said person, firm, copartnership, association, or corporation in another locality, after making due allowance for the difference, if any, the actual cost of transportation, by train, truck, or other carrier from the locality of such purchase to the locality of manufacture or the locality of the sale of such milk, cream, or butterfat, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful, and, upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding ninety days, or both, for the first offense and for the second and each subsequent offense not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or both: *Provided*, That it shall not be unfair discrimination for any person, firm, copartnership, association, or corporation to pay in any section, locality, community, city, or village of this state, a price equal to that actually paid on the same day by any bona fide competitor in such place, or its trade territory for milk, cream, or butterfat of the same kind and grade, if such price is

² See **MARKETING LAWS SUB. EY** vol. *State Antitrust Laws: General Antitrust Laws*.

paid in a good faith effort to meet such competition, and the burden of proving such facts shall be upon the defendant. (1927, p. 59; 1929, p. 84.)^{*}

Comp. Stat. (Kyle, Supp. 1939)

Milk, Cream, Butterfat

Sec. 59-1001. Unfair methods of competition, defined.—Unfair methods of competition and unfair acts in the buying of milk or cream on the basis of the butterfat contained therein by any person, firm, copartnership, corporation, or association, or agent of either, the effect or tendency of which is to destroy or substantially injure those engaged in the buying of milk, cream, or butterfat and/or the manufacture thereof, or create a monopoly, are hereby declared unlawful. That for the purpose and within the meaning of this act it shall be unlawful for any person, firm, copartnership, corporation, or association, or agent of either: (a) To give or to loan any person, firm, copartnership, corporation, or association any cream can, apparatus, or equipment for a cream station, or in any manner furnish the same to any person, firm, copartnership, corporation, or association for a consideration less than the fair market value thereof. or to furnish any person, firm, copartnership, corporation, or association money or credit with which to buy milk or cream on the basis of the amount of butterfat contained therein: *Provided*, That this act shall not be construed to prevent any person, firm, copartnership, corporation, or association from furnishing cream cans, apparatus, or equipment for a cream station or money or credit with which to buy milk or cream, on the basis of the amount of butterfat contained therein to its agents or employees. (b) To pay a higher price for milk or cream of the same quality which has been shipped by a producer to a cream station or buying station by common carrier or truck than is paid any producer who delivers his milk or cream to the door of such cream station or buying station: *Provided*, It shall not be considered an unfair practice for any person, firm, copartnership, corporation, or association engaged in the manufacture of milk and/or cream to pay a higher price for milk and/or cream of the same grade and quality shipped direct by a producer to place of manufacture. (c) To fail to pay or render in accordance with advertisement, statement broadcasted by radio, or holding out to the shipper or his representative the full price for dairy products purchased; to fail to deduct full transportation costs; to fail to deduct actual costs of hauling when such products are gathered by wagon or truck. (d) To make, cause, or permit to be made, broadcasted

^{*} See MARKETING LAWS SURVEY VOLUME *State Antitrust Laws: Special Antitrust Laws; Special Industry Antitrust Acts.*

by radio, or published any false or untrue statement of or concerning the business policies or methods of a competitor. (e) To pay or offer to pay in trade or in exchange for goods, wares, or merchandise a higher price for milk or cream than the cash price paid or offered to be paid for milk or cream. (f) To furnish free cans or dairy equipment to producers. (1931, p. 72.)

Sec. 59-1002. Same; violation; penalty.—Any person, firm, co-partnership, corporation, or association violating any provisions of this act (C. S. Supp., 1937, 59-1001 to 59-1003) shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00) or be imprisoned in the county jail not exceeding six months. (1931, p. 73.)

Sec. 59-1003. Same; validity clause.—If any section, subdivision, sentence, or clause in this act shall, for any reason, be held unconstitutional or void, such decision shall not affect the validity of any other portion of this act (C. S. Supp. 1937, 59-1001 to 59-1003). (1931, p. 73.)⁴

**Comp. Stat. (Kyle, Supp. 1939)
Motor Vehicle Dealers⁴**

Sec. 60-912. Same; denial or revocation of license, grounds, investigations by administrator.—The administrator [for the department of roads and irrigation] may, upon his own motion, and shall, upon sworn complaint in writing of any person, investigate the actions of any such person licensed as a motor vehicle dealer, used motor vehicle dealer, or motor-vehicle salesman and shall have power to deny any license or revoke any license issued under this act at any time when the dealer or salesman has been found guilty of any of the following: (a) Violation of any of the provisions of the laws of the State of Nebraska or of the United States of America as are now in force, or which may be later enacted, that pertain to fair or unfair trade practices generally. (b) Intentionally publishing advertising which is misleading or inaccurate in any material particular or in any way misrepresents any of the products or services of the business conducted. (c) Violation of or refusal to comply with any legal request or order of the administrator or department.

⁴ See *MARKETING LAWS SURVEY* volume *State Antitrust Laws: Special Antitrust Laws; Special Industry Antitrust Acts*.

⁴ The provisions of the Motor Dealers License Act (Comp. Stat., Kyle, Supp. 1939, secs. 60-901 to 60-919) regulating and licensing the sale of motor vehicles, which prohibit price discriminations made with intent to substantially lessen competition, do not constitute the exercise of arbitrary powers or an interference with the rights of property or personal liberty guaranteed by the State and Federal Constitutions. *Nelson v. Tilley*, 289 N. W. 388 (1939).

(d) Knowingly purchasing, selling, or dealing in stolen motor vehicles. (e) Failure to make or provide to the administrator or department all listings, notices or reports required by either under the laws of the State of Nebraska. (f) Proof of unfitness of licensee. (g) Material misstatement in application for license. (h) Wilfully defrauding any retail buyer, to the buyer's damage or any other person in the conduct of the licensee's business. (i) Wilfully discriminating, either directly or indirectly, in price between different purchasers of a commodity of like grade or quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly or to injure or destroy the business of a competitor. (j) Wilfully discriminating in favor of one purchaser against another purchaser of a motor vehicle by contracting to furnish or furnishing services or facilities or allowing such discounts or rebates in connection with the sale or offering for sale of such motor vehicle so purchased upon terms not accorded to all purchasers on proportionally equal terms. (k) Wilfully and habitually making excessive trade-in allowances on used motor vehicles for the purpose of lessening competition or destroying a competitor's business. (l) Wilful failure to perform any written agreement with any retail buyer. (m) Having made a fraudulent sale, transaction or repossession. (1937, p. 545.)

Sec. 60-913. Same; survey may be made, when.—For the purpose of determining whether or not an applicant for a license or a holder of a license has violated any of the provisions of this law with particular regard to price discrimination and excess allowances on used motor vehicles, the administrator may authorize or at the request of 40% of the licensed motor vehicle dealers in any county or section larger than a county of this State, shall authorize a survey to be made to determine a fair basis for allowances to be made for used cars in purchases thereof or exchanges for other new or used cars. Such survey, if made, shall be amended from time to time as market conditions change and copies of the survey and amendments thereto shall be made available to all licensed dealers and salesmen. Said survey shall serve as a guide and shall in no way be binding upon any licensed dealer or salesman except for the purposes stated hereinbefore in this act. (1937, p. 546.)⁶

⁶ See **MARKETING LAWS SURVEY** volume *State Antitrust Laws: Special Antitrust Laws; Special Industry Antitrust Acts.*

NEVADA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Comp. Laws (Hillyer, Supp., 1938)

Sec. 1470.2L Contracts validated under certain provisions—Provisions enumerated.—SEC. 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment through which such commodity is sold bears, the trade-mark, brand, or name of the producer or distributor of such commodity, and which commodity is in fair and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any laws of the State of Nevada by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor, subject, however, to any and all State sale or excise tax, the amount of which shall be in addition to any price schedule;

(2) That the vendee or purchaser of such commodity require any person, partnership, firm, corporation, joint-stock company, or other association to agree not to resell such commodity at not less than the minimum price stipulated by the original vendor, producer, or agent.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out in good faith the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public;

(2) When the goods are altered, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(3) By any officer acting under an order of court. (L. 1937, c. 48, p. 87, sec. 1.)

Sec. 1470.22. Unfair competition defined.—SEC. 2. Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Id., sec. 2.)

Sec. 1470.23. This act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (Id., sec. 3.)

Sec. 1470.24. Terms of act defined.—SEC. 4. The following terms, as used in this act, are hereby defined as follows:

- (1) "Commodity" means any subject of commerce;
- (2) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher;
- (3) "Retailer" means any person selling a commodity to consumers for use;
- (4) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (Id., sec. 4.)

Sec. 1470.25. What deemed violation.—SEC. 5. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

- (1) The sale or offering for sale of such commodity in combination with any other commodity shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 2 of this act shall be available. (Id., sec. 5.)

Sec. 1470.26. Minimum sale price, how established.—SEC. 6. No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor or agent specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Id., sec. 6.)

Sec. 1470.27. Invalidity of one portion not to affect others.—If any provisions of this act are declared unconstitutional, it is the intent of the legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect. (Id., sec. 7.)

Sec. 1470.28. **Short title.**—This act may be known and cited as the “Fair Trade Act.” (Id., sec. 8.)

Sec. 1470.29. **In effect.**—This act shall be in full force and effect from and after its passage and approval. (Id., sec. 9.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

NEW HAMPSHIRE

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1937, c. 184

Sec. 1. Fair Trade Act.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producers or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract: That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor; that the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not in turn, resell such commodity at less than the minimum price stipulated by such producer or vendee. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

I. In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: *Provided, however,* That such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten days before such stock shall be offered for sale to the public.

II. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

III. By any officer acting under the orders of any court.

Sec. 2. Unfair competition.—Wilfully and knowingly advertising, offering for sale, selling, or disposing of any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of the preceding section, whether the person so advertising, offering for sale, selling, or disposing of is or is not a party to such

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contract, is unfair competition and is actionable at the suit of any person injured thereby.

Sec. 3. Exception.—This act shall not apply to any contract or agreement between producers or between wholesalers, or between retailers as to sale or resale prices.

Sec. 4. Injunction.—Any person, firm, corporation, or incorporated trade association may maintain an action in the superior court to enjoin a continuance of any act or acts in violation of section 2 hereof and if injured thereby for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of said section 2 it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Sec. 5. Act named.—This act may be known and cited as the "Fair Trade Act."

Sec. 6. Take effect.—This act shall take effect upon its passage.

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

NEW JERSEY

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Rev. Stat. (1937), as amended by L. 1938, c. 165

Sec. 56:4-3. Definitions.—As used in this article: “Producer” means grower, baker, maker, manufacturer, or publisher.

“Commodity” means any subject of commerce.

Source L. 1935, c. 58, sec. 4, p. 141.

Sec. 56:4-4. Application of article.—This article shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices.

Source L. 1935, c. 58, sec. 3, p. 141.

Sec. 56:4-5. (1) No contract relating to the sale or resale 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, the trade-mark, brand, or the name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of this State by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

¹The Fair Trade Act is constitutional, the court citing *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936) as authority. *Johnson & Johnson v. Weissbard Bros.*, 121 N. J. Eq. 585, 191 Atl. 873 (1937) rev'g 120 N. J. Eq. 314, 184 Atl. 783 (1936).

PARTIES ESTABLISHING A RESALE PRICE.

In allowing a wholesaler to fix a resale price, it was held that the statute does not require the resale price to be fixed by or on behalf of the owner of the

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(2) Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity;

(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof;

trade-mark. *Schenley Products Co. v. Franklin Stores Co.*, 124 N. J. Eq. 100, 199 Atl. 402 (1938) rev'g 122 N. J. Eq. 69, 192 Atl. 375 (1937).

A "sole exclusive distributor" can establish a resale price. *Houbigant Sales Corp. v. Woods Cut Rate Store*, 123 N. J. Eq. 40, 196 Atl. 683 (1937).

MANNER OF ESTABLISHING A RESELL PRICE.

The statute requires that a resale price must be fixed by and incorporated in a contract. *Houbigant Sales Corp. v. Woods Cut Rate Store*, *supra*. A single valid contract is sufficient to establish a resale price restriction and put the statute in operation. *Revlon Nail Enamel Corp. v. Charmley Drug Store*, 123 N. J. Eq. 301, 197 Atl. 661 (1938). A separate consideration is not necessary to support a resale price restriction incorporated in a contract. *Houbigant Sales Corp. v. Woods Cut Rate Store*, *supra*.

EXCEPTED SALES.

The retailer may remove the mark or brand and sell the merchandise he owns at his own price but he may not utilize the goodwill of another without complying with the statute. *Johnson & Johnson v. Weissbard Bros.*, *supra*. It is no defense that the liquor law forbids the removal of the label, thereby preventing the retailer from avoiding the resale price restriction. *Schenley Products Co. v. Franklin Stores Co.*, *supra*.

INDIRECT PRICE CUTTING.

A department store which allows its employees a 10-percent discount on all merchandise in the store is in violation of the statute when the net price to the employees is less than the price established under a Fair Trade contract. *Bristol-Myers Co. v. Bamberger Co.*, 122 N. J. Eq. 559, 195 Atl. 625 (1937), *aff'd* 124 N. J. Eq. 235, 1 Atl. (2d) 332 (1938).

PARTIES BOUND BY A RESELL PRICE RESTRICTION.

Resale prices established under the Fair Trade Act are binding upon non-contracting retailers only with respect to so much of the maker's products as were acquired by the retailer with notice of the prices so fixed. *Lentheric Inc. v. Weissbard Bros.*, 122 N. J. Eq. 573, 195 Atl. 818 (1937); *Johnson & Johnson v. Weissbard Bros.*, *supra*. See also *Burnstein v. Charlins*, 10 Atl. (2d) 646 (1940).

DEFENSES TO VIOLATION OF FAITH TRADE CONTRACTS.

Plaintiff is required to use due diligence in enforcing resale price restrictions. *Calvert Distilling Co. v. Gold's Drug Stores*, 123 N. J. Eq. 458, 198 Atl. 536 (1938).

Where plaintiff refused to sell to defendant retailer upon the same terms as had been given to other chain stores, an injunction was denied. *Lentheric Inc. v. Weissbard Bros.*, *supra*. But where plaintiff confined the sale of his product to beauty parlors as a business policy and in order to maintain the standard of his product, refused to sell to drug stores, an injunction was granted against the defendant drug store, the court holding that the defendant was not discriminated against. *Revlon Nail Enamel Corp. v. Charmley Drug Store*, *supra*.

Where a manufacturer of a commodity on which a resale price had been established allowed another manufacturer to sell both the price-fixed commodity and another article in a combined package for less than the price established for one commodity, defendant retailer was justified in not complying with the price restriction, the manufacturer having abandoned its price structure. *Magazine Repeating Razor Co. v. Weissbard Bros.*, 125 N. J. Eq. 593, 7 Atl. (2d) 411 (1939).

(c) By any officer acting under orders of any court. (L. 1935, c. 58, sec. 1, p. 140; L. 1938, c. 165, sec. 1, p. 375.)

Sec. 56: 4-6. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 56: 4-5 of this title, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of the producer or distributor of such commodity or at the suit of any retailer selling such commodity at not less than the price stipulated in any contract entered into pursuant to the provisions of section 56: 4-5 of this title. (L. 1935, c. 58, sec. 2, p. 141; L. 1938, c. 165, sec. 2, p. 376.)

Approved May 14, 1938.

Rev. Stat. (1937)

Sec. 56: 4-1. Unfair practices prohibited.²—No merchant, firm, or corporation shall appropriate for his or their own use a name, brand, trade-mark, reputation, or goodwill of any maker in whose product such merchant, firm, or corporation deals, or discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except where such products do not carry any notice prohibiting such practices, and except in the case of a receiver's sale or a sale by a concern going out of business.

Source: 1913, c. 210, sec. 1; p. 377, as am. by L. 1915, c. 376, sec. 1, p. 704; L. 1916, c. 107, sec. 1, p. 235 (1924 Suppl., sec. 225-1).

Sec. 56: 4-2. Injunction; damages.—Any person, firm, or corporation violating any of the provisions of section 56: 4-1 of this title

²The statute is constitutional as a valid exercise of the police power of the State, in order to prevent the misuse of the trade-mark and goodwill of another. The contract between the manufacturer and retailer stated that the resale price fixed by the contract could be disregarded if the retailer removed the trade-mark and notice and sold the commodity without the goodwill of the manufacturer. The court granted an injunction restraining the retailer from selling below the fixed prices, stating that the resale price fixed was not for the article but for the use and protection of the trade-mark and good will of the manufacturer. *Ingersoll & Bro. v. Hahne*, 88 N. J. Eq. 222, 101 Atl. 1030 (1917); 89 N. J. Eq. 332, 108 Atl. 128 (1918).

Where a manufacturer in selling watches to a jobber forbade the jobber from selling the watches at prices less than those specified by the manufacturer, forbade the jobber from selling to retailers designated by the manufacturer as objectionable and prohibited the jobber from granting discounts in sales to retailers, it was held that such notice was too broad under section 56: 4-1, and an injunction against the jobber prohibiting him from selling at less than the fixed prices will be denied. The court stated that the contract would have been invalid at common law as a restriction on a chattel after its sale, and the statute, being strictly construed, did not validate such an extensive arrangement. *Ingersoll v. Goldstein*, 84 N. J. Eq. 445, 93 Atl. 193 (1915).

shall be liable, at the suit of the maker of such branded or trade-marked products, or any other injured person, to an injunction against such practices, and shall be liable in such suit for all damages, directly or indirectly caused, to the maker by such practices, which damages may be trebled in the discretion of the court.

Source: L. 1913, c. 210, sec. 2, p. 377 (1924 Suppl., sec. 225-2).

Rev. Stat. (Supp., 1938)
Alcoholic Beverage Control Act³

Sec. 33: 1-23.1. Commissioner may enforce fair trade contracts for sale of liquor.—The state commissioner of alcoholic beverage control is hereby vested with the following powers to be exercised in such manner as will assist in properly supervising the liquor industry and promoting temperance: The commissioner may, in his discretion, by rule or regulation, prohibit, or regulate the sale of alcoholic beverages within this State in violation of any fair trade contract entered into pursuant to the legislative sanction afforded by Revised Statutes, title 56, chapter 4. (L. 1938, c. 208, sec. 1, p. 492.)

B. PROHIBITION OF SALES BELOW COST

Rev. Stat. (Supp., 1939)
Fair Sales Act⁴

Sec. 56: 4-7. Definitions.—The words and phrases herein shall, unless the content otherwise indicates, have the following meanings:

(a) "Cost to the retailer" shall mean the total consideration necessary for the replacement of the merchandise to the retailer at the retail outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased by the retailer prior to the sale of the said merchandise would have cost per unit if bought at the most favorable market price available to the retailer at any time within thirty (30) days prior to the said sale less any customary trade discounts, but exclusive of discounts for cash, display allowances, and unearned discounts for volume.

³This statute is constitutional as a valid exercise of the police power of the State, as the sale of liquor is not an inherent right in all persons; the legislature has the right to regulate its sale for the protection of the public health, safety and morals. *Gain v. Burnett*, 122 N. J. L. 39, 4 Atl. (2d) 37 (1939).

⁴The statute is unconstitutional and an invalid exercise of the police power of the State. The businesses regulated are not affected with a public interest and in this respect the act is violative of the due process clause. As sales below cost are not pernicious nor fraudulent per se, the statute, requiring neither an intent to nor effect of injuring competition, has no reasonable relation to the protection of the general welfare. *State v. Packard-Bamberger & Co.*, 16 N. J. Misc. 479, 2 Atl. (2d), 509 (1938); aff'd, 123 N. J. L. 180, 8 Atl. (2d) 291 (1939).

(b) "Cost to wholesaler" shall mean the total consideration necessary for the replacement to the wholesaler at the wholesale outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased by the wholesaler prior to the sale of said merchandise would have cost per unit if bought at the most favorable market price available to the wholesaler at any time within sixty (60) days prior to the said sale less any customary trade discounts but exclusive of discounts for cash, display allowances, and unearned discounts for volume.

(c) "Cost to the retailer" and "cost to the wholesaler" must be bona fide costs and sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing market conditions within this State shall not be used as basis for computing costs with respect to sales by retailers and wholesalers.

(d) "Sell at retail" and "sales at retail" shall mean any transfer of title to tangible personal property for a valuable consideration where such property is to be used by the purchaser for purpose other than resale manufacture or further processing. The above terms shall also include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

(e) "Sell at wholesale" and "sales at wholesale" shall mean any transfer of title to tangible personal property for a valuable consideration where such property is to be used by the purchaser for purpose of resale manufacture or further processing. The above terms shall also include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

(f) "Retailer" shall mean and include every person, firm, corporation or association engaged in the business of transferring title within this State to tangible personal property for a valuable consideration where such property is to be used by the purchaser and is not to be resold or used for the purpose of manufacture or further processing.

(g) "Wholesaler" shall mean and include every person, firm, corporation or association engaged in the business of transferring title within this State to tangible personal property for a valuable consideration where such property is to be resold by a retailer.

"Wholesaler" shall also include any person, firm, corporation or association conducting a warehouse connected with or separate and apart from a retail outlet where goods to be sold at said retail outlet are stored prior to transfer to said retail outlet for sale. (L. 1938, c. 394, sec. 1.)

Sec. 56: 4-8. Sales below cost.—It is hereby declared that the advertisement, offer for sale, or sale of any merchandise at less than cost by retailers is prohibited. (Id., sec. 2.)

Sec. 56: 4-9. Mark-up.—It is hereby declared that the advertisement, offer for sale, or sale of any merchandise at less than cost by a wholesaler plus a two per centum (2%) delivery charge is prohibited. (Id., sec. 3.)

Sec. 56: 4-10. Penalty.—Any person, firm, corporation, or association who shall violate any of the provisions of this act shall forfeit and pay a penalty of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00) for each offense to be sued for and recovered by and in the name of "The State of New Jersey." (Id., sec. 4.)

Sec. 56: 4-11. Enforcement.—Every district court in any city or judicial district in any county and every court of common pleas in any county is hereby empowered, upon filing of a complaint in writing, duly verified, which said verification may be made by any resident of the State of New Jersey, upon information and belief, that any person, firm, corporation or association has violated any of the provisions of this act, to issue process at the suit of the State of New Jersey as plaintiff, such process shall be by summons returnable in not less than five or more than fifteen entire days; such process shall state what provision of the law is alleged to have been violated by the defendant or defendants, and on the return of such process or at any time to which the trial shall be adjourned, the said court shall proceed with or without a jury as the defendant may desire, to hear testimony and to determine and give judgment in the matter without the filing of any pleadings for the plaintiff, for the recovery of such penalty with costs, or for the defendant, and the said court shall, if judgment be rendered for the plaintiff, cause any such defendant, who may refuse or neglect to forthwith pay the amount of the judgment rendered against him and all the costs and charges incident thereto, to be committed to the county jail for any period not exceeding one hundred days; that the officers to serve and execute all process under this act shall be the officers authorized to serve and execute process in said court; that said district court or court of common pleas shall have power to adjourn the hearing or trial in any case from time to time.

The clerk of any district court or of any court of common pleas may sign and seal any process required to be issued under this act. Any judgment recovered for a penalty under the provisions of this act in any district court may be docketed in the same manner as judgments in said court are docketed under the provisions of chapter 32

of title 2 of the Revised Statutes. Execution may issue for the collection of any judgment obtained under this act, against the goods and chattels and body of the defendant without any order first obtained for such purpose. (Id., sec. 5.)

Sec. 56:4-12. Penalties remitted to treasurer.—Every penalty recovered for any violation of this act shall be remitted to the Treasurer of the State of New Jersey. (Id., sec. 6.)

Sec. 56:4-13. Injunctive relief.—Nothing herein contained shall prevent the court of chancery from granting an injunction for continued violations of this act. (Id. sec. 7.)

Sec. 56:4-14. Exceptions.—The provisions of this act shall not apply to sales at retail or sales at wholesale, (a) where merchandise is sold in bona fide clearance sales and is advertised, marked, and sold as such, (b) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked, and sold as such, (c) where merchandise is sold upon the final liquidation of any business, (d) where merchandise is sold for charitable purposes, (e) where the price of merchandise is made to meet the legal price of a competitor for merchandise of the same grade, quality, and quantity, and (f) where merchandise is sold by any officer acting under the direction of any court. (Id. sec. 8.)

Sec. 56:4-15. Citation.—This act may be known and cited as the "Fair Sales Act." (Id. sec. 9.)

Sec. 56:4-16. Effect of partial invalidity.—If any section, sentence, or clause of this act shall for any reason be held invalid or unconstitutional, such decision shall not affect the validity of the remaining parts hereof. (Id. sec. 10.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

NEW MEXICO

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Stat. Ann. (Courtright, Supp., 1938)

Sec. 145-107. Contracts relating to the sale of trade-marked articles.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New Mexico by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the vendee or producer shall require that any person to whom delivery of a commodity is made for the purpose of resale shall agree that the latter will not, in turn, resell except at the price stipulated by the vendor or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out in good faith the owners' stock or any part thereof for the purpose of discontinuing [or] delivering any such commodity.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court. (L. '37, ch. 44, sec. 1.)

Sec. 145-108. Unfair competition defined.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 (145-107) of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such

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contract, is unfair competition and is actionable at the suit of any person damaged thereby. (L. '37, ch. 44, sec. 2.)

Sec. 145-109. Contracts between producers or between wholesalers.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (L. '37, ch. 44, sec. 3.)

Sec. 145-110. Terms defined.—The following terms, as used in this act, are hereby defined as follows: "Producer" means grower, maker, baker, manufacturer or publisher. "Commodity" means any subject of commerce. (L. '37, ch. 44, sec. 4.)

Sec. 145-111. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. (L. '37, ch. 44, sec. 5.)

Sec. 145-112. Emergency clause.—That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico that the provisions of this act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect from and after its passage and approval. (L. '37, ch. 44, sec. 6.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Stat. Ann. (Courtright, Supp., 1938)
Motion Pictures

Sec. 35-2910. Filing names and information as to certain films with corporation commission.—Whenever a producer and/or distributor announces a group or series of pictures or annual product to exhibitors, either made or to be made, it shall be filed immediately with the corporation commission and announced directly and simultaneously to all exhibitors in competitive situations. All pictures or productions shall be announced by either name, title, star,

star series, series, or by number and shall be classified in groups as to the price and/or box office value. Each group so classified shall be identified by letters A, B, C, D, etc.; group "A" being the highest priced or best box-office pictures or productions; Group "B" being the next highest priced or next best box-office pictures or productions, and so on, and the number of pictures in each group shall be specified. In the event of any change or changes in the product made, or to be made, making it different from that in the announcement filed with the corporation commission, notice of the nature of such change or changes made or to be made shall be filed with the corporation commission within ten days after such change, or changes are made. After one competitive exhibitor has purchased, rented, or contracted for his proportionate part of a product, it shall be unlawful for the producer and/or distributor to sell or lease the remainder of said product to the other competitive exhibitor or exhibitors, on a different playing arrangement or for a less price, for a period of six months. And all pictures sold or leased by producers and/or distributors shall be by written contract, in which the price paid or to be paid, and playing arrangement for each picture sold or leased shall be stated. Any producer or exhibitor violating any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars (\$1,000.00) and not more than twenty thousand dollars (\$20,000.00). (L. '33, ch. 177, sec. 6.)

Sec. 35-2912. Rebates unlawful—Penalty.—It shall be unlawful for any producer and/or distributor or any other person, either directly or indirectly, to give any secret refund, rebate, or reward of any kind to any competitive exhibitor, or for any competitive exhibitor to receive, either directly or indirectly, any secret refund, rebate, or reward of any character from any producer, distributor, or any other person, or for any producer, distributor, or any other person to sell, lease, license or supply any motion picture or pictures, or permit same to be done to any competitive exhibitor by or through any secret or undisclosed manner, method, contract, combination, or arrangement of any kind, or for any competitive exhibitor to so receive or acquire same in such a manner, or to exhibit any such motion picture or pictures so received or acquired. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, punished by a fine of not less than one thousand dollars (\$1,000.00) nor more than twenty thousand dollars (\$20,000.00) for each offense and by imprisonment at hard labor of not less than one year or more than one year for each offense. Each and every picture furnished, received, or

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exhibited in violation of any of the provisions of this act shall be deemed a separate offense. (L. '33, ch. 177, sec. 8.)

Sec. 35-2918. Civil liability for violations.—Any person, or persons, or corporation, who shall violate any of the provisions of this act, shall be civilly liable in both actual and punitive damages to the person or persons injured, damaged, or discriminated against for any and all damages occasioned thereby, either directly or indirectly, and including all costs and attorney's fees. (L. '33, ch. 177, sec. 14.)

Sec. 35-2927. Construction clause.—Should any action, or function of any section of this act be declared unconstitutional by any court of this State, the same shall not affect the validity of the remaining part thereof, it being expressly declared that such is the intention of the legislature.

NEW YORK

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Unconsolidated Laws (McKinney)

Sec. 2201. Price fixing of certain commodities permitted.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New York by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee. (Subd. 1 amended by L. 1938, c. 14, sec. 1, in effect Feb. 10, 1938. Amendment corrected errors in paragraphs (a) and (b).)

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

Sec. 2202. Unfair competition defined and made actionable.—**SEC. 2.** Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, whether the person so advertising, offering for sale, or selling is or

is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 2203. Exceptions.—SEC. 3. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 2204. Definitions.—SEC. 4. The following terms, as used in this act, are hereby defined as follows: "Producer" means grower, baker, maker, manufacturer, or publisher. "Commodity" means any subject of commerce.

Sec. 2205. Effect of partial invalidity.—SEC. 5. If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. (L. 1935, c. 976, in effect May 17, 1935.)

Judicial Decisions

Application of the Common Law.

A contract whereby a manufacturer of proprietary articles agreed to give a ten percent discount to wholesalers who maintained a stipulated resale price is valid. A manufacturer of patented and trade-marked commodities can exercise such a control after sale in order to protect his goodwill. *John D. Park & Sons. Co. v. National Wholesale Druggists Ass'n*, 175 N. Y. 1, 67 N. E. 136 (1903), aff'g 54 App. Div. 223, 66 N. Y. Supp. 615 (1900).

Application of the Antitrust Law.

A contract made by a single producer with a group of dealers for the maintenance of a price scale on his products and for the enforcement thereof by prohibiting dealers from selling to one who violates the price scale is not invalid under the antitrust law (Gen. Bus. L. sec. 340) and affords no basis for a claim of damages by one claiming to be aggrieved thereby. *Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. Supp. 140 (1935), aff'd 269 N. Y. 621, 200 N. E. 27 (1936); *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91 (1899).

Constitutionality of the Act.

The Fair Trade Act is constitutional as a valid exercise of the police power of the State, following *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936) (see Resale Price Maintenance, Illinois, *supra*). *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937), overruling *Doubleday-Doran & Co. v. R. H. Macy & Co.*, 269 N. Y.

272, 199 N. E. 409 (1936). In the last cited case, the court of appeals stated that while the statutory validation of resale price contracts might be constitutional, the attempt to bind noncontracting dealers under section 2 (sec. 2201) of the act was unconstitutional. In *Coty, Inc., v. Hearn Department Stores*, 158 Misc. 516, 284 N. Y. Supp. 909 (1935), the statute was also held unconstitutional because of the nonsigners' clause. The court stated as objections to the act that no machinery is provided for judicial or administrative review of any of the acts of producers in fixing prices; there is no requirement that the prices fixed be uniform; there is no standard set up which is adjustable to particular conditions in given localities; there is no standard set up to guide noncontracting retailers as to which contract they are to be bound by, the statute permitting the producer to have many forms of contract; there is no standard set up as to the method of fixing prices, the producer being permitted to establish prices which may be exorbitant, arbitrary, and unreasonable; the statute furnishes no standard for its enforcement, it resting in the discretion of the producer to enforce or not to enforce his agreements against any retailer, contracting or noncontracting. The absence of fair standards in the statute and the controlling effect of the whim of a producer over the business of others render the statute unconstitutional as arbitrary, discriminatory, and unreasonable.

Application of the Act.

Commodities Subject to Resale Price Maintenance.

Gasoline, when sold to the public through gas tanks which bear the trade-mark of the producer, is within the scope of the Fair Trade Act. *Schumer v. Essar Gas Stations, Inc.*, 100 N. Y. L. J. 1125 (App. Div. Oct. 13, 1938), 3 CCH 25161. *Broadway Arthur Garage v. Coliseum Motors*, 100 N. Y. L. J. 814 (Sup. Ct. N. Y. County, Sept. 23, 1938); 2 P-H 40480; 3 CCH 25158.

Where a fabric manufacturer contracted to supply a dress manufacturer with a certain trade-marked fabric, the agreement establishing prices at which the dress manufacturer was to sell the finished product, the fabric manufacturer cannot enforce the resale prices fixed against a retailer selling dresses of the same fabric. Inasmuch as only the cloth bore a trade-mark, a finished garment of that fabric is not a "commodity" bearing a trade-mark within the purview of the Fair Trade Act. *Mallinson Fabrics Corp. v. R. H. Macy & Co., Inc.*, 101 N. Y. L. J. 3003 (Sup. Ct. N. Y. County, June 28, 1939), 170 Misc. 875, N. Y. Supp. (2d) 203 (1939), 3 CCH 25284.

Manner of Establishing a Resale Price.

It is not essential that contracts be made with substantially all dealers. It is sufficient if there are agreements made indicating an

intention to resort to the provisions of the act. *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N. Y. Supp. (2d) 320 (1938); *Calvert Distillers Corp. v. Stockman*, 26 Fed. Supp. 73 (D. C. N. Y., 1939).

A retailer's cost and profit chart which is not an advertising circular alone but contains an express notice by the distributor of what the minimum retail prices are, is sufficient. *Calvert Distillers Corp. v. Nack*, 101 N. Y. L. J. 2015 (Sup. Ct. N. Y. County, May 1, 1939).

Types of Resale Price Established.

A wholesale as well as a retail price may be fixed. *Gillette Safety Razor Co. v. Green*, 167 Misc. 251, N. Y. Supp. (2d) 822, aff'd 258 App. Div. 723, 15 N. Y. Supp. (2d) 142 (1938).

The resale price established must be a fixed or stipulated price and not merely a price suggested or recommended by the owner or producer. *Calvert Distillers Corp. v. Nussbaum Liquor Store, supra*; *Calvert Distillers Corp. v. Stockman, supra*.

A contract establishing a resale price and providing for trade-in allowances is sufficiently definite to be enforced. *Schimpf v. R. H. Macy & Co.*, 166 Misc. 654, 2 N. Y. Supp. (2d) 152 (1938), rev'd. in part, 254 App. Div. 835, 6 N. Y. Supp. (2d) 328 (1938); cf. *Kline v. Davega City Radio*, 168 Misc. 835, 4 N. Y. Supp. (2d) 541 (1938).

The resale price established need have no relation to the value of the article and a price established by the owner of the trade-mark for "one dram or less" of perfume is enforceable. *Guerlain, Inc., v. F. W. Woolworth Co.*, 170 Misc. 150, 9 N. Y. Supp. (2d) 886 (1939); *Lentheric, Inc., v. W. T. Grant Co.*, 13 N. Y. Supp. (2d) 169, 251 App. Div. 348 (1939).

The prices fixed must be uniform in any one competitive area and there must be no unfair discrimination in prices to retailers. *Calvert Distillers Corp. v. Nussbaum Liquor Store, supra*; *Calvert Distillers Corp. v. Stockman, supra*.

A "retail" price fixed in a contract does not necessarily contemplate a resale price and a wholesaler not party to the contract, reselling at less than the "retail" price established is not violating the Fair Trade Act. *Lucien Lelong, Inc. v. H. Mohr & Co.*, 169 Misc. 560, 8 N. Y. Supp. (2d) 131 (1938).

Excepted Sales.

A sale of damaged goods at prices less than those fixed in a resale price contract is not within the provisions of the statute. *Ritter v. Gorlitz*, 98 N. Y. L. J. 2184 (Sup. Ct. N. Y. County, Dec. 14, 1937), 3 CCH 25088.

The owner of a commodity may remove the trade-mark and sell it

at his own price provided he can do so without utilizing the goodwill of the manufacturer, *Guerlain, Inc. v. F. W. Woolworth Co., supra*.

Parties Bound by a Resale Price Restriction.

A noncontracting dealer who has acquired the goods with notice of a resale price restriction is bound by the restriction. *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937); *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc.*, 281 N. Y. 101, 22 N. E. (2d) 253 (1939), aff'g 254 App. Div. 780, 6 N. Y. Supp. (2d) 147, aff'g 253 App. Div. 188, 1 N. Y. Supp. (2d) 802, rev'g 1 N. Y. Supp. (2d) 337; *Calvert Distillers Corp. v. Nussbaum Liquor Store, supra*; *Calvert Distillers Corp. v. Stockman, supra*.

In *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, supra*, the court said: "The law endeavors to protect the interest of parties in existing contractual relations from intentional and wrongful interference by strangers. The principle constitutes a limitation upon the doctrine of freedom of contract, which courts have imposed in an attempt to promote justice and fair dealing and to prevent wrongs. Section 2 (sec. 2202) of the statute is an extension of this principle." While this statement appears to be an affirmation of the nonsigners' clause as the embodiment of the tort doctrine of interference with contractual relations, the court further states: "We express no opinion as to whether a reseller must observe resale price restrictions laid down after he acquired the commodity," which seems to imply that notice of the time of acquisition might be the determining factor in the enforcement of a resale price restriction. This view is substantiated by the Supreme Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra*, where the Court expressly based its decision on the fact that the defendant had notice of the price restriction at the time of acquisition of the commodity.

The court of appeals in *Bourjois Sales Corp. v. Dorfman, supra*, followed the Supreme Court. The interpretation of these latter statements implies that section 2 is the statutory enactment of the "equitable servitude" doctrine, prior notice being the essential factor. And in *Doubleday, Doran & Co., Inc., v. R. H. Macy & Co., Inc., supra*, the court, at page 273, stated that "it is possible to read section 2 (sec. 2202) as referring to the contract made under section 1 (sec. 2201), or as binding on those books like an equitable servitude which had been parted with under a contract as to resale price." The final determination of what parties are bound by a resale price restriction established pursuant to the Fair Trade Act must await a reconciliation of the above statements. To date, in all cases where a resale price restriction has been enforced, the defendant has had notice of the restriction prior to acquisition of the commodity.

An injunction has been denied where it could not be shown that defendant had purchased the commodity in question with notice of the price restriction. *Oneida Ltd. v. Macher Watch Co., Inc.*, 99 N. Y. L. J. 1706 (Sup. Ct. N. Y. County, Apr. 7, 1938), 3 CCH 25118.

And in *Calvert Distillers Corp. v. Nussbaum Liquor Store*, *supra*, the court stated that before relief can be obtained against a non-contracting dealer, it must appear that he had notice of the prices fixed at the time he purchased the goods.

Notice.

The receipt of a blank form of a "fair trade" contract, neither signed nor dated, with the statement that it is a copy of existing contract, is sufficient notice to obligate a dealer to observe the prices established therein. *Seagram-Distillers Corp. v. Seyopp Corp.*, 2 N. Y. Supp. (2d) 550 (Sup. Ct. N. Y. County, 1938).

In a suit for violation of a resale price restriction, prior notice of the restriction on the part of the defendant is a necessary allegation of the complaint. *Seagram-Distillers Corp. v. Seyopp Corp.*, *supra*; reversed on reargument, 99 N. Y. L. J. 418 (Sup. Ct. N. Y. County, Jan. 25, 1938), 3 CCH 25093.

Price Cutting.

Where a contract established a resale price for "one dram or less" and defendant sold smaller quantities at less than the established price, it is no defense that the price charged for quantities less than one dram was proportionately greater than the price stipulated for an entire dram. *Guerlain, Inc., v. F. W. Woolworth Co.*, *supra*.

Parties Enforcing a Resale Price Restriction.

An action to enforce a resale price restriction may be instituted by the owner or holder of the brands or marks or by having the exclusive right to use such marks in a given territory. *Calvert Distillers Corp. v. Nussbaum*, *supra*. Under this rule, a distributing company, affiliated with the producer, has maintained actions to prevent violations of fair trade contracts. *Calvert Distillers Corp. v. Stockman*, *supra*; *Schenley Distributors, Inc., v. Wall Street Liquor Corp.*, 99 N. Y. L. J. 3009 (Sup. Ct. N. Y. County, June 21, 1938), 3 CCH 25141; *Calvert Distillers Corp. v. Goldstein* (D. C. E. D. N. Y. Jan. 26, 1939), 3 CCH 25211.

It has been held that a retailer, party to a resale price contract, can enforce the restriction against a competing noncontracting retailer. *Port Chester Wine & Liquor Shop, Inc., v. Miller Bros. Fruiterers*, *supra*. The appellate division held that a contracting retailer has a sufficient property interest in the goodwill of the producer and is a person damaged within the meaning of section 2 to sustain an action

by him for enforcement. The court of appeals held that a contracting retailer can maintain the action in order to prevent interference by the defendant with the contractual relations of the plaintiff and that a contracting retailer is a person damaged within the purview of the statute.

Where an attempt was made to incorporate an organization for the purpose of enforcing resale price restrictions, the application for approval of the petition for a corporate charter was denied. *In re Fair Trade Enforcement Service, Inc.*, 100 N. Y. L. J. 1937 (Sup. Ct. Kings County, Oct. 26, 1938), 3 CCH, 25165. It has been held that a group of retailers, all members of a trade association, suing as individuals, may join in one action to enforce a resale price restriction against a single retailer. *Pekarne v. J. Rothstein Sons, Inc.*, 99 N. Y. L. J. 2978 (Sup. Ct. Kings County, June 18, 1938), 3 CCH 25140.

It has been held that actual damage need not be shown by the owner or producer. Injury will be presumed upon proof of unlawful price cutting. *Calvert Distillers Corp. v. Nussbaum, supra*; *Calvert Distillers Corp. v. Stockman, supra*. In like manner, injury to a contracting retailer has been presumed upon proof of unlawful price cutting by a competing retailer. *Port Chester Wine & Liquor Shop, Inc., v. Miller Bros. Fruiterers, Inc., supra*; *Weisstein v. Freeman's Wines & Liquors, Inc.*, 169 Misc. 391, 7 N. Y. Supp. (2d) 234 (1938). But where plaintiff retailer is not within the same competitive area as defendant, actual damage must be proved in order to sustain the action. *Gordon J. Weil, Inc., v. Gimbel Bros., Inc.*, 101 N. Y. L. J. 2528 (Sup. Ct. Westchester County, May 31, 1939, 3 CCH 25273; *Steinberg v. Wall Street Liquor Corp.*, 101 N. Y. L. J. 669 (Sup. Ct. N. Y. County, Feb. 9, 1939), 3 CCH 25217.

Defenses to Suit for Violation of Fair Trade Contracts.

The courts have frequently applied the equitable doctrine of "clean hands" in actions to enforce resale price agreements. Under this rule, it has been held that the producer or distributor need not sue all violators to enforce fair trade contracts. *Schenley Distributors, Inc., v. Stockman*, 99 N. Y. L. J. 1020 (Sup. Ct., N. Y. County, Feb. 28, 1938), 3 CCH 25110. The statute does not require but merely permits suit for injunction and strict enforcement is not a condition precedent to equitable relief. *Calvert Distillers Corp. v. Stockman, supra*; *National Distillers Products Corp. v. Columbus Circle Liquor Store*, 166 Misc. 719, 2 N. Y. Supp. (2d) 319 (1938). But the producer or distributor cannot act arbitrarily in enforcing observance of fixed prices. There must be a reasonable and diligent effort to prevent price cutting uniformly, through legal process if

necessary. *Calvert Distillers Corp. v. Nussbaum Liquor Store, supra*. Some courts have stated that as a contracting retailer can enforce the restriction himself, the failure of the producer or distributor to prevent price cutting is no defense. *Calvert Distillers Corp. v. Stockman, supra*; *National Distillers Products Corp. v. Martell's Wine & Liquor Store, Inc.*, 100 N. Y. L. J. 979 (Sup. Ct. N. Y. County, Oct. 4, 1938), 3 CCH 25162. The general rule, however, seems to be that the producer or distributor, while using discretion, must take reasonable steps to enforce resale price restrictions uniformly. *Calvert Distillers Corp. v. Nussbaum, supra*; *Calvert Distillers Corp. v. Stockman, supra*; *Schenley Distributors, Inc., v. Wall Street Liquor Corp.*, 99 N. Y. L. J. 3009 (Sup. Ct. N. Y. County, June 21, 1938), 3 CCH 25141; *Gordon J. Weil, Inc., v. Gimbel Bros., Inc., supra*.

That competitors are cutting prices and plaintiff has failed to restrain them is no defense unless there is a showing of bad faith on the part of the plaintiff. *Wilson Distilling Co., Inc., v. Gelb*, 101 N. Y. L. J. 1790 (Sup. Ct. N. Y. County, Apr. 18, 1939), 3 CCH 25246.

The validity of the defense that defendant was forced to cut prices to meet competition will depend upon the prior efforts of the defendant to compel uniform observance of the price restrictions. Where it is shown that defendant had called upon the distributor to prevent price cutting and no action had been taken, the court has upheld the defense and denied an injunction. *Schimpf v. R. H. Macy & Co., supra*; *Ferran v. Woodside Wine & Liquor Store*, 101 N. Y. L. J. 408 (Sup. Ct. Queens County, Jan. 25, 1939), 3 CCH 25201. Where the defendant has not taken prior steps to compel observance of prices, an injunction will be granted. *Weisstein v. Sokolin & Co.*, 100 N. Y. L. J. 1564 (Sup. Ct. N. Y. County, Nov. 9, 1938), 3 CCH 25170. Where the distributor has made diligent efforts to compel enforcement, the defense is insufficient and will not justify price cutting. *Calvert Distillers Corp. v. Goldstein, supra*. Where the distributor acquiesced in price cutting, made to meet competition, but asked defendant not to advertise the cut price, an injunction will be denied. *Wilson Distilling Co. v. Stockman*, 11 N. Y. Supp. (2d) 51 (Sup. Ct. N. Y. County, 1939).

An injunction will be denied where it is shown that the plaintiff is also guilty of price cutting. *Kline v. Davega-City Radio*, 168 Misc. 185, 4 N. Y. Supp. (2d) 541 (1938); *Golden Gate Wine & Liquor Corp. v. Polignani, Inc.*, 100 N. Y. L. J. 2257 (Sup. Ct. N. Y. County, Dec. 20, 1938), 3 CCH 25187; *Gurock v. Brandiewine Stores, Inc.*, 101 N. Y. L. J., 38 (Sup. Ct. Westchester County, Jan. 3, 1939), 3 CCH 25190.

An injunction has been denied where the defendant alleged that his price cutting was unintentional. *Johnson & Johnson v. Webster*

Cut Rate Drug Stores, Inc., 98 N. Y. L. J. 2184 (Sup. Ct. N. Y. County, Dec. 14, 1937), 3 CCH 25089; *National Distillers Products Corp. v. Brandiewine Stores, Inc.*, 99 N. Y. L. J. 601 (Sup. Ct. Westchester County, Feb. 3, 1938), 3 CCH 25103.

Where the producer or distributor discriminates in prices to wholesalers or retailers, an injunction will be denied. *Calvert Distillers Corp. v. Nussbaum Liquor Store, supra*; *Lucien Lelong, Inc. v. H. Mahr & Co., supra*; *Gillette Safety Razor Co. v. Green*, 167 Misc. 251, 3 N. Y. Supp. (2d) 822 (1938). See also *Wilson Distilling Co., Inc. v. Stockman, supra*.

Where plaintiff has agreed not to sell to anyone who does not in turn agree to maintain the price established, defendant, party to plaintiff's breach of this contract, cannot raise plaintiff's breach as a defense to an action for price cutting. *Seagram-Distillers Corp. v. Seyopp Corp., supra*.

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Penal Law (McKinney)

Sec. 515. Discrimination against person or class in price for admission.—If a person who owns, occupies, manages, or controls a building, park, inclosure, or other place, opens the same to the public generally at stated periods or otherwise, he shall not discriminate against any person or class of persons in the price charged for admission thereto. A person violating the provisions of this section is guilty of a misdemeanor.

NORTH CAROLINA

REGULATION OF PRICE COMPETITION

A. RESELL PRICE MAINTENANCE

Code Ann. (Michie, 1939)

Sec. 5126 (k). Definitions.—The following terms, as used in this article, are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. "Person" shall not include the State of North Carolina or any of its political subdivisions. (1937, c. 350, sec. 1.)

Sec. 5126 (1)¹ Authorized contracts relating to sale or resale.—No contract relating to the sale or resale of a commodity which bears,

¹In challenging the validity of the Fair Trade Act, the court held that the act is not in violation of due process because of the fact that the statute delegates the power to fix resale price on another's property. "*The statute is not a delegation of power to private persons to control the disposition of property of others, because the restrictions already imposed with notice runs with the acquisition of the purchased property and conditions it.*" As to the contention that the act was in violation of Art. II, sec. 29, of the State constitution, which provides that the general assembly shall not pass any local, private, or special act regulating labor, trade, mining, or manufacturing, the court held that an act excepting from its operation articles not identified by name or brand or producer or distributor and not in free competition with commodities of same general class, is not unconstitutional as special legislation. The classification of a statute renders it unconstitutional as special legislation only when it has no basis in reasoning or is arbitrary and capricious. The exceptions in this act are reasonable and well grounded. *Ely Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528 (1939).

or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of North Carolina by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (1937, c. 350, sec. 2.)

Sec. 5126 (m). Certain evasions of resale price restrictions, prohibited.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this article (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 5126 (p) shall be available. (1937, c. 350, sec. 3.)

Sec. 5126 (n). Contracts with persons other than the owner of the brand, etc., not authorized.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this article, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or a distributor specifically authorized to

establish said price by the owner of such trade-mark, brand, or name. (1937, c. 350, sec. 4.)

Sec. 5126 (o). Resales not precluded by contract.—No contract containing any of the provisions enumerated in section 5126 (l) shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, The owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement sale thereof;

(c) When the goods are altered, second-hand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court.

(e) When any commodity is sold to a religious, charitable, or educational organization or institution, provided such commodity is for the use of such organization or institution and not for resale. (1937, c. 350, sec. 5.)

Sec. 5126 (p) Violation.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1937, c. 350, sec. 6.)

Sec. 5126 (q). Exemptions.—This act shall not apply to any contract or agreement between or among producers or distributors or, except as provided in subdivision (c) of section 2 of this act between or among wholesalers, or between or among retailers, as to sale or resale prices. This act shall not apply to any prices offered in connection with contracts or purchases made by the State of North Carolina or any of its agencies or any of the political subdivisions of the said State. (1937, c. 350, sec. 7.)

Sec. 5126 (r). Title of article.—This article may be known and cited as the "Fair Trade Act." (1937, c. 350, sec. 10.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

I. General Prohibitory Laws

Code Ann. (Michie, 1939)

Sec. 2563 (3). Unlawful intent to fix prices.²—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.

Sec. 2563 (4). Predatory price practice.—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 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. (1913, c. 41, sec. 5.)³

Sec. 2563 (5). Unlawful discriminations.—Who deals in anything 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. (1913, c. 41, sec. 5.)

² Predatory sales below cost have been held to be within the scope of section 2563, subsection (3). *State v. Atlantic Ice & Coal Co.*, 210 N. C. 742, 188 S. E. 412 (1936). In a prosecution against a foreign corporation operating the largest coal business in town, for violating section 2563, subsection (3) by willfully 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.*

³ See. vol. *State Antitrust Laws: General Antitrust Laws; MARKETING LAWS SURVEY* series.

Sec. 2564. Violation a misdemeanor; punishment.—Any corporation, either as agent or principal, violating any of the provisions of 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.)

2. Special Prohibitory Laws

No provisions.

NORTH DAKOTA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1937, c. 126

Section 1. Contracts relating to sale of trade-marked articles.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer, or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of North Dakota by reason of any of the following provisions which may be contained in such contract :

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without references to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivery of any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

4. When sold for taxes or other liens.

Sec. 2. Acts deemed a violation.—Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of this act, whether the person so advertising, offering for

sale, or selling, is, or is not, a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 3. Exception.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 4. Definitions.—The following terms, as used in this act, are hereby defined as follows:

“Producer” means grower, baker, bottler, maker, packer, converter, processor, manufacturer, or publisher.

“Commodity” means any subject of commerce.

Sec. 5. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Sec. 6. Title.—This act may be known and cited as the “Fair Trade Act.”

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Comp. Laws Ann. (Supp., 1925)

Sec. 3048. Discrimination prohibited.—Any person, firm, association, or corporation, foreign or domestic, doing business in the State of North Dakota, and engaged in the production, manufacture, or distribution of any commodity in general use, that shall intentionally for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this State, by selling, buying, bartering, or exchanging such commodity at a lower rate in one section, community, or city, than is charged for said commodity by said party in another section, community, or city, after making due allowance for the difference, if any, in the grade and 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, however,* That where the same person, persons, estate, association, or corporation own or control a majority of the stock in each of two or more corporations doing business in this State, they

shall come under and be subject to the provisions of this article. (1907, ch. 260, sec. 1, as amended 1919, ch. 112, sec. 1.)

Sec. 3049. 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. (1907, ch. 260, sec. 2.)

Sec. 3050. Contracts void.—All contracts or agreements made in violation of any of the provisions of the two preceding sections shall be void. (1907, ch. 260, sec. 3.)

Sec. 3051. Duty of county attorney and attorney general.—It shall be the duty of the county attorneys, in their counties, and the attorney general, to enforce the provisions of the preceding sections of this article by appropriate actions in courts of competent jurisdiction. (1907, ch. 260, sec. 4.)

Sec. 3052. 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 this article, 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. (1907, ch. 260, sec. 5.)

Sec. 3053. Charter and rights forfeited.—If any corporation, foreign or domestic, authorized to do business in this State, is found guilty of unfair discrimination, such findings shall cause a forfeiture of all the privileges and rights conferred by the laws of this State upon corporations and shall bar its right to do business in this State. (1907, ch. 260, sec. 6.)

Sec. 3054. Duty of attorney general.—If any corporation, having been found guilty of a violation of any of the provisions of this article, shall continue or attempt to do business in this State, it shall be the duty of the attorney general by a proper action in the name of the State of North Dakota to enjoin such corporation from transacting all business of every kind and character in said State of North Dakota. (1907, ch. 260, sec. 7.)

Sec. 3055. Remedies cumulative.—Nothing in this article shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. (1907, ch. 260, sec. 8.)

2. Special Prohibitory Laws

Comp. Laws Ann. (Supp., 1925)

Cream Stations

Sec. 2846. Annual report of cream station; price discrimination forbidden; dairy products.¹—The agent or person in charge of any cream station at which cream is purchased for shipment out of the state or for shipment from the place where purchased to a point within the state, shall on July 1st of each year or within thirty days thereafter report to the dairy commissioner the name, location, and business of his employer, amount of capital stock invested in business, property or assets, liabilities, and such other information pertaining to the business and conduct of the cream station of which such agent has charge, as shall be requested in writing by the dairy commissioner. Any person, partnership, firm, corporation, or association engaged in the business of buying milk, cream or butterfat, who shall discriminate between different sections, localities, communities, villages or cities of this state by purchasing such commodity at a different price or rate in one locality than is paid for the same commodity by said person, partnership, firm, corporation, or association in another locality or section of the state after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, or place of destination, shall be deemed guilty of unfair discrimination and such acts are hereby declared to be unlawful, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars or thirty days' imprisonment in the county jail, or both, for conviction of first offense and not less than two hundred fifty dollars, or ninety days' imprisonment in the county jail, or both, for each additional or subsequent offense: *Provided, however,* That the purchase of such commodities at a different price or rate may be made at a particular section, locality, community, village or city, to meet legitimate competition in such section, locality, community, village or city, and legitimate competition as used herein is defined to be the meeting of a price or rate paid for the same commodity by a competitor located in the same section, locality, community, village or city and engaged in the same business under the same conditions and circumstances and operating in the same manner as the person, partnership, firm, corporation or association meeting said price. The meeting of this competition as herein defined shall not be a violation of this act. (L. 1925, ch. 127; L. 1917, ch. 104, sec. 1.)

¹ CONSTITUTIONALITY.—For the reasons given in *Fairmont Creamery Co. v. State of Minnesota*, 274 U. S. 1, 47 Sup. Ct. 506, 71 L. Ed. 893 (1927) (See Antidiscrimination Legislation: Special Prohibitory Laws, Minnesota, *supra*), sec. 2846 is unconstitutional. *State v. North American Creamery Co.*, 55 N. D. 489, 214 N. W. 503 (1927).

Trade Discrimination in Grain and Dairy Products

Sec. 3043. Unfair competition.—Any person, firm, or corporation, foreign or domestic, doing business in the State of North Dakota and engaged in the production, manufacture, distribution, purchase, or selling of milk, cream, butterfat, grain or any commodity in general use that shall, with the intention of creating a monopoly, or of destroying the business of a competitor, or of any regular established dealer, or to prevent competition of any person who in good faith intends and attempts to become such a dealer, discriminate between different sections, communities, towns, or cities, or portions thereof, in this State, by purchasing at a higher or selling at a lower rate or price in one section, community, town or city or portion thereof, in this State, than is paid or charged by such person, firm, or corporation for such milk, cream, butterfat, grain or commodity in general use in another section, community, town, or city, or portion thereof, in this State, after making due allowance for the difference, if any, in the actual cost of transportation of such commodities, shall be guilty of unfair discrimination. (1913, ch. 287, sec. 1; 1907, ch. 258, sec. 1.)

Sec. 3044. Forfeiture of charter.—If complaint shall be made to the attorney general that any person, firm, or corporation is guilty of unfair discrimination, as defined by this article, he shall investigate the matter complained of, and for that purpose may subpoena witnesses, administer oaths, take testimony and require the production of books or other documents belonging to such person, firm or corporation, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the State of North Dakota, in the proper court, to annul the charter or revoke the permit or license of such person, firm or corporation, as the case may be. (1913, ch. 287, sec. 2; 1907, ch. 258, sec. 2.)

Sec. 3045. Attorney general brings action, when.—If, after the revocation of such charter in the case of a domestic corporation, or of its permit if it be a foreign corporation, any such corporation shall continue or attempt to do business within this State, it shall be the duty of the attorney general of this State by a proper action commenced in the name of the State, to oust such corporation from any and all business of any kind or character within the State of North Dakota. (1907, ch. 258, sec. 3.)

Sec. 3046. Penalty.—Any person, firm, or corporation convicted of unfair discrimination shall be fined in any sum not less than two hundred dollars nor more than three thousand dollars. (1913, ch. 287, sec. 3; 1907, ch. 258, sec. 4.)

Sec. 3047. Cumulative remedies.—Nothing in this article contained shall in any manner be construed as repealing or in any man-

ner altering any other act or part of act heretofore adopted by the legislature of this State, but the remedies herein provided shall be cumulative to all other remedies now existing. (1907, ch. 258, sec. 5.)

L. 1939, c. 8

Unfair Discrimination Purchase Certain Farm Products

Sec. 1. Definition.—The following words, terms, and phrases shall, for the purposes of this act, be given the meaning hereinafter subjoined to them.

Sec. 2. (a) The term “person” means an individual, firm, copartnership, corporation, or association.

(b) The term “farm products,” as used in this act, shall mean, and include butter, milk, cream, butterfat, cheese, and other dairy products, honey, eggs, and poultry.

(c) The term “bona fide competitor” shall be deemed to be a duly licensed dealer in any farm product maintaining a place of business in the same trade territory.

Sec. 3. Discrimination prohibited.—Any person engaged in the business of buying any such farm products, for manufacture or sale, who shall discriminate between different sections, localities, communities, cities, or villages of this State, by purchasing any such farm products at a higher price or rate in one locality than is paid for such products of the same kind, quality, and grade by such person in another section, locality, community, city, or village, or than is paid to another person of the same community, after making due allowance for the difference, if any, in the actual cost of transportation paid from the locality of purchase to the locality of manufacture or sale, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful. It shall not be unfair discrimination for any person to pay in any section, locality, community, city, or village, a price equal to that actually paid on the same day by any bona fide competitor in such section or locality, for farm products of the same kind and grade, provided such price is paid in a bona fide and good faith effort to meet competition, and in such case the burden of proving such facts shall be upon the defendant.

Sec. 4. Evidence.—Proof that any person has paid a higher price for any such farm products in one section, locality, community, village, or city, than in another, or has paid another person a different price for the same kind and quality product in the same community, after due allowance for the cost of transportation has been made, shall be prima facie evidence of a violation of this act.

Sec. 5. Enforcement.—The commissioner of agriculture and labor, the state dairy commissioner and his deputies, assistants and agents,

and the State's attorneys, sheriffs, and peace officers of the respective counties, shall enforce the provisions of this act, and in so doing shall have all the powers conferred upon each of them by the provisions of law.

Sec. 6. Investigation; revocation of charter.—If complaint shall be made to the commissioner of agriculture and labor, or to the dairy commissioner, that any person is guilty of unfair discrimination, either of them shall forthwith investigate such complaint, or may, upon his own initiative, investigate whether this statute has been violated, and in either event, for that purpose, either of them may subpoena, supervise, and control witnesses the same as the district court, administer oaths, take testimony, and if, in his opinion, sufficient ground exists therefor, he may prosecute an action in the name of the State in the proper court to annul the corporation or the existence of the corporation violating the provisions of this act. If any corporation is adjudged by the courts to be guilty of unfair discrimination, such court may vacate the charter or revoke the authority of such corporation to do business in the State of North Dakota, and may permanently enjoin it from transacting business in this State.

Sec. 7. Penalties.—Any person violating the provisions of section 3 of this act shall, upon conviction thereof, be fined not less than fifty dollars (\$50.00), nor more than five hundred dollars (\$500.00), for each offense, and in default of the payment of such fine be imprisoned in the county jail for not less than three (3) months, nor more than one (1) year.

Sec. 8. Instituting other proceedings.—The authority hereby extended to the commissioner of agriculture and labor and the dairy commissioner shall be considered as their duties only, and shall not be construed to preclude any other prosecuting officer or any interested party from instituting proceedings, civil or criminal, for the enforcement of any of the provisions of this act.

Sec. 9. Repeal.—Chapter 3 of the Session Laws of 1933 is hereby expressly repealed, but nothing in this act shall be construed as repealing any other act or parts of acts, but the remedies herein provided for shall be cumulative to all other remedies provided by law.

Sec. 10. Emergency.—This act is hereby declared to be an emergency measure, and shall take effect immediately upon its passage and approval.

OHIO

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Code Ann. (Baldwin's Throckmorton, 1936)

Sec. 6402-2. Purpose of act.—The purpose of this act is to promote the public welfare by protecting the general public, trade-mark owners, and distributors against injurious and uneconomic practices in the distribution of articles of standard quality bearing a trade-mark, brand, or name. (116 v. pt. 2, 1st s. ses. H. 609, sec. 1. Eff. July 9, 1936.)

Sec. 6402-3. Contract, certain provisions not deemed in violation of law.—No contract relating to the sale or resale of a commodity which bears, or the label or container or content of which bears, the trade-mark, brand, or name of the producer or of the owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Ohio by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.

(b) That the vendee or producer require any person to whom he may resell such commodity to agree that he will not, in turn, resell such commodity at less than the minimum price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply provisions that such commodity may be resold, without reference to such agreement, in the following cases:

¹A contract by a manufacturer binding his vendees to resell his commodity at a price fixed by the manufacturer is void and unenforceable under the anti-trust law. *Freeman v. Miller*, 21 Ohio Dec. 766 (1909); *McCall Co. v. O'Neil*, 25 Ohio Dec. 591 (1914).

(a) When closing out the owner's stock for the purpose of discontinuing delivery of any such commodity, provided, however, that such stock is first offered to the manufacturer of such stock, or his duly authorized agent, at the prevailing invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(b) When the commodity is damaged or deteriorated in quality and proper notice thereof is given to the public.

(c) When the commodity is sold by the order of any court of record. (116 v. pt. 2, 1st s. ses. H. 609, sec. 2. Eff. July 9, 1936.)

This section referred to in section 6402-4.

Sec. 6402-4. Sale, etc., of commodity at less than minimum price; penalty.—Whoever knowingly and wilfully advertises, offers for sale, or sells any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provisions of section 2 of this act, whether said person so advertising, offering for sale or selling such commodity is or is not a party to such contract shall be deemed guilty of engaging in unfair competition and unfair trade practices and is actionable at the suit of any person damaged thereby. (116 v. pt. 2, 1st s. ses. H. 609, sec. 3. Eff. July 9, 1936.)

Sec. 6402-5. Liability when provisions violated.—Any person violating the provisions of this act shall be liable at the suit of any other retailer of such commodity or at the suit of any other person or persons injured thereby, including the producer of such commodity, which suit may be for an injunction against such practice. (116 v. pt. 2, 1st s. ses. H. 609, sec. 4. Eff. July 9, 1936.)

Sec. 6402-6. Act not applicable, when.—This act shall not apply to any contract or agreement between producers or between wholesalers, or between retailers as to sale or resale prices. (116 v. pt. 2, 1st s. ses. H. 609, sec. 5. Eff. July 9, 1936.)

Sec. 6402-7. Definitions.—As used in this act unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

“Producer” means grower, baker, maker, manufacturer, or publisher.

“Commodity” means any subject of commerce bearing a trademark, brand, or name.

“Trade-mark,” “brand,” or “name” means any form, symbol, or name appropriated by any person, as herein defined, who produces or owns or in any manner deals in a commodity, to designate the origin of ownership thereof.

“Person” includes individuals, partnerships, corporations, and any other business unit and/or receiver, trustee, or assignee of such business units. (116 v. pt. 2, 1st s. ses. H. 609, sec. 6. Eff. July 9, 1936.)

Sec. 6402-8. Constitutionality.—If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered. No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto. (116 v. pt. 2, 1st s. ses. H. 609, sec. 7. Eff. July 9, 1936.)

Sec. 6402-9. Certain sections not applicable to contracts, when.—As of the effective date of this act, sections 6390 to 6402-1, inclusive, of the General Code, shall not apply to contracts entered into, or proceedings instituted, pursuant to the provisions of this act. (116 v. pt. 2, 1st s. ses. H. 609, sec. 8. Eff. July 9, 1936)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Code Ann. (Baldwin's Throckmorton, 1936)

Milk, Cream, Butterfat

Sec. 6402-1. Penalty when violation relates to milk, cream, or butterfat.—Whoever, being engaged in the business of buying milk, cream, or butterfat, shall, for the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor, discriminate between different sections, localities, communities or cities of this State, by purchasing such commodity at a higher price or rate in one locality than in another, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture, shall be deemed guilty of unfair discrimination and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months. (110 v. 19. Eff. June 11, 1923.)

This section referred to in G. C., sec. 1080-2.

See Gates' Ohio Corporation Manual, sec. 430.

OKLAHOMA

REGULATION OF PRICE COMPETITION

A. RE SALE PRICE MAINTENANCE¹

Stat. Ann. (1938), tit. 78

Sec. 41. Contracts relating to sale or resale of commodities bearing trade-marks or labels.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Oklahoma by reason of any of the following provisions which may be contained in such contract:

First: That the buyer will not resell such commodity below a minimum price stipulated by the vendor.

Second: That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell below a minimum price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

First: In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

Second: When goods are damaged or deteriorated in quality and notice is given to the public thereof.

¹APPLICATION OF THE COMMON LAW: A contract whereby a dealer agreed to sell no other goods than those sold to him by plaintiff, and which goods were to be sold at regular retail prices as indicated by plaintiff is invalid at common law where such contract is part of a system established by plaintiff to control the resale price of his merchandise. *Stewart v. Rawleigh Medical Co.*, 58 Okla. 344, 159 Pac. 1187 (1916); *Hunt v. Rawleigh Medical Co.*, 71 Okla. 193, 176 Pac. 410 (1918); *Brooks v. Watkins Medical Co.*, 81 Okla. 82, 196 Pac. 956 (1921).

APPLICATION OF ANTITRUST LAW: A single transaction whereby a wholesaler attempted to control the resale price of goods is not condemned in law. Unless it is proven that the price-fixing agreement was one of a number of like agreements in use between plaintiff wholesaler and his retailers throughout plaintiff's trade territory, there is no evidence to warrant a finding that a monopoly existed or was intended in violation of the antitrust laws. *Thomas v. Belcher*. 184 Okla. 40, 87 Pac. (2d) 1084 (1939).

Third: By any officer acting under the orders of any court. (L. 1937, p. 479 (S. B. No. 45), sec. 1.)²

Sec. 42. Exceptions to application of act.—This act³ shall not apply to any contract or agreement between producers, or between wholesalers, or between retailers as to sale or resale prices. (L. 1937, p. 479 (S. B. No. 45), sec. 2.)

Sec. 43. Definitions.—The following terms, as used in this Act,³ are hereby defined as follows:

“Producer” means grower, baker, maker, manufacturer, packer, bottler, converter, processor, or distributor.

“Commodity” means any subject of commerce. (L. 1937, p. 479 (S. B. No. 45), sec. 3.)

Sec. 44. Unfair competition.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the minimum price stipulated in any contract entered into pursuant to the provisions of section 1 of this act,⁴ whether the person so advertising, offering for sale, or selling is or is not a party to such contract is unfair competition and is actionable at the suit of any person damaged thereby.

Provided, That the provisions of this section shall not render any newspaper or other advertising medium liable in damages for running any ad furnished them by a vendor of said merchandise. (L. 1937, p. 479 (S. B. No. 45), sec. 4.)⁵

Sec. 45. Name of act.—This act³ may be known and cited as the “Fair Trade Act.” (L. 1937, p. 480 (S. B. No. 45), sec. 6.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

CONSTITUTIONAL PROVISION

Const. Art. IX, sec. 45.—Prohibits, until otherwise provided by law, any person or corporation from discriminating in the distribu-

² Sec. 5 of the act of 1937, cited to the text, read as follows: “If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.”

Title of act: A bill entitled an act to protect trade-mark owners, producers, distributors, and the general public against injurious and uneconomic practice in the distribution of competitive commodities bearing a distinguishing trade-mark, brand, or name, through the use of voluntary contracts establishing minimum resale prices. (L. 1937, p. 479 (S. B. No. 45).)

³ Sections 41–45 of this title.

⁴ Section 41 of this title.

⁵ For sec. 5 of the act of 1937, see historical note 2 under sec. 41 of this title.

tion of any commodity in general use, by selling such commodity at a lower rate in one locality than another, after making due allowance for differences in grade, quantity, quality, and actual cost of transportation.

STATUTORY PROVISIONS

Stat. Ann. (1936), tit. 79

Sec. 2. Combinations in restraint of trade—Discrimination prohibited.—It shall be unlawful for any person, firm, corporation, or association, engaged in the production, manufacture, distribution, purchase, 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 representative, 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 or 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 publications 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 attempts to become such a dealer, or to destroy the competition of any person, firm, copartnership, corporation, or asso-

* A mere allegation of unlawful discrimination is insufficient to charge a violation of the statute (tit. 79, sec. 2, 81-87). The act requires the intent to or effect of establishing a virtual monopoly. A complaint which alleges that defendant, a public utility, sold gas to plaintiff at higher prices than to other similar businesses using like quantities does not state a cause of action under the statute. *James v. Oklahoma Natural Gas Co.*, 181 Okla. 54, 72 Pac. (2d) 485 (1937). See also footnote 7, *infra*.

ciation 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 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 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. S. 1910, sec. 8227; L. 1923, c. 29, p. 41, sec. 1; L. 1933, c. 112, p. 224, sec 1; L. 1935, p. 338, sec. 1.)

Sec. 7. Penalty—Civil liability in damages.—Any person, firm, corporation, or association guilty of a violation of this act 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 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. (Id., p. 339, sec. 3.)

Discrimination

Sec. 81. Unfair discrimination—Definition.—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, 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.⁷ (L. 1913, c. 114, p. 211, sec. 1.)

Sec. 82. Investigations—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 this act, 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. (Id., p. 212, sec. 2.)

Sec. 83. Violations of act—Punishment.—Any person, or the managing agent or agents of any firm or corporation violating the provisions of section one (1) of this act 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. (Id., p. 212, sec. 3.)

Sec. 84. Combination of corporations—Definition.—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

⁷ Where defendant reduced prices in one town solely because a competitor had likewise reduced prices, only one sale being made, and this reduction resulted in different prices in different localities, it was held that this did not establish an unlawful intent and the indictment so charging defendant is demurrable. *Western Lumber Co. v. State*, 17 Okla. Cr. 427, 189 Pac. 869 (1920). Where the statute requires a sale as an act of violation and the indictment alleges the listing only of discriminatory prices, the indictment is defective. See also footnote 6, *supra*.

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 by them, or either of them, directly or indirectly, are declared to be members of such combination. (Id., p. 213, sec. 4.)

Sec. 85. Unfair competition—Definition—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 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: 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 anyone 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. (Id., sec. 5.)

Sec. 86. Damages to weaker competitor.—Liability of combination.—Every such weaker competitor injured by reason of any of the acts herein prohibited in the foregoing sections 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 jurisdiction in the county wherein such damage may be sustained. (Id., sec. 6.)

Sec. 87. Act cumulative to other legal remedies.—Nothing in this act⁹ 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. (Id., p. 214, sec. 7.)

2. Special Prohibitory Laws

Stat. Ann. (1936), tit. 79

Advertising

Sec. 6. Advertising—Monopolies prohibited.—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. (R. S. 1910, sec. 8227; L. 1923, c. 29, p. 41, sec. 1; L. 1933, c. 112, p. 224, sec. 1; L. 1935, p. 338, sec. 1.)⁹

⁹ Sec. 81 to 87 of this title.

⁹ For penalty provisions see *General Prohibitory Laws, supra*.

OREGON

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code Ann. (Supp., 1935), as amended by L. 1937, c. 113

Sec. 70-401. Contracts relating to sales of articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment through which such commodity is sold bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Oregon by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

2. That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

3. That the seller will not sell such commodity:

(a) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(b) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

4. No contract containing any of the provisions enumerated in this act shall be deemed to preclude the resale of any commodity

covered thereby without reference to such contract in the following cases:

(a) In closing out the owners' stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public, provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock and an opportunity to purchase such stock at the original invoice price;

(b) When the goods are altered, second-hand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(c) By any officer acting under an order of court.

5. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act, except to the extent authorized by the said contract:

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever, whether by the giving of coupons or otherwise, in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by this act shall be available.

6. No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 70-402. Acts deemed a violation.—Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 70-401, Oregon Code, 1935 Supplement, as amended by section 1 of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 70-403. Application of act.—This act shall not apply to any contract or agreement between or among producers or distributors

or, except as provided in section 70-401, subsection 3, between or among wholesalers, or between or among retailers, as to sale or resale prices.

Sec. 70-404. Defined.—The following terms, as used in this act, hereby are defined as follows:

(a) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(b) "Commodity" means any subject of commerce.

(c) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Sec. 70-405. Provisions of act severable.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect. (L. 1935, ch. 295, sec. 5, p. 45.)

Sec. 70-406. Short title of act.—This act may be known and cited as the "Fair Trade Act." (Id., sec. 6.)

Sec. 6. Inconsistent acts repealed.—That all acts or parts of acts inconsistent herewith hereby are repealed to the extent of such inconsistency. (L. 1937, ch. 113, sec. 6.)

B. PROHIBITION OF SALES BELOW COST

L. 1937, c. 215, as amended by L. 1939, c. 495

Unfair Practices Act

Section 1. Definitions.—When used in this act, unless the context otherwise requires:

(a) The term "person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, or an unincorporated organization;

(b) The term "price" as used herein shall mean the net price to the buyer after the deduction of all discounts, rebates, or other price concessions paid or allowed by the seller;

(c) The term "commerce" means trade or commerce within this state, exclusive of "food commerce" as herein defined;

(d) The term "food commerce" means trade or commerce within this state in articles of food for human consumption and such other articles as usually are sold in food stores in connection with articles of food for human consumption. "Retailer in food commerce" means

any person engaged in food commerce who sells directly to the consumer for use. "Wholesaler in food commerce" means any person engaged in food commerce other than a retailer or producer, manufacturer, or processor.

(e) The term "replacement cost" shall mean the cost per unit at the retail outlet at which the merchandise sold or offered for sale could have been bought by the seller at any time within ten (10) days prior to the date of sale or the date upon which it is offered for sale by the seller, if bought in the same quantities as the seller's usual or customary purchase of the said merchandise, after deducting all discounts, rebates, or other price concessions.

(f) *Provided, however,* The definition "food commerce," as defined in this section, subparagraph "d" is restricted, in the case of persons selling items other than items of food commerce, solely to such items of food commerce as above defined. (As amended March 27, 1939.)

Sec. 2. Dealing with price discriminations, see *Antidiscrimination Legislation: General Prohibitory Laws, infra.*

Sec. 3. Cooperatives.—Nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earning or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the association.

Sec. 4. Sales below cost prohibited.—It shall be unlawful for any person engaged in commerce and/or food commerce, in the course of such commerce, to sell, offer for sale, or advertise for sale, any article, product, or commodity, or service or output of a service trade, at less than cost thereof to such vendor, or give, offer to give, or advertise the intent to give away any article, product, or commodity or service or output of a service trade, where the effect of such sale below cost, or the giving, offering to give, or advertising the intent to give away any article or product, or service, or the output of a service trade, may lessen, injure, destroy, prevent, hinder, or suppress the competition of competitors of such person engaged in business within this state, or to advertise brands or types of goods they are not prepared to supply.

(a) For the purpose of this section the term "cost" as applied to production hereby is defined as including the cost of raw materials, labor and all overhead expenses of the producer, and as applied to distribution, "cost" shall mean the replacement cost of the article, product, or commodity to the distributor and vendor, plus the cost of doing business by said distributor and vendor: *Provided,* That "cost" as applied to a wholesaler in food commerce shall mean the price paid.

(b) For the purpose of this section, the phrase "cost of doing business" or "overhead expense" is defined as the average of all costs of

doing business incurred in the conduct of such business during the 12 months immediately preceding any alleged violation of this act or in the event any person shall be engaged in business within the state for a shorter period of time, in that event the average cost for such period immediately preceding any alleged violation of this act must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, buildings and fixtures, transportation and delivery costs, as fixed under tariffs approved by the public utilities commissioner of the State of Oregon, light, heat, power, and water, credit losses, all types of licenses, taxes, insurance, and advertising.

(c) For the purpose of this act, the phrase "cost of doing business" or "overhead expense" of a "retailer in food commerce" is defined as 6 percent of replacement cost or as the average monthly cost incurred in the conduct of such business during the 12 months immediately preceding any alleged violation of this act, or whichever is lower. In the event any person as herein defined shall be engaged in business within this state for a shorter period of time than one year, then the average cost for such period that such person has been in business immediately preceding any alleged violation of this act shall be the monthly average for the purpose of this act. In computing such cost, it shall include, without limiting, the following items of expense: Labor (including the expense for salaries of executives and officers), rent; interest on borrowed capital, depreciation, selling costs, maintenance of equipment, buildings and fixtures, transportation and delivery costs as fixed under tariffs approved by the public utilities commissioner of the State of Oregon, light, heat, power, and water, credit losses, all types of licenses, taxes, insurance and advertising. (As amended March 27, 1939.)

Sec. 5. Establishing cost.—In establishing the cost of a given article, product, or commodity to the distributor and vendor, the invoice cost of said article, product, or commodity purchased at a forced, bankrupt, close-out sale or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of such sale of said article, product, or commodity replaced through the ordinary channels of trade, unless said article, product, or commodity is kept separate from goods purchased in the ordinary channels of trade and unless said article, product, or commodity is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Sec. 6. Exceptions.—The provisions of sections 4 and 5 of this act shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity and such person does not sell new stocks of such discontinued commodity or merchandise within ninety (90) days after such close-out, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided prior notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and prior notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product in the same locality or trade area. (As amended March 27, 1939.)

Sec. 7. Vendors.—Any person who performs work upon, renovates, alters, or improves any personal property belonging to another person shall be construed to be a vendor within the meaning of this act.

Sec. 8. Injunctive relief.—(a) Any person injured by any violation, or who will suffer injury from any threatened violation, of this act, may maintain an action in any court of general equitable jurisdiction of this State, to prevent, restrain, or enjoin such violation or threatened violation. If in such action, a violation or threatened violation of this act shall be established, the court shall enjoin and restrain or otherwise prohibit such violation or threatened violation, and the plaintiff in said action shall be entitled to recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

(b) In the event no injunctive relief is sought or required, any person injured by any violation of this act may maintain an action for damages alone in any court of general jurisdiction in this State, and the measure of damages in such action shall be the same as that prescribed by subsection (a) of this section.

(c) In any proceedings instituted or action brought in pursuance of the provisions of subsections (a) and (b) of this section, the plaintiff, upon proof that he has been unlawfully discriminated against by the defendant, shall conclusively be presumed to have sustained damages equal to the monetary amount or equivalent of the unlawful discrimination; and, in addition thereto, may establish such further damages, if any, as he may have sustained as a result of such discrimination.

(d) Any defendant in an action brought under the provisions of this section may be required to testify under the provisions of chapters XV and XVII, title IX, Oregon Code 1930, of the Code of Civil

Procedure of this State; in addition, the books and records of any such defendant may be brought into court and introduced, by reference, into evidence: *Provided, however,* That no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of this act.

(e) Any contract, express or implied, made by any person in violation of any of the provisions of this act is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 9. Cost surveys.—Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act.

Sec. 10. Citations.—This act shall be known and designated as the "Antiprice Discrimination Act" and its inhibitions against discrimination shall embrace any scheme of special concessions or rebates, any collateral contracts or agreements or any device of any nature whereby discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

Sec. 11. Penalties.—Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor for each single violation and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment not exceeding six months, or by both such fine and imprisonment, in the discretion of the court.

Sec. 12. Invalidity of part.—If any provision of this act, or the application thereof to any person or circumstance is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 13. Repeal.—All acts or parts of acts inconsistent herewith hereby are repealed to the extent of such inconsistency.

C. ANTIDISCRIMINATION LEGISLATION

L. General Prohibitory Laws

L. 1937, c. 215, as amended by L. 1939, c. 495
Unfair Practices Act

Sec. 2. Price discrimination prohibited.—(a) It shall be unlawful for any person engaged in commerce and/or food commerce, in the

course of such commerce, either directly or indirectly, 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 sections, communities, or cities or portions thereof or between different locations in such sections, communities, cities, or portions thereof in this State, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise, or service or output of a service trade, in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, in any suit or other proceeding in which any violation of this act may be at issue, that there has been discrimination in price, or in services or facilities furnished, or in payment for services or facilities rendered or to be rendered, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with such violation: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price, or the payment for or furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce and/or food commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, service, or output of a service trade, or merchandise: *Provided, however*, That in all such transactions of sale

and purchase it shall be unlawful for either party to such transaction to pay or grant anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, to the other party to the transaction or to any agent, representative, or other intermediary therein, where such agent, representative, or other intermediary is acting for or in behalf of or is subject to the direct or indirect control of the said other party to such transaction.

(d) It shall be unlawful for any person engaged in commerce and/or food commerce, in the course of such commerce, to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, service, or output of a service trade, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities, or service, or output of service trades.

(e) It shall be unlawful for any person engaged in commerce and/or food commerce, in the course of such commerce, to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity, or service, or output of a service trade, bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity, or service, or output of a service trade, purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce and/or food commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.¹

2. Special Prohibitory Laws

Code Ann. (1930)
Milk, Cream, Butterfat

Sec. 41-701. Discrimination in purchase of milk and cream prohibited.—Any person, firm, or corporation engaged in the business of buying milk, cream, or butterfat for the purpose of manufacture, either by himself or another, who shall, with the intention of creating

¹ For definitions, procedural, and penalty provisions see *Prohibition of Sales Below Cost*, *supra*.

a monopoly, destroying the business of a competitor or restraining in any manner an open competition in said business, discriminate between the different section[s], localities, communities, or cities of this State by purchasing or offering to purchase such commodity at a higher price in any one locality than is paid or offered for the same commodity by such person, firm, or corporation in any other locality after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the place of purchase to the place of manufacture, sale, or storage, shall be deemed guilty of a misdemeanor and punished as hereinafter provided. (L. 1915, ch. 344, sec. 1, p. 588; O. L. sec. 8758.)

Sec. 41-709. Prosecuting attorney—Enforcement of act.—It shall be the duty of every prosecuting attorney to whom the dairy and food commissioner shall report any violation of the provisions of this act to cause proceedings to be commenced against the person or persons so violating the provisions of this act, and to prosecute the same to final termination according to the laws of the State of Oregon. (L. 1915, ch. 344, sec. 10, p. 588; O. L. sec. 8767.)

Sec. 41-710. Penalty for violating act.—Any employee of a firm, company, association, corporation, or persons receiving or purchasing milk or cream on the basis of the amount of butterfat contained therein, violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not more than two hundred fifty (\$250) dollars or be imprisoned in the county jail for not more than twelve months, or both. Any person, firm, or corporation purchasing milk or cream on the basis of the amount of butterfat contained therein, 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 \$1,000, or imprisoned in the county jail for a period of not more than one year, or both such fine and imprisonment. (L. 1915, ch. 344, sec. 11, p. 588; O. L. sec. 8768.)

Sec. 41-714. Courts—Concurrent jurisdiction—Prosecution of violations.—Justice courts, district courts, and municipal courts sitting as justice courts, shall have concurrent jurisdiction with the circuit courts of all prosecutions arising under the act. The district or county attorney is authorized to institute prosecutions for violation of this act by information or the same may be instituted by indictment or by complaint verified before any magistrate. (L. 1915, ch. 344, sec. 15, p. 588; O. L. sec. 8772.)

Code Ann. (Supp., 1935)

Gasoline

Sec. 55-1709. Unfair discrimination between sections of State prohibited.—Any person, firm, company, association, or corporation,

foreign or domestic, engaged in the business of selling gasoline within the state and who is selling such commodity in more than one (1) section, community, town, village or city of the state, who with the intent to suppress competition or create a monopoly, shall discriminate by direct or indirect methods between different sections, communities, towns, villages or cities of this state by selling gasoline at a lower rate in one section, community, town, village or city, or any portion thereof, then [than] such person, firm, company, association or corporation shall charge for the same in another section, community, town, village, or city, after making due allowance, if any, in the grade or quality and the cost of transportation from the refinery, shall be deemed guilty of unfair discrimination which hereby is prohibited and declared unlawful. (L. 1933, ch. 317, sec. 1, p. 491.)

Complier's note: The bracketed word "than" was inserted by the secretary of state.

Sec. 55-1710. Unfair discrimination between purchasers in same section of state prohibited.—Any person, firm, company, association, or corporation, foreign or domestic, engaged in the business of selling gasoline who, with the intent to suppress competition or create a monopoly, shall discriminate by direct or indirect methods in the sale of gasoline at wholesale as hereinafter defined between purchasers in any section, community, town, village, or city in this State, shall be deemed guilty of unfair discrimination which hereby is prohibited and declared unlawful; and provided, that the sale or consignment of gasoline in quantities of fifty (50) gallons or more at a time to a purchaser shall be deemed to be selling at wholesale. (L. 1933, ch. 317, sec. 2, p. 491.)

Sec. 55-1711. Unfair competition by price-fixing agreements.—Any person, firm, company, association, or corporation, foreign or domestic, engaged in the business of selling gasoline within this State, who, with the intent to suppress competition or create a monopoly, makes or carries into effect any contract, understanding or agreement with any person, corporation, partnership, or association of persons in this State to fix prices with respect to the sale or distribution of gasoline so as to prevent or obstruct competition in the purchase, sale, or distribution of gasoline shall be deemed guilty of unfair discrimination, which is hereby prohibited and hereby is declared unlawful. (L. 1933, ch. 317, sec. 3, p. 491.)

Sec. 55-1712. Agreements void.—All contracts or agreements made in violation of any of the provisions of sections 55-1709 to 55-1713, inclusive, Oregon Code, 1935 Supplement, shall be void. (L. 1933, c. 317, sec. 4; as amended by L. 1939, c. 85.)

Sec. 55-1713. Penalty.—Any person, firm, company, association, or corporation, or any officer, agent or receiver thereof that shall vio-

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late any of the provisions of sections 55-1709 to 55-1713, inclusive, Oregon Code, 1935 Supplement, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$500, nor more than \$5,000, or be imprisoned in the county jail not exceeding one year or be punished by both such fine and imprisonment. (L. 1933, c. 317, sec. 5; as amended by L. 1939, c. 85.)

PENNSYLVANIA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Stat. Ann. (Purdon, Supp. 1938), tit. 73

Sec. 7. Contracts for sale of goods bearing a trade-mark; exceptions.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.

(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

(c) By any officer acting under orders of any court or in the execution of any writ or distress. (1935, June 5, P. L. 266, sec. 1.)

Section 6 provided that the act should become effective immediately upon its final enactment.

Sec. 8. Unfair competition, defined.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than

the price stipulated in any contract entered into pursuant to the provisions of section one of this act,¹ whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1935, June 5, P. L. 266, sec. 2.)

Sec. 9. Parties excepted from provisions of the act.—This act shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices. (1935, June 5, P. L. 266, sec. 3.)

Sec. 10. Definitions.—The following terms as used in this act are defined as follows:

“Producer” means grower, baker, maker, manufacturer, or publisher.

“Commodity” means any subject of commerce. (1935, June 5, P. L. 266, sec. 4.)

Sec. 11. Constitutional provision.—If any provision of this act is declared unconstitutional, it is the intent of the legislature that the remaining portions thereof shall not be affected, but that such remaining portions shall remain in full force and effect. (1935, June 5, P. L. 266, sec. 5.)

Judicial Decisions

Constitutionality of the Act.

The Fair Trade Act is constitutional. The classification of trademarked commodities as distinguished from unidentified products is reasonable. The primary purpose of the statute is to protect the goodwill of the producer, and as only vendees with notice of the restriction at time of purchase are bound, the act is not an unlawful delegation of power to private persons to control the property of another. *Shryock v. Ass'n of United Fraternal Buyers, Inc.* (Comm. Pleas, June 1, 1938), 3 CCH 25150; rev'd on other grounds, 135 Sup. Ct. 428, 5 Atl. (2d) 581 (1939).

Application of the Act.

Type of Price Established.

A producer may clearly adopt any price restriction, reasonable or not, as an appropriate means of protecting its goodwill. Where plaintiff established one price for perfume for one ounce or less,

¹ Section 7, ante.

defendant, selling a lesser quantity for a lower price, is violating the statute. *Lentheric, Inc., v. F. W. Woolworth Co.* (Comm. Pleas. June 19, 1939), 3 CCH 25275.

Cooperatives.

In *Shryock v. Ass'n of United Fraternal Buyers, Inc., supra*, the defendant alleged that it is a corporation engaged in purchasing commodities at trade discounts, credits, and allowances and in selling these commodities at less than retail prices to its stockholders and affiliated fraternal organizations. The court found that the defendant had sold a price-fixed commodity at cut prices to a member of the general public and stated that the defendant would be bound, other factors being present.

Indirect Price Cutting.

The defendant in making sales, issued only on request, trading stamps redeemable in merchandise, one stamp for each 10-cent purchase. The trading stamps were not redeemable until a book of 990 stamps had been collected. A separate trading-stamp corporation under contract with defendant redeemed each book of stamps for an article priced at \$1.75 at retail. The court held that the issuance of such stamps upon request in connection with the sale of commodities subject to a resale price restriction is not a violation of the Fair Trade Act. *Bristol-Myers Co. v. Lit Bros.*, 335 Pa. 406, 6 Atl. (2d) 843 (1939), aff'g 33 D. & C. 52 (1938). The court stated that issuance of such trading stamps was not a price-cutting device but merely an additional benefit to the customer, given in order to induce further purchases. The court further stated that the added benefit to the customer was so minute, under the "de minimis" doctrine, a court of equity would not inflict severe penalties for a trifling infraction.

In *Bristol-Myers Co. v. Soble et al.*, — D. & C. — (Comm. Pleas. Jan. 7, 1938), 106 CCH, par. 25114, the court held that the issuance of profit-sharing coupons in connection with the sale of commodities at minimum prices established under a resale price contract, was a violation of the statute. The court distinguished the case of *Bristol-Myers Co. v. Lit Bros., supra*, in that in the latter case, the trading stamps constituted little, if any, value.

Defenses

It is not necessary for plaintiff to prosecute all violators simultaneously. Reasonable diligence to enforce the price restriction, in the absence of discrimination and bad faith is sufficient. *Lentheric, Inc., v. F. W. Woolworth Co., supra*.

B. PROHIBITION OF SALES BELOW COST

Stat. Ann. (Purdon, 1938), tit. 73

Fair Sales Act²

Sec. 201. Definitions.—The words and phrases used herein shall, unless the context otherwise indicates, have the following meanings:

(a) "Cost to the retailer" shall mean: (1) the total consideration paid by the retailer for the merchandise delivered at the retail outlet; or (2) the total consideration necessary for the replacement of the merchandise to the retailer at the retail outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased by the retailer prior to the sale of said merchandise would have cost per unit if bought at the most favorable market price available to the retailer at any time within thirty (30) days prior to said sale, whichever is lower, less any customary trade discounts, but exclusive of discounts for cash.

(b) "Cost to the wholesaler" shall mean: (1) the total consideration paid by the wholesaler for merchandise delivered at the wholesale outlet; or (2) the total consideration necessary for the replacement of the merchandise to the wholesaler at the wholesale outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased by the wholesaler prior to the sale of said merchandise would have cost per unit if bought at the most favorable market price available to the wholesaler at any time within sixty (60) days prior to said sale, whichever is lower, less any customary trade discounts, but exclusive of discounts for cash.

(c) "Cost to the retailer" and "cost to the wholesaler" must be bona fide costs; and sales to consumers, retailers, and wholesalers, at prices which cannot be justified by existing market conditions within this State, shall not be used as basis for computing costs with respect to sales by retailers and wholesalers.

(d) "Sell at retail" and "sales at retail" shall mean any transfer of title to tangible personal property for a valuable consideration, where such property is to be used by the purchaser for purposes other than resale, manufacture, or further processing. The above terms shall

²The Fair Sales Act is unconstitutional. It fixes prices in a business not affected with a public interest. Selling below cost per se is not unfair competition and is not injurious to the public. As the statute does not require an unlawful intent and proscribes all sales below cost, there is no distinction drawn between a lawful and an unlawful act. *Commonwealth v. Hodin*, 34 D. & C. 270 (Quarter Sessions, 1938); *Commonwealth v. Zasloff*, 86 P. L. J. 597, aff'd, 87 P. L. J. 463 (1939).

Where a druggist purchased a large box of tablets, reboxed them, and sold them below the usual cost of such sized boxes but for more than they actually cost him, it was held not to be a violation of the act. *Commonwealth v. Cost*, 32 D. & C. 204 (Comm. Pleas, 1939).

also include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

(e) "Sell at wholesale" and "sales at wholesale" shall mean any transfer of title to tangible personal property for a valuable consideration, where such property is to be used by the purchaser for purposes of resale, manufacture, or further processing. The above terms shall also include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

(f) "Retailer" shall include every person, firm, corporation, or association engaged in the business of making sales at retail within this State: *Provided*, That in the case of a person, firm, corporation, or association engaged in the business of making both sales at retail and at wholesale, such term shall be applied only to the retail portion of such business.

(g) "Wholesaler" shall mean and include every person, firm, corporation, or association engaged in the business of making sales at wholesale within this State: *Provided*, That in the case of a person, firm, corporation, or association engaged in the business of making both sales at wholesale and at retail, such term shall be applied only to the wholesale portion of such business. (1937, July 1, P. L. 2672, sec. 1.)

TITLE OF ACT: An act to insure and protect fair trade practices in distribution; defining such practices; prohibiting the advertisement, offer for sale, or sale of merchandise at less than cost; and fixing a penalty for such advertisement, offer for sale, or sale; and investing the courts with jurisdiction to prevent and restrain violations of the act. (1937, July 1, P. L. 2672.)

Sec. 202. Sales at less than cost prohibited.—It is hereby declared that the advertisement, offer for sale, or sale of any merchandise at less than cost by retailers or wholesalers prohibited. (1937, July 1, P. L. 2672, sec. 2.)

Sec. 203. Penalties.—Any retailer who shall advertise, offer to sell, or sell at retail, any merchandise at less than cost to the retailer, as defined in this act, or any wholesaler who shall advertise, offer to sell, or sell at wholesale, any merchandise at less than cost to the wholesaler, as defined in this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500). Proof of any such advertisement, offer to sell, or sale, by any retailer or wholesaler, shall be prima facie evidence of a violation of this act. (1937, July 1, P. L. 2672, sec. 3.)

Sec. 204. Injunctive relief.—In addition to the penalties provided in this act, the courts of common pleas of this Commonwealth are hereby invested with jurisdiction to prevent and restrain violations

of this act, and it shall be the duty of the several district attorneys, in their respective districts, to institute proceedings in equity to prevent and restrain violations. Any person shall be entitled to sue for and have injunctive relief in any court of common pleas of this Commonwealth against threatened loss or damage by reason of a violation of this act. (1937, July 1, P. L. 2672, sec. 4.)

Sec. 205. Sales excepted.—The provisions of this act shall not apply to sales at retail or sales at wholesale: (a) where merchandise is sold in bona fide clearance sales, and is advertised, marked, and sold as such; (b) where perishable merchandise must be promptly sold in order to forestall loss; (c) where merchandise is imperfect, or damaged, or is being discontinued, and is advertised, marked, and sold as such; (d) where merchandise is sold upon the final liquidation of any business; (e) where merchandise is sold for charitable purposes; (f) where the price of merchandise is made to meet the legal price of a competitor for merchandise of the same grade, quality, and quantity; and (g) where merchandise is sold by any officer acting under the direction of any court. (1937, July 1, P. L. 2672, sec. 5.)

Sec. 206. Short title.—This act may be known and cited as the "Fair Sales Act." (1937, July 1, P. L. 2672, sec. 6.)

Sec. 207. Partial invalidity.—If any section, sentence, or clause of this act shall for any reason be held invalid or unconstitutional, such decision shall not affect the validity of the remaining parts hereof. (1937, July 1, P. L. 2672, sec. 7.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Stat. Ann. (Purdon, 1931), tit. 47

Liquor^{*}

Sec. 621. Offering or giving premiums with sales prohibited.—*Be it enacted, etc.,* That, from and after the passage of this act, it shall be unlawful for any person, partnership, or corporation, licensed to sell vinous, spirituous, malt, or brewed liquors at wholesale or retail,

^{*} Sections 621-623 are not invalid as class legislation or as an invasion of the personal rights of citizens, but are a valid exercise of the police power of the State. *Commonwealth v. Mutual Union Brewing Co.*, 252 Pa. 168, 97 Atl. 206 (1916), aff'g 58 Pa. Sup. Ct. 647 (1915).

to offer or give anything of value as a premium for the return of caps, stoppers, corks, stamps, or labels taken from any bottle, case, keg, barrel, or package containing such vinous, spirituous, malt, or brewed liquors, or to offer or give anything of value as a premium or present to induce the purchase of such liquors or for any other purpose whatsoever, in connection with the sale of such liquors. (1913, June 12, P. L. 490, sec. 1; 1917, July 17, P. L. 1020, sec. 1.)

Sec. 622. Rebates and discounts for return of packages excepted.—This act shall not prohibit the offering or giving of any rebate or discount by any person, partnership, or corporation, licensed to sell vinous, spirituous, malt, or brewed liquors at wholesale or retail, for the return of any bottle, case, keg, barrel, or package in which such vinous, spirituous, malt, or brewed liquor is actually sold. (1913, June 12, P. L. 490, sec. 2.)

Sec. 623. Penalty for violations.—Any person, partnership, or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished, for the first offense, by a fine of not more than one hundred dollars, or by imprisonment in the county jail for not more than ten days; and subsequent offense shall be punished by a fine not to exceed three months, either or both, at the discretion of the court. (1913, June 12, P. L. 490, sec. 3.)

RHODE ISLAND

REGULATION OF PRICE COMPETITION

A. RE SALE PRICE MAINTENANCE

Rev. Gen. Laws (1933), c. 393

Section 1. Definitions.—The following terms, as used in this chapter, are hereby defined as follows:

- (1) "Commodity" means any subject of commerce.
- (2) "Producer" means any grower, baker, maker, manufacturer, packer, converter, processor, or publisher.
- (3) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (4) "Retailer" means any person selling a commodity at retail.
- (5) "Resale" means any sale by the purchaser of a commodity made in the State of Rhode Island or in any other State, Territory, or the District of Columbia, where contracts made lawful by this chapter are valid, by a wholesaler or retailer, and "to resell" means to make a "resale" as herein defined.

Sec. 2. Contracts authorized.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer of such commodity and which is in free and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Rhode Island by reason of any of the following provisions which may be contained in such contract:

- (1) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.
- (2) That the vendor will not sell such commodity:
 - (a) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree

not to resell the same at less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(b) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 3. Exceptions.—No contract containing the provisions enumerated in section 2 hereof shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

1. In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, The owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase said stock at the original invoice price.

2. When the goods are damaged or deteriorated in quality and notice is given to the public thereof.

3. By any officer acting under an order of court. (P. L., 1938, c. 2607, amending P. L., 1936, c. 2427.)

Sec. 4. Parties to action.—An action at law or suit in equity may be brought by any person damaged by: (a) The breach, or (b) the procurement of the breach, or (c) the interference with the carrying out of any contract entered into in pursuance of this chapter, or (d) the act of any person whether a party to such contract or not in wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any such contract, or (e) any other act whereby a party to such contracts is deprived of the benefits therefrom.

Sec. 5. Parties excepted from provisions of act.—This chapter shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices: *Provided, however*, That when a commodity is distributed by more than one wholesaler, or more than one retailer, each of said wholesalers or of said retailers may make or be a party to contracts stipulating minimum resale prices established by the producer of such commodity as provided by this chapter.

Sec. 6. Short title.—This chapter may be known and cited as the "Fair Trade Act."

Sec. 7. Severability.—If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid,

the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby.

B. PROHIBITION OF SALES BELOW COST

L. 1939, c. 671

Unfair Practices Act

Section 1. Definitions.—(a) The term “cost to the retailer” shall mean the invoice cost of the merchandise to the retailer within thirty days prior to the date of the sale, or the replacement cost of the merchandise to the retailer within thirty days prior to the date of the sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, (2) cartage to the retail outlet if performed or paid for by the retailer, which cartage cost shall be deemed to be three-fourths of one percent of the cost of the merchandise to the retailer, unless said retailer claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be six percent of the total cost at the retail outlet;

(b) The term “cost to the wholesaler” shall mean the invoice cost of the merchandise to the wholesaler within thirty days prior to the date of the sale, or the replacement cost of the merchandise to the wholesaler within thirty days prior to the date of the sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, and (2) cartage to the retail outlet if performed or paid for by the wholesaler, which cartage cost shall be deemed to be three-fourths of one percent of the cost of the merchandise to the wholesaler, unless said wholesaler claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lesser cost shall be two percent of the total cost at the wholesale establishment;

(c) Where two or more items are advertised, offered for sale or sold at a combined price, the price of each such item shall be determined in the manner set forth in paragraphs (a) and (b);

(d) The terms “cost to the retailer” and “cost to the wholesaler” as defined in paragraphs (a) and (b) shall mean bona fide costs; and sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing conditions within this State shall not be used

as a basis for computing replacement costs with respect to sales by retailers and wholesalers;

(e) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer of title to tangible personal property for a valuable consideration made, in the ordinary course of trade or in the usual prosecution of the seller's business, to the purchaser for consumption or use other than resale or further processing or manufacturing. In this and in the preceding paragraph the above terms shall include any such transfer of property where title is retained by the seller as security for the payment of the purchase price;

(f) The term "retailer" shall mean and include every person, copartnership, corporation, or association engaged in the business of making sales at retail within this State; provided that, in the case of a retailer engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business; and

(g) The term "wholesaler" shall mean and include every person, copartnership, corporation, or association engaged in the business of making sales at wholesale within this State; provided that, in the case of a wholesaler engaged in the business of making sales both at wholesale and at retail, such term shall be applied only to the wholesale portion of such business;

(h) Whenever any person, copartnership, corporation, or association in the course of doing business performs the functions of both wholesaler and retailer without actually being engaged in the business of making sales at wholesale, the term "wholesaler" shall mean and include that function of the business of preparation for sale at the retail outlet and the term "retailer" shall be applied only to the retail portion of such business.

Sec. 2. Penalties.—Any retailer, who, with intent to injure competitors or destroy competition, advertises, offers to sell or sells at retail any item of merchandise at less than cost to the retailer, or any wholesaler who, with intent as aforesaid, advertises, offers to sell, or sells at wholesale any item of merchandise at less than cost to the wholesaler, shall, if the offender is an individual, be punished by a fine of not more than five hundred 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. Evidence of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him, as herein defined, shall be prima facie evidence of intent to injure competitors or destroy competition.

Sec. 3. Exceptions.—Sections 1, 2, 4, 5, 6, and 7, inclusive, shall not apply with respect to advertising or offering to sell, or selling, at retail or at wholesale, as the case may be, if done;

(a) In an isolated transaction and not in the usual course of business;

(b) Where merchandise is sold in bona fide clearance sales, if advertised or offered for sale as such or marked and sold as such, or where merchandise is marked down in an effort to sell the same after bona fide efforts to sell the same prior to such mark-down;

(c) Where perishable merchandise must be sold promptly in order to forestall loss;

(d) Where merchandise is imperfect or damaged or its sale is being discontinued, if advertised or offered for sale as such or marked and sold as such;

(e) Where merchandise is advertised or offered for sale or sold upon the final liquidation of any business;

(f) Where merchandise is advertised or offered for sale or sold for charitable purposes or to relief agencies;

(g) Where merchandise is sold on contract to any department, board, or commission of this State or of any political subdivision thereof, or to any institution maintained thereby;

(h) Where merchandise is advertised or offered for sale or sold by any fiduciary or other officer acting under the order or direction of any court.

Sec. 4. Attorney general to enjoin violation.—Upon the complaint of any person the superior court shall have jurisdiction to restrain and enjoin any act forbidden or declared illegal by any provisions of this act; and it shall be the duty of the attorney general of this State to enforce, and restrain the violation of, said sections of this act.

Sec. 5. Severability.—Whenever the application of any provisions of any other law of this State conflicts with the application of any provision of sections 1 to 7, inclusive, of this act, then said latter sections shall prevail.

Sec. 6. Validity.—If any of the provisions of said sections 1 to 7, inclusive, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of said sections, or the application of such provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Sec. 7. Effective date.—This act shall take effect thirty days after its passage, and shall continue in effect notwithstanding any of the

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provisions of chapter 2600 of the public laws, 1938, as amended, and of the general laws of 1938, and thereupon, all acts and parts of acts inconsistent herewith are hereby repealed.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

No provisions.

SOUTH CAROLINA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Code (Supp. 1938)

Section 6044-1. Definitions.—*Be it enacted by the general assembly of the State of South Carolina:* The following terms, as used in this Act are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization. (L. 1937, p. 301.)

Sec. 6044-2. Provisions contained in contract for sale or resale of commodity bearing trade-mark, brand, or name of producer, distributor, or owner.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer, distributor, or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of South Carolina by reason of any of the following provisions which may be contained in said contract.

¹ The Fair Trade Act is constitutional citing *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 100 (1936) (see Resale Price Maintenance, Illinois, *supra*). *Calvert Distilling Co. v. Brandon*, 24 Fed. Supp. 857 (1938). See also *Miles Laboratories, Inc., v. Seignious*, 30 Fed. Supp. 549 (1939).

A noncontracting retailer with notice of the price restriction is bound by it. *Calvert Distilling Co. v. Brandon, supra*.

Where plaintiff sued defendant for violation of a fair trade agreement knowing that other retailers would follow defendant's actions, defendant cannot claim discriminatory enforcement as a defense. *Ibid*.

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.

(b) That the producer or vendee of a commodity require upon the sale of such commodity to another that such purchaser agree that he will not, in turn, resell at less than the minimum price stipulated by such producer or vendee. *Provided*, That such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing dealing in such commodity: *Provided, however*, That such stock is first offered to the producer or distributor of such stock at the original invoice price, at least ten days before such stock shall be offered for sale to the public.

(b) When the goods are damaged or deteriorated in quality and one week's notice is given to the public thereof by publication in a newspaper published in the county where the seller's place of business is located.

(c) By any officer acting under the orders of any court. (Id.)

Sec. 6044-3. Unfair competition.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract is unfair competition and is actionable at the suit of any person damaged thereby. (Id.)

Sec. 6044-4. Contracts exempted.—This act shall not apply to any contract or agreement between producers, or between wholesalers, or between retailers as to the sale or resale prices. (Id.)

Sec. 6044-5. Invalidity.—If any provision of this section is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Sec. 6044-6. Short title.—This act may be known and cited as "The Fair Trade Act."

B. PROHIBITION OF SALES BELOW COST

Code (1932)

Sales Below Cost of Manufacture

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 bought 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.)

For procedural and penalty provisions. See **MARKETING LAWS SURVEY** volume: *State Antitrust Laws; General Antitrust Laws.*

C. ANTIDISCRIMINATION LEGISLATION

I. General Prohibitory Laws

Code (1932)

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(s) between different purchasers of such commodity in general use in such village, town, or cities in this State, or discriminate(s) 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 section 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.² (Civ. C. '22, sec. 3536; Civ. C. '12, sec. 2443; 1909, XXVI, 19; 1927, XXXV, 115.)

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. (Id., sec. 3537; id., sec. 2444; id., 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. (Id., sec. 3538; id., sec. 2445; id., 19.)

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. (Id., sec. 3539; id., sec. 2446; id., 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. (Id., sec. 3540; id., sec. 2447; id., sec. 19.)

² Section 6626, prior to the amendment thereof in 1927, did not prohibit discrimination in prices as between different points in the same city but only discrimination in prices as between different cities. *State v. Texas Co.*, 136 S. C. 200, 134 S. E. 211 (1926).

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. (Id., sec. 3541; id., sec. 2448; id., sec. 19.)

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. (Id., sec. 3442; id., sec. 2449; id., sec. 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. (Id., sec. 3543; id., sec. 2450; id., sec. 19.)

2. Special Prohibitory Laws

L. 1939, No. 267

Wholesale and Retail Merchandising Act

Section 1. Construction.—For the purpose of construing this act,

(a) A wholesale sale shall be one deemed to be made to a person, association of persons, firm or corporation, for the purpose of resale at retail.

(b) A retail sale shall be deemed to be a sale for the purpose of consumption or use.

(c) Where a wholesaler owns controlling interest or stock in a retail establishment or corporation and creates, organizes, or maintains such retail outlet for the purpose of violating this act by making retail sales therefrom at a price that would be in violation of this act if made at retail directly by the wholesaler, such wholesaler shall be liable also for any violation of this act by any such retailer. It is hereby declared a violation of this act for any wholesaler that owns controlling interest or stock in a retail establishment or corporation to create, organize, or maintain such retail outlet for the purpose of violating this act in the way and manner aforesaid.

Sec. 2. Selling retail at wholesale prices.—It is hereby declared an unfair trade practice and unlawful in this State for any person, firm, or corporation, who is in both the wholesale and retail business of selling merchandise, to sell merchandise of like grade and quality

at retail at a price as low as said person, firm, or corporation sells the same merchandise at wholesale in the same town or locality.

Sec. 3. Selling retail at prices lower than wholesale.—It is hereby declared an unfair trade practice and unlawful in this State for any person, firm, or corporation, who is in both the wholesale and retail business of selling merchandise, to sell merchandise of like grade and quality at retail at a lower price than said person, firm, or corporation sells the same merchandise at wholesale in the same town or locality.

Sec. 4. Exceptions.—No part of this act shall be construed to prohibit the sale at wholesale to hotels, restaurants, colleges, bona fide licensed contractors, farmers buying for his plantation, including labor on his own farm, boarding houses, cooperative purchases for redistribution among farmers, religious institutions, or county, city, Federal or State institutions or departments. *Provided, further,* Retail sales of merchandise of like grade and quality at a price to meet existing competition at any time in any town or locality are exempt from the provisions of this act: *Provided, however,* That, if such competition is created by any person, firm, or corporation in violation of this act, or when any two or more persons, firms, or corporations contend that they are meeting the competition of the other and all would be making retail sales in violation of this act, except for the above provision allowing existing competition to be met, then any retailer affected thereby shall have the right to enjoin all in such category from continuing such practices in any court of competent jurisdiction in this State.

Sec. 5. Penalties.—Each and every sale in violation of the terms of this act shall be declared a separate offense, and the penalty for each violation of same shall be a fine of not more than one hundred (\$100.00) dollars, or imprisonment for not more than thirty (30) days in the discretion of the court.

Sec. 6. Constitutionality.—If any part of this act shall be held unconstitutional, the part which is held unconstitutional shall not affect any other part of this act.

Sec. 7. Effective date.—This act shall take effect upon its approval by the Governor. Approved June 15, 1939.

SOUTH DAKOTA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Comp. Laws (1939)

Sec. 54.0401. Definitions.—Terms used in this chapter unless the content otherwise plainly requires are defined as follows:

- (1) "Commodity" means any subject of commerce;
- (2) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher;
- (3) "Wholesaler" means any person selling a commodity other than a producer or retailer;
- (4) "Retailer" means any person selling a commodity to consumers for use;
- (5) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (L. 1937, c. 126, sec. 1.)

Sec. 54.0402. Contracts relating to sale of trade-marked articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of South Dakota by reason of any of the following provisions which may be contained in such contract:

- (1) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;
- (2) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller;
- (3) That the seller will not sell such commodity;

(a) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(b) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Id., sec. 2.)

Sec. 54.0403. Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect to any commodity by any contract entered into pursuant to the provisions of this chapter, except to the extent authorized by said contract, any of the following shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 54.0406 shall be available:

(1) The offering or giving of any article of value in connection with the sale of such commodity;

(2) The offering or the making of any concession of any kind whatsoever whether by the giving of coupons or otherwise in connection with any such sale; or

(3) The sale or offering for sale of such commodity in combination with any other commodity. (Id., sec. 3.)

Sec. 54.0404. Only owners of trade-marks to establish resale prices.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this chapter, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Id., sec. 4.)

Sec. 54.0405. Contract relating to sale or resale.—No contract containing any of the provisions enumerated in section 54.0402 of this chapter shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(1) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(2) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(3) When the goods are altered, secondhand, damaged, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(4) By any officer acting under an order of court. (Id., sec 5.)

Sec. 54.0406. Unfair competition.—Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Id., sec. 6.)

Sec. 54.0407. Exemptions.—This chapter shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (Id., sec. 7.)

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Comp. Laws (1939)

Sec. 13.1803. Discrimination in selling: defined.¹—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

¹ A former statute dealing with discriminations in buying and selling was held constitutional as a valid exercise of the police power of the State. The statute, requiring an intent to injure competition for a violation thereof, is not a denial of the equal protection and due process clauses of the Federal Constitution. *Central Lumber Co. v. State of South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164 (1912), affg, 24 S. D. 136, 123 N. W. 504 (1909).

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.

Source: Sec. 4365 Rev. Code 1919.

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: § 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. 4366 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.

Source: Sec. 3995 Rev. Code 1919.

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. 5362 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.

2. Special Prohibitory Laws

Comp. Laws (1939)

Grains and Flaxseed

Sec. 4.1701. Discrimination to destroy competition unlawful.—Any person, natural or artificial, partnership, association, or corporation, foreign or domestic, engaged in the purchase of grain or flaxseed, at more than one place in this State, who shall, with the intent and for the purpose of destroying competition, discriminate, by direct or indirect methods, between different places, by paying a different price for any grain or flaxseed at one place than such person is at the same time paying for the same kind of grain or flaxseed at another place within this State, after taking into consideration the difference, if any, in the grade and quality of such grain or flaxseed and in the cost of transportation from the point where same is purchased to the market where sold or intended to be sold, shall be guilty of discrimination in the purchase of grains and flaxseed, which is hereby prohibited and declared to be unlawful.

Provided, however, That any such person engaged in the purchase of grain or flaxseed at more than one place in this State, may raise the price paid for any kind, grade, and quality of grain or flaxseed in any given place to, but not above, the price being paid for the same kind, grade, and quality of grain or flaxseed by another buyer at the same place, when necessary to meet actual legitimate competition at such place, without being held to have violated the provisions of this chapter.

Provided further, That when one or more such persons are the only persons engaged in the purchase of grain or flaxseed at a given place in this State, such person or persons may raise prices at that place to, but not above, the prices being paid for the same kind, grade, and

quality of grain or flaxseed by a buyer at another place in that immediate section, when necessary to meet actual legitimate competition, without being held to have violated the provisions of this chapter.

Source: Sec. 1, Ch. 203, 1937, revised in form only.

Sec. 4.1702. Posting prices grain, flaxseed required; contracts future delivery required; execution and content.—Every public warehouse or miller engaged in the purchase of grain and flaxseed, or either, within the state, shall during each day keep posted, in a conspicuous place plainly accessible to view from the dump, pit, or place where such grain so purchased is unloaded, one slate or card which shall plainly show all prices offered that day by such warehouseman or miller, for each kind, grade, and quality of grain and flaxseed, and another slate or card plainly showing all prices paid for each kind, grade, and quality of grain or flaxseed purchased that day. Provided, that when any grain or flaxseed is purchased for delivery after the purchase agreement is made, the terms of such agreement shall be reduced to writing in duplicate, showing the date, place, kind, grade, and quality, number of bushels, price agreed upon, period allowed for delivery, and the signatures of the seller and buyer or their agents. One copy shall be retained by the seller and the other by the buyer as a permanent record in his office.

Source: Sec. 2, Ch. 203, 1937.

Sec. 4.1703. Public utilities commission enforcement agency; jurisdiction; procedure; appeals.—If complaint shall be made to the public utilities commission that any person is guilty of discrimination as defined in this chapter, said commission shall investigate such complaint within thirty days, and for such purpose, insofar as applicable, the procedure before the public utilities commission in cases involving the rates, facilities, service, or other affairs of railroads in this state, including notices of hearing; the conducting of hearings; compelling the attendance and testimony of witnesses and the production of records, data, and information; the preparation, recording, and serving of reports and orders of the commission, shall be followed and shall govern in all proceedings and investigations before the commission under the provisions of this chapter. After investigation or hearing upon such complaint the public utilities commission may, by proper order and for good cause shown, revoke the license of such person to purchase grain or flaxseed in this state, but such person shall have all the rights of rehearing and review as to such order of the commission as is provided by statute or rule relating to rehearings, reviews, and appeals from decisions or orders of the public utilities commission.

Source: Sec. 3, Ch. 203, 1937, revised in form only.

Cross-reference: Ch. 4.99 for penal provision violation of foregoing chapter generally.

Sec. 4.9909. Discrimination in buying grain and seed; violation of chapter; general penalty.—Whoever shall violate any of the provisions of chapter 4.17 shall be guilty of a misdemeanor and punished by a fine of not less than two hundred dollars nor more than ten thousand dollars.

Source: Sec. 4, Ch. 203, 1937, revised in form for separate statement of penal provision.

Milk, Cream, Butter, etc.

Sec. 4.1801. Unfair discrimination; defined; unlawful.—Any person, natural or artificial, partnership, association, or corporation, doing business in this State and engaged in the business of buying milk, cream, butter, butterfat, or any other dairy product, that shall intentionally, for the purpose of injuring or destroying the business or trade of a competitor in any locality or to prevent or destroy competition by any person, who in good faith, intends or attempts to engage in such business, discriminate between different sections, communities, or cities of this State, by paying for such milk, cream, butter, butterfat, or any other dairy product, a higher price in one section, community, or city, than such person, firm, or corporation is at the same time paying for such property in another section, community, or city within the 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 where same is purchased to the market where it is sold, or intended to be sold, or who shall, in any section, locality, community, city or village, pay a rebate, bonus, gift, or patronage dividend in addition to the regular price paid at the time of purchase, to others than stockholders or to patrons to be applied on shares of capital stock of any corporation or association, unless such bonus, gift, or rebate be paid to every patron in every locality in this State, from whom said person, firm, or corporation purchases such dairy products, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

Source: Sec. 1, Ch. 195, 1923, as am. by Ch. 249, 1929, revised in form only.

Sec. 4.1802. Posting prices dairy products required; record of prices posted and paid required; inspection open to public.—Every person, firm, or corporation, foreign or domestic, doing business in this State, operating a creamery or cream buying station, or engaged in the business of buying milk, cream, butter, butterfat, or any other

dairy product, whether as agent or otherwise, shall at all times keep posted in the front window or on the front of the building or place where such business is transacted, a sign printed in letters and figures at least two inches in height, and so printed and posted as to be plainly legible from the outside of such building or place, stating and showing the price being offered or paid for such dairy products, and every such person or corporation shall also keep, in writing, at such building or place, a permanent record showing the price offered or paid for each kind of such dairy products and the exact time when each change in price was posted, and such record shall at all times be subject to inspection and examination by any person interested, without giving any reason therefor.

Source: Sec. 5, Ch. 195, 1923.

Sec. 4.1803. Corporation violation; attorney general enforcement officer; complaints; investigations; testimony; prosecution; license revoked; injunction.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this chapter, 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 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 chapter, such court may annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this State.

Source: Sec. 4, Ch. 195, 1923.

Sec. 4.1804. Remedies cumulative.—The remedies provided for in this chapter shall be construed as cumulative and not exclusive.

Source: Sec. 7, Ch. 195, 1923, revised in form only.

Sec. 4.1907. Forfeiture license; grounds; rehearing; reinstatement by agreement; appeal to Circuit Court.—Any person, firm, association, or corporation engaged in the business of operating a creamery, cheese factory, butter factory, renovating or process butter factory, ice cream factory, condensory, wholesale milk dealer, or cream station who shall violate any of the laws relating to the handling, purchasing, and selling of dairy products under the dairy statutes now in force, or who shall violate any of the statutes relating to unfair and unlawful discrimination shall, as defined by the laws of this state in addition to the penalties provided therefor, forfeit the license herein provided for after notice and hearing as

above provided: *Provided*, That when any license has been revoked the person, firm, association, or corporation complained of may upon request be granted a rehearing and if a satisfactory agreement can be reached by and between such person, firm, association, or corporation and the Secretary of Agriculture, the license of said person, firm, association or corporation may be reinstated and he be authorized to resume business at the place named in the license: *Provided further*, That if a rehearing is denied or an agreement cannot be reached, then and in that case, recourse may be had by an appeal to the circuit court.

Source: Sec. 7, Ch. 96, 1927, revised as to form only.

Sec. 4.9910. Discrimination in buying dairy products; violations of chapter generally; penalty.—Whoever shall violate any of the provisions of section 4.1802 of this title by paying any other prices for dairy products than the posted prices or violating any other provision of such section or failing to comply with all the provisions of such section shall be guilty of a misdemeanor and, in addition to the general penalty for punishment of misdemeanors, the judgment of conviction shall operate as a forfeiture of the license to engage in such business.

Whoever shall violate any provisions of chapter 4.18 relating to discrimination in buying dairy products for which no punishment is otherwise specified shall be punished by a fine of not less than two hundred dollars nor more than ten thousand dollars.

Source: Secs. 3 and 6, Ch. 195, 1923, revised in form and combined for separate statement of penal provision.

Sec. 4.9911. Dairy product dealer licensing; engaging in business without license or continuing without valid license; penalty.—Whoever shall violate any of the provisions of chapter 4.19 by engaging in the business of dairy products dealer without having a license in good standing as required by such chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each offense by a fine of not less than \$15 nor more than \$100 or by imprisonment of not less than 10 days nor more than 90 days or both.

Source: Sec. 6, Ch. 96, 1927, revised in form only for separate statement of penal provision and to remove redundancy.

Comp. Laws (1939)

Gasoline

Sec. 54.0901. Discrimination defined and applied: declared unlawful; exception to meet competition.—Any person, firm, company, association, or corporation, foreign or domestic, engaged in the business of selling gasoline or kerosene within the state that shall

intentionally, for the purpose of creating a monopoly, or of destroying the business of a regularly established competitor in any locality, discriminate by direct or indirect methods between different sections, communities, towns, villages, or cities of this state, by selling the above commodities at a lower rate in one section, community, town, village, or city, or any portion thereof, than such person, firm, company, association, or corporation shall charge for same in another section, community, town, village, or city, after making due allowance, if any, in the grade or quality, and the cost of transportation from the refinery, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

Any person, firm, company, association, or corporation selling such commodities in more than one section, community, town, village, or city, may lower prices in any given section, community, town, village, or city, to but not below the prices for which others are selling such commodities in such section, community, town, village or city, when necessary to meet actual legitimate competition in such section, community, town, village, or city, without being held to have violated the provisions of this chapter.

Source: Sec. 1, Ch. 203, 1923, revised in form.

Sec. 54.0902. Prima facie evidence of violation: sales at different prices.—Proof of the selling of any such commodity by any person, firm, company, association, or corporation at a lower rate in one section, community, town, village, or city of this state than such firm, person, company, association, or corporation charges for such commodity in another section, community, town, village, or city, after making due allowance for the difference, if any, in the grade or quality, and in the cost of transportation from the refinery shall constitute prima facie evidence of a violation of section 54.0901.

Source: Sec. 2, Ch. 203, 1923.

Sec. 54.0903. Remedies cumulative.—Nothing in this chapter shall be construed as repealing any other law in this state, but the remedies herein provided shall be cumulative to all other remedies provided by law in and for such cases.

Source: Sec. 4, Ch. 203, 1923, revised in form.

Sec. 54.9906. Gasoline and kerosene: discrimination in selling; penalty.—Whoever shall violate any of the provisions of chapter 54.09 relating to discrimination in the sale of gasoline and kerosene, shall be guilty of a misdemeanor and fined not less than \$500 nor more than \$5,000 or be imprisoned in the county jail not exceeding one year or be punished by both such fine and imprisonment.

Source: Sec. 3, Ch. 203, 1923, revised in form.

TENNESSEE

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code Ann. (Michie, 1938)

Section 6770 (1). *Contracts relating to sale of trade-marked articles.*—*Be it enacted by the general assembly of the State of Tennessee,* That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Tennessee by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to which agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court. (1937, ch. 58, sec. 1.)

Sec. 6770 (2). *Selling, advertising, etc., at less than stipulated price.*—That wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 6770 (1) of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition

and is actionable at the suit of any person damaged thereby. (Id., sec. 1½.)

Sec. 6770 (3) Contracts to which law does not apply.—That this act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (Id., sec. 2.)

Sec. 6770 (4). Definitions.—That the following terms, as used in this act, are hereby defined as follows:

“Producer” means grower, baker, maker, manufacturer or publisher. “Commodity” means any subject of commerce. (Id., sec. 3.)

Sec. 6770 (5). Citation.—That this act may be known and cited as the “Fair Trade Act.” (Id., sec. 4.)

B. PROHIBITION OF SALES BELOW COST

Code Ann. (Michie, 1938)

Unfair Sales Act¹

Section 6770 (6). Definitions.—*Be it enacted by the General Assembly of the State of Tennessee,* That the words and phrases used herein shall, unless the context otherwise indicates, have the following meanings:

(a) The term “cost to the retailer” shall mean whichever is lower of the following: (1) The purchase price of the product or commodity to the retailer at the retail outlet when invoice is dated not more than 60 days prior to the sale of such product or commodity by the retailer, or (2) the replacement cost of such product or com-

¹The Supreme Court of Tennessee upheld the Unfair Sales Act as a valid exercise of the police power of the State. It was held that the act was not a price-fixing statute, and as only sales below cost with the intent or effect of injuring competition were denounced, the act was valid legislation designed to foster free competition and to prevent monopoly. In reply to the contention that the specific terms of the statute were vague, indefinite, arbitrary, or discriminatory, the court held that:

(1) The mark-up provision, while following only the clause defining replacement cost, is applicable also to the clause defining invoice cost.

(2) While the legislature omitted the word “not” in the act, its intention is so clear that court will supply the missing word.

(3) The words “most efficient retailer” are used generally and are sufficiently definite. Ascertainment of cost of distribution to such persons can be gotten from numerous trade journals and trade surveys.

(4) Six percent mark-up as prima facie evidence is merely a rule of evidence and clearly within the powers of the legislature to prescribe.

(5) The contention that the act requires a retailer who has made a purchase on a low market more than 60 days prior to resale to increase his price without regard to reasonable profit and violates due process clause is invalid. Act provides for exceptions—as isolated transactions or bona fide clearance sales.

(6) While sales at prices not justified by existing market conditions within the State cannot be used as a basis for computing cost, this is not a burden on interstate commerce. Existing market conditions include buying as well as selling and merely means that an exceptional sale cannot be used as a basis *Rust v. Griggs*, 172 Tenn. 565, 113 S. W. (2d) 733 (1938).

modity to the retailer at the time of sale in the quantity last purchased by the retailer; less any legitimate trade discounts but exclusive of cash discounts for prompt payment, and plus a mark-up amounting to less than the minimum cost of distribution by the most efficient retailer, which mark-up, in the absence of proof to the contrary, shall be six percent (6%). In all retail sales involving more than one item or commodity, the retailer's selling price on individual items or commodities shall be computed on the "cost to the retailer" as herein defined.

(b) The term "cost to the wholesaler" shall mean and include whichever is lower of the following: (1) The purchase price of the product or commodity to the wholesaler when invoice is dated not more than 60 days prior to the sale of such product or commodity by the wholesaler, or (2) the replacement cost of such product or commodity to the wholesaler at the time of sale in the quantity last purchased by the wholesaler; less any legitimate trade discounts but exclusive of cash discounts for prompt payment.

In all wholesale sales involving more than one item or commodity, the wholesalers' selling price on individual items or commodities, shall be computed on the "cost to wholesaler" as herein defined.

(c) The terms "cost to the retailer" and "cost to the wholesaler" must be bona fide costs, and sales to retailers and wholesalers at prices which cannot be justified by existing market conditions within this State shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers.

(d) The terms "sale at retail," "sales at retail," and "retail sale" shall mean and include any transfer, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for use or consumption and for a valuable consideration. The above terms shall mean any transfer of such property where title is retained as security for the purchase price but is intended to be transferred later.

(e) The terms "sale at wholesale," "sales at wholesale," and "wholesale sales" shall mean and include any transfer, for a valuable consideration made in the ordinary course of trade or the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for resale either in its original form or as processed or prepared for resale by hotels, cafes, or hospitals, or other institutions. The above terms shall mean any transfer of such property where title is retained as security for the purchase price but is intended to be transferred later.

(f) The term "retailer" shall mean and include every person, partnership, firm, corporation, or association engaged in the business of making sales at retail within this State.

(g) The term "wholesaler" shall mean and include every person, partnership, firm, corporation, or association engaged in the business of making sales at wholesale within this State. (L. 1937, c. 69, sec. 1.)

Sec. 6770 (7). Sales below cost.—That it is hereby declared that advertising, offers to sell, or sales by retailers or wholesalers at less than cost as defined in this act, with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy, where the result of such advertising, offers, or sales is to tend to deceive or mislead any purchaser or prospective purchaser or to substantially lessen competition or unreasonably restrain trade or tend to create a monopoly in any line of commerce. It is further declared that such advertising, offers, or sales by any retailer or wholesaler with such intent or effect or result are in contravention of the policy of this act. (Id., sec. 2.)

Sec. 6770 (8). Penalties.—That any retailer who shall, in contravention of the policy of this act, advertise, offer to sell or sell at retail any merchandise at less than cost to the retailer as defined in this act, shall be guilty of a misdemeanor, punishable upon the first conviction by a fine of not less than \$5.00, nor more than \$50.00, and upon each subsequent conviction punishable by a fine of not less than \$50.00, nor more than \$500.00. Any wholesaler, who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at wholesale any merchandise at less than cost to the wholesaler as defined in this act, shall be guilty of a misdemeanor punishable as above set forth. Proof of any such advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this act shall be prima facie evidence of a violation of this act. (Id., sec. 3.)

Sec. 6770 (9). Injunction.—That in addition to the penalties provided in this act, the state's attorney of any county or any person damaged, or who is threatened with loss or damage, by reason of a violation of this act, shall have the right to apply for an injunction, and any court of competent jurisdiction shall have power to restrain sales in violation of this act. (Id., sec. 4.)

Sec. 6770 (10). Exceptions.—That the provisions of this act shall not apply to sales at retail or sales at wholesale made (a) in an isolated transaction and not in the usual course of business; (b) where merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such; (c) where highly perishable merchandise must be promptly sold in order to forestall loss; (d) of imperfect or actually damaged merchandise, or merchandise which is being discontinued,

if advertised, marked and sold as such; (e) or merchandise sold upon the complete final liquidation of any business; (f) of merchandise sold for charitable purposes or to unemployment relief agencies; (g) of merchandise sold on contract to departments of government and governmental institutions; (h) in meeting the legal price of a competitor on merchandise which is the same as to comparable competitive factors, such as weight, quantity, quality, pack, brand or packaging; (i) by any officer acting under the order or direction of any court. (Id., sec. 5.)

Sec. 6770 (11). Short title.—That this act may be known and cited as the “Unfair Sales Act.” (Id., sec. 6.)

Sale Less Than Cost of Manufacture

Sec. 5889. Unlawful for manufacturers to give away manufactured articles to destroy competition; exception.—It shall be unlawful for any person engaged in the business of manufacturing in this or any other State, to give away or sell for a less price than the cost of manufacture any manufactured article in this State, with the intent and purpose of destroying honest competition: *Provided, however,* That nothing in this section shall be construed to prohibit the distribution to consumers of specimens of proprietary articles in good faith as a sample. (1907, ch. 36, sec. 1; 1907, ch. 360, sec. 1.)

Sec. 5890. Violation is a misdemeanor; fine.—Any person violating the preceding section shall be guilty of a misdemeanor, and be fined not less than ten nor more than five thousand dollars. (1907, ch. 36, sec. 2.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Code Ann. (Michie, 1938)

Dairy Products

Sec. 6562. Discriminations forbidden; defined.—Any person doing business in the State and engaged in the sale of any dairy products, who shall discriminate between different localities of the State, by selling such commodity at a lower rate or price in one locality than in any other locality, after making due allowance for the difference, if any, in grade or quality, and in the actual cost of transportation from the point of production or purchase of the product to the place of sale, the effect of which would be to injure

or destroy the business of a competitor, shall be guilty of unfair discrimination, which is prohibited and declared unlawful: *Provided, however,* That prices fairly made to meet competition in any locality shall not be in violation of this law; and that any person doing business in this State and engaged in the business of purchasing any dairy product for manufacture, storage, sale, or distribution, who shall discriminate between different localities in the State by purchasing such commodity at a higher rate or price in one locality than in any other locality, after making due allowance for the difference, if any, in grade or quality, and in the actual cost of transportation from point of purchase to point of manufacture, storage, sale; or distribution, shall be guilty of unfair discrimination, which is declared unlawful: *Provided, however,* That prices fairly made to meet competition in any locality shall not be in violation of this law; and any person violating this section shall be guilty of a misdemeanor, and be fined not less than one hundred dollars, nor more than one thousand dollars, or be imprisoned in jail for not more than twelve months, or shall suffer both fine and imprisonment in the discretion of the court. (L. 1925, c. 65, sec. 8.)

Sec. 6563. Violation a misdemeanor.—Any person violating any of the provisions of this law, except as provided for in the preceding section, shall be guilty of a misdemeanor; and shall for the first offense be fined not less than ten dollars nor more than fifty dollars, and for each subsequent offense be fined not less than fifty dollars nor more than two hundred dollars, or be imprisoned in the county jail for not more than twelve months nor less than sixty days, or shall in the discretion of the court suffer both fine and imprisonment. (Id., sec. 9.)

Discrimination in Supplying News to Newspapers Prohibited

Sec. 6759. Unlawful discrimination.—*Newsgatherers not to discriminate in supplying news to newspapers.*—It shall be unlawful for any corporation, firm, or person, or any combination or association of corporations, firms, or persons engaged in the business of buying, gathering, or accumulating information or news, or vending, supplying, distributing, or publishing the same, to refuse to vend, supply, distribute, or publish such information or news to any person, firm, or corporation, conducting a newspaper in this State, offering to pay for the same, or to make discrimination in any manner between persons, firms, or corporations conducting newspapers in this state in the vending, supplying, distributing or publishing of such information or news. (1899, ch. 286, sec. 1.)

Comparative legislation.—Agencies for collection and distribution of news: Ky., Carroll's Stat. 1930, secs. 883a-1 to 883a-4.

Sec. 6760. Agents and employees.—*Agents or employees not to assist such newsgatherer that has so discriminated.*—It shall be unlawful for any agent or employee in this State of such person, firm, or corporation, or association or combination of persons, firms, or corporations engaged in the business of gathering, accumulating, vending, supplying, and distributing news or information, to assist in the carrying on or conducting of such business when such person, firm, or corporation or association of such persons, firms or corporations shall have refused to furnish news or information without discrimination in price, method of supply, or otherwise to any person, firm, or corporation conducting a newspaper in this State and desiring to be supplied with such information or news. (Id., sec. 2.)

Sec. 6761. Violation.—*Violation is a misdemeanor; fine.*—Any person, firm, or corporation violating the provisions of this chapter, or aiding or abetting in the violation of the same, shall be guilty of a misdemeanor; and upon conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars for each and every offense. (Id., sec. 3.)

TEXAS

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

No provisions.¹

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Stat. (Vernon, 1936)
Storage of Oil, Gas, Etc.

Art. 1495. Purposes.—This chapter embraces corporations created for the purpose of storing, transporting, buying and selling oil, gas, salt brine, and other mineral solutions; also sand and clay for the manufacture and sale of clay products; and the production of oil and gas. (Acts 1899, p. 202; Acts 1915, p. 259); Acts 1935, 44th Leg. p. 296, ch. 110, sec. 3.

¹ Where a manufacturer in one State sold medicines to a wholesaler in Texas to be sold by him at the regular retail prices, the agreement also providing for exclusive dealing by defendant with the manufacturer, the transaction, although in interstate commerce, is nevertheless void under the antitrust law. *Watkins Medical Co. v. Johnson*, 162 S. W. 394 (Civ. App. 1914). Contra, *McCall Co. v. J. D. Stiff Dry Goods Co.*, 142 S. W. 659 (Civ. App. 1911). Cf. *Butterick Publishing Co. v. Mistrot-Munn Co., Inc.*, 167 App. Div. 632, 153 N. Y. Supp. 61 (1915), aff'd 217 N. Y. 678, 112 N. E. 1055 (1916), where a New York court held a similar transaction to be in intrastate commerce and invalid under the Texas antitrust law.

Art. 1505. Discrimination.—It shall be unlawful for any corporation organized under this chapter to discriminate against any person, corporation, firm, association, or place in the charge for such storage or transportation, or in the service rendered; but it shall receive, store or transfer oil or gas, salt, sand, and clay for any person, corporation, firm, or association upon equal terms, charges and conditions with all other persons, corporations, firms or associations for like service. (Acts 1899, p. 202; Acts 1915, p. 259. Acts 1935, 44th Leg. p. 296, ch. 110, sec. 4.)

Stat. (Vernon, 1936) Pen. Code
Public Amusement

Art. 1646. Discrimination against reputable productions.—No owner or lessee, or any manager, agent, employee, or representative owner or lessee who may be in charge and having the care and management of any house of public amusement, shall discriminate against reputable theaters, operas, shows, or other productions by whatever name known. Any owner or lessee, or any manager, agent, employee, or representative of the owner or lessee in charge of such house who shall fill and refuse to rent, lease, and let such house of public amusement for one or more performances upon such terms and conditions as shall not be deemed unreasonable, extortionate, or prohibitive to the agent, manager, proprietor, or representative, who may in good faith make application therefor, of any reputable theater, opera, or show, by whatever name known, shall be fined not less than one hundred nor more than five hundred dollars, one-half of which fine shall be paid to the complainant, the balance to go to the jury fund of the county in which such prosecution is had; and in addition, such person so convicted may be committed to the county jail for not more than ten days. Each violation of any provision of this article is a separate offense. (Acts 1907, p. 21.)

Art. 1647. Exceptions.—If at the time of the application to lease or rent such house of public amusement for said purposes, it shall be shown by the owner, lessee or other person in charge thereof that said house of public amusement has in good faith been already leased, let, or rented to other persons or parties, and that other bookings have in good faith been made for the date or dates so applied for, and not with the intention of evading the provisions of this chapter, then the penalties provided by the preceding article shall not be imposed. (Id.)

Art. 1648. List of bookings.—Owners, lessees, managers, or other persons in charge of such houses of public amusement shall make and keep in convenient form a list of all bookings of shows for

such houses, with the dates specifically set out therein, and said list of bookings shall be exhibited upon request, to all persons applying therefor who in good faith desire to lease or rent such house or houses for the purposes indicated in the first article of this chapter. Each owner, lessee, or other person in charge of such house who shall fail or refuse to keep and exhibit such list of bookings as required herein, shall be fined not less than ten or more than twenty dollars. Each such failure or refusal is a separate offense. (Id.)

Stat. (Vernon, 1936)

Art. 179. Leases.—Upon the failure of [or] refusal of any lessee, or his assigns, of any such public house of amusement to comply with the law governing such places of amusement, or upon conviction of the violation of any provision of the Penal Code relating to discrimination in the booking of plays, opera shows, or other productions, by whatever name known, which are and shall hereafter be used for public performances, he shall forfeit his lease and all rights and privileges thereunder. (Acts 1907, p. 21.)

UTAH

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Rev. Stat. Ann. (Supp. 1939)

Section 95-3-1. Definitions.—The following terms as used in this act are defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (L. 37, c. 20, sec. 1.)

Sec. 95-3-2. Contracts establishing minimum resale prices not violation of law.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment through which such commodity is sold bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state of Utah by reason of any of the following provisions which may be contained in such contract:

- (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.
- (b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not in turn resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (Id., sec. 2.)

Sec. 95-3-3. Transactions deemed evasions of resale price restrictions.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract) the following shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 6 of this act shall be available.

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity. (Id., sec. 3.)

Sec. 95-3-4. Persons permitted to fix resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (Id., sec. 4.)

Sec. 95-3-5. Resale transactions exempt from act.—No contract containing any of the provisions enumerated in section 95-3-2 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, The owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, defaced or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court. (Id., sec. 5.)

Sec. 95-3-6. Violations deemed unfair competition.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Id., sec. 6.)

Sec. 95-3-7. Agreements exempt from act.—This act shall not apply to any contract or agreement between or among producers or except as provided in subsection (c) of section 2 of this act distributors or between or among wholesalers or between or among retailers as to sale or resale prices. (Id., sec. 7.)

Sec. 95-3-8. Constitutionality.—If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby. (Id., sec. 8.)

Sec. 95-3-9. Inconsistent acts repealed.—All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency. (Id., sec. 9.)

Sec. 95-3-10. Short title.—This act may be known and cited as the "Fair Trade Act." (Id., sec. 10.)

B. PROHIBITIONS OF SALES BELOW COST

Rev. Stat. Ann. (Supp., 1939)

Unfair Practices Act

Section 94A-2-1. Citation.—This act shall be known and may be cited as the Unfair Practices Act. (L. 1937, c. 21, sec. 1.)

Sec. 94A-2-2. "Person" defined.—When used in this act, unless the context otherwise requires the term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (Id. sec. 2.)

Sec. 94A-2-3. For prohibitions against price discrimination see *Antidiscrimination Legislation; General Prohibitory Laws, infra.*

Sec. 94A-2-4. Cooperative associations.—Nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers, the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the association.

Sec. 94A-2-5. Definition of commerce.—Definition of commerce as used in this bill shall be construed to mean intrastate commerce in the State of Utah.

Sec. 94A-2-6. For responsibility of agents, see *infra*.

Sec. 94A-2-7. Sales, less than cost.—(a) It shall be unlawful for any person engaged in business within the state of Utah to sell, offer for sale or advertise for sale any article, product or commodity at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article, product or commodity for the purpose of injuring competitors and destroying competition, or of misleading the public, or when the effect of selling, offering for sale or advertising for sale of such article, product or commodity at less than cost thereof to such vendor or when the effect of giving, offering to give or advertising the intent to give away any article, product or commodity may be substantially to lessen competition or tend to create a monopoly in any line of commerce; and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 15 [94A-2-15] of this act for any such act.

Cost defined.

(b) The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean, whichever is lower of the following: (1) The laid-in purchase price of the merchandise to the distributor or vendor based on the quantity last purchased or (2) The laid-in replacement cost of such merchandise to the distributor or vendor. *Id.* sec. 7.

Sec. 94A-2-8. Unlawful advertising.—It shall be unlawful for any person engaged in business within the State of Utah to advertise goods, wares, or merchandise they are not prepared to supply. *Id.* sec. 8.

Sec. 94A-2-9. Combination sales.—For the purpose of preventing evasion of the provisions of this act in all sales involving more than one item or commodity and in all sales involving the giving of any concession of any kind whatsoever, whether it be coupons or otherwise, the vendor's or distributor's selling price shall not be below the cost of all articles, products, commodities, and concessions included in such transactions. *Id.* sec. 9.

Sec. 94A-2-10. Establishing cost.—In establishing the cost of a given article, product, or commodity to the distributor and vendor, the invoice cost of said article, product, or commodity purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of the date of said sale of said article, product, or commodity replaced through the ordinary channels of trade, unless said article, product, or commodity is kept separate from goods purchased in the ordinary channels of trade and unless said article, product, or commodity is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale. *Id.* sec. 10.

94A-2-11. Proceedings—Local cost surveys as evidence.—In any injunction proceedings or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or for which he acts. Where a particular trade or industry of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act. *Id.* sec. 11.

Sec. 94A-2-12. Exceptions.—The provisions of this act shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods, or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided prior notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and prior notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article, product, or commodity in the same locality or trade area.

(e) By manufacturers, producers, brokers, or wholesale distributors meeting in good faith prices established by interstate competition regardless of cost provided such prices are available to all persons buying on like terms and conditions in the same locality and vicinity.

Any person who performs work upon, renovates, alters, or improves any personal property belonging to another person, except necessary repairs due to damage in transit, shall be construed to be a vendor within the meaning of this act. Id. sec. 12.

Sec. 94A-2-13. Contract in violation of act declared illegal.—Any contract expressed or implied, made by any person in violation of any of the provisions of this act is declared to be an illegal contract and no recovery thereon shall be had. Id. sec. 13.

Sec. 94A-2-6. Directors, officers, agents.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assist or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or for which he acts. Id. sec. 6.

Sec. 94A-2-14. Injunctive relief.—Any person, municipal, or other public corporation or the State of Utah may maintain an action to enjoin a continuance of any act or acts in violation of this act, and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Any defendant in an action brought under the provisions of this section may be required to testify, and the books and records of any such defendant may be brought into court and introduced, by reference, into evidence: *Provided, however,* that no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of this act. Id. sec. 14.

Sec. 94A-2-15. Penalties.—Any person, whether as principal, agent, officer, or director, for himself, or itself, or for another person, who shall violate any of the provisions of this act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than two hundred and ninety-nine dollars, or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court. Id. sec. 15.

Sec. 94A-2-16. Invalidity of part.—If any section, 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. The legislature hereby declares that it would

have passed this act, and each section, sentence, clause, or phrase thereof; irrespective of the fact that any one or more other sections, sentences, clauses, or phrases be declared unconstitutional. *Id.* sec. 16.

Sec. 94A-2-17. Purpose of act.—The legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved. *Id.* sec. 17.

Sec. 94A-2-18. Different activities of person considered separate entities.—For the purposes of this act, manufacturing, jobbing, wholesaling, and retailing activities of a person shall be considered separate and distinct entities of business in establishing and determining cost of any article, product, or commodity. *Id.* sec. 18.

Sec. 94A-2-19. Inconsistent acts repealed.—All other acts and parts of acts in conflict herewith are repealed. *Id.* sec. 19.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Rev. Stat. Ann. (Supp. 1939)

Sec. 94A-2-3. Price discrimination.¹—(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the State of Utah and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered, and *Provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide trans-

¹ For penal and procedural provisions see *Unfair Practices Act: Prohibition of Sales Below Cost*, *supra*.

actions and not in restraint of trade, and *Provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any suit on a complaint under this section, that there has been discrimination in price or services or facilities furnished or in payment for services or facilities to be rendered, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section: *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for and not exceeding the actual cost of such services rendered in connection with the sale or purchase of goods, wares, or merchandise.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products, or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or re-

ceive a discrimination in price which is prohibited by this section. (L. 1937, c. 21, sec. 3.)

Rev. Stat. Ann. (1933)

Sec. 103-55-2. Unfair Competition.—Every person, 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, discriminates 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 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, is guilty of unfair discrimination. (C. L. '17, sec. 8333.)

Sec. 103-55-3. Attorney general to prosecute.—If complaint is made to the attorney general that any corporation is guilty of unfair discrimination as defined by the preceding section, 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 license 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 preceding section, such court shall annul the charter or revoke the license of such corporation, and may permanently enjoin it from transacting business in this State. (C. L. '17, sec. 8334.)

Sec. 103-55-4. Penalty.—Any person, firm, or corporation violating any of the foregoing provisions of this chapter shall be fined not less than \$100, nor more than \$3,000 for each offense. (C. L. '17, sec. 8335.)

2. Special Prohibitory Laws

Rev. Stat. Ann. (1933)

Milk

Sec. 103-55-5. Milk, cream, and butterfat.—Any person doing business in this State and engaged in the business of buying milk, cream, or butterfat for the purpose of sale or storage, who, for the purpose of creating a monopoly or destroying the business of a com-

petitor, discriminates between different sections, communities, localities, cities, or towns of this State by purchasing such commodity or commodities at a higher price or rate in one section, community, location, city, or town than is paid for the same commodity by such person in another section, community, locality, 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 is guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; and any person, firm, company, association or corporation, or any officer, agent, receiver or member of such firm, company, association, or corporation, found guilty of unfair discrimination as herein defined shall be punished by a fine in any sum not more than \$5,000 or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. (C. L. '17, sec. 8336.)

Unjust Discrimination Against Newspapers

Sec. 73-2-1. Business of gathering and vending news a matter of public interest.—All persons, all associations of persons, and all corporations engaged in the business of buying, gathering, or accumulating information or news for publication, and vending, supplying, distributing, or disseminating the same for publication, either to the members of such associations or corporations or otherwise, shall be deemed to be engaged in a business upon which a public interest is ingrafted, and shall make no distinction with respect to newspaper publishers desiring to purchase such news or information for publication. (C. L. 17, sec. 4490.)

Sec. 73-2-2. Discrimination against newspaper publishers forbidden.—It shall be unlawful for any person, association of persons, or corporation engaged in gathering and furnishing news for publication to make any discrimination or distinction with respect to persons engaged in publishing newspapers. (C. L. 17, sec. 4491.)

Sec. 73-2-3. Combination to control news unlawful.—Any combination having for its object or effect the controlling of information or news gathered or accumulated for distribution and publication, shall be deemed a trust, and hostile to the public welfare, and is prohibited and declared unlawful. (C. L. 17, sec. 4492.)

Sec. 73-2-4. Discrimination in service charges forbidden.—All associations of persons and corporations engaged in the business of gathering and disseminating information or news for publication by their members or stockholders, or otherwise, shall be deemed to be engaged in a business in which the public is interested, and shall furnish such news to any and all newspapers desiring to publish the

same at the same price as charged to the members of such association or corporation, or stockholders of any such corporation, without discrimination between the members or stockholders and such newspapers desiring to publish such information and news; and shall render equal and impartial service to all publishers of newspapers who shall offer to pay a reasonable price therefor. (C. L. 17, secs. 17, 4493.)

Sec. 73-2-5. Contracts in violation, void.—Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable. (C. L. 17, sec. 4494.)

Sec. 73-2-6. Evidence to establish trust or combination.—In all actions brought under this chapter it shall be sufficient to prove that a trust or combination as defined herein existed, and that the defendant belonged to it, or acted for or in connection with it, 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. The character of the trust or combination alleged may be established by proof of its general reputation as such. (C. L. 17, sec. 4495.)

Sec. 73-2-7. Telephone and telegraph companies deemed agents of vendors.—All telephone and telegraph companies employed to transmit such information or news shall be deemed to be process agents of such persons and corporations, and an offer to pay a reasonable price to such telephone or telegraph companies shall be equivalent to an offer to pay the same to the persons or corporations gathering and disseminating such information or news. (C. L. 17, secs. 17, 4496.)

VERMONT

REGULATION OF PRICE COMPETITION

A. RE SALE PRICE MAINTENANCE

No provisions.

B. PROHIBITION OF SALES BELOW COST

No provisions.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

No provisions.

2. Special Prohibitory Laws

Rev. Pub. Laws (1933) as amended by L. 1937, art. 98

Dairy Products

Sec. 7722. Unfair discrimination, definition.—A person, firm, company, association, or corporation doing business in this state and engaged in the business of buying milk, cream, or butter fat for the purpose of manufacture or sale, who or whose agents, officers, or employees, 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, or to destroy or affect adversely the operations of a producers' cooperative bargaining or marketing association organized under the Vermont cooperative marketing act, shall discriminate between different sections, communities, localities, cities or towns of this state by purchasing such commodity at a higher price or rate in one section, community, location, city or town than is paid for the same commodity by such person, firm, company, association or corporation in another section, community, locality, 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 sale, or who shall with such intent discriminate between different persons in the same section, community, location, city or town by purchasing such commodity at a lower price from one person than paid for the same commodity to another person 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 who shall with such intent discriminate between different persons by refusing to purchase, within the limits of its actual requirements, such commodities from a person, or his agent, offering the same for sale, on the ground that such person has executed a marketing contract with a cooperative marketing association by the terms of which such cooperative marketing association has been designated the marketing agent of such person for such commodities, or who shall intimidate or attempt to intimidate members of such a producers' cooperative bargaining association for the purpose of causing them to withdraw from such membership or who shall intimidate or attempt to intimidate persons or producers of dairy products for the purpose of preventing them from joining such an association, shall be deemed guilty of unfair discrimination. (1929, No. 109, G. L. sec. 5916.)

Sec. 7723. Discrimination defined; revocation of license; penalty.—The commissioner shall have the power to revoke the license issued in accordance with section 4605, if after due investigation made by him or at his order, such person, firm, company, association, or corporation shall be deemed by him in violation of the preceding section, and any person, firm, company, association or corporation or any officer, agent, receiver, or member of such firm, company, association or corporation found guilty of unfair discrimination as defined in the preceding section shall be imprisoned not more than one year or fined not more than five hundred dollars, or both. (1929, No. 109, G. L. sec. 5916.)

VIRGINIA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code Ann. (Michie, Supp. 1938) ¹

Sec. 1463 (i). Definitions.—The following terms, as used in this act, are hereby defined as follows:

(A) "Commodity" means any subject of commerce, except meats and meat products, meal, flour, bakery products, fresh and canned fish, sea food, fresh and canned fruits and vegetables, coffee, tea, ice, sugar, and wearing apparel.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person selling a commodity to consumers for use.

(E) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Sec. 1463 (j). Provisions not rendering contracts invalid.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Virginia by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

¹ L. 1938, c. 413, amending and reenacting L. 1936, c. 321.

(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(C) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 1463 (k). Violation of resale price restrictions.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act. (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 1463 (n) of this act shall be available.

Sec. 1463 (l). Who may establish minimum resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity, or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 1463 (m). Certain contracts not affected.—No contract containing any of the provisions enumerated in section 1463 (j) of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and

reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(B) When the goods are altered, second-hand, damaged, defaced or deteriorated, and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(C) By any officer acting under an order of court.

Sec. 1463 (n). Unfair competition defined and made actionable.—Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 1463 (o). Contracts exempted.—This act shall not apply to any contract or agreement between or among producers or distributors or, except as provided in subdivision (C) of section 1463 (j) of this act between or among wholesalers, or between or among retailers, as to sale or resale prices.

Sec. 1463 (p). Title.—This act may be known and cited as the "Fair Trade Act."

B. PROHIBITION OF SALES BELOW COST

Code Ann. (Michie, Supp., 1938)

Unfair Sales Act

Section 1463 (1). Title of chapter.—This act shall be known and designated, and may be cited as the "Unfair Sales Act." (L. 1938, p. 992.)

Sec. 1463 (2). Definitions.—When used in this act, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

(a) The term "merchandise" shall mean any tangible personal property the subject of commerce.

(b) The term "cost to the retailer" shall mean the invoice cost of the merchandise to the retailer or the replacement cost of the merchandise to the retailer within thirty (30) days prior to the date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, (2) cartage to retail outlet if done or paid for by the retailer,

which cartage cost shall be deemed to be no more than the lowest published common carrier rate available for such merchandise and in the absence of such published rate such cartage cost shall be deemed to be not less than three-fourths ($\frac{3}{4}$) of one per centum of the cost of the merchandise to the retailer as herein defined, unless said retailer claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up in the absence of proof of a lesser cost, shall be not less than six (6) per centum of the total cost at retail outlet.

(c) The term "cost to the wholesaler" shall mean the invoice of cost of the merchandise to the wholesaler, within thirty (30) days prior to date of sale, in the quantity last purchased, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the cost of the merchandise, and (2) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost shall be deemed to be no more than the lowest published common carrier rate available for such merchandise and in the absence of such published rate such cartage cost shall be deemed to be not less than three-fourths ($\frac{3}{4}$) of one per centum of the cost of the merchandise to the wholesaler as herein defined, unless said wholesaler claims and proves a lower cartage cost, and (3) a mark-up to cover in part the cost of doing business, which mark-up, in the absence of proof of a lower cost, shall be not less than two (2%) per centum of the total cost of the merchandise at wholesale warehouse or outlet.

(d) Where two or more items are advertised, offered for sale, or sold at a combined price, the price of each item named shall be governed by the provisions of paragraphs (b) or (c) of section 2, respectively.

(e) The terms "cost to the retailer" and "cost of the wholesaler" as defined in paragraphs (b) and (c) shall mean bona fide costs; and sales to consumers, retailers, and wholesalers at prices which cannot be justified by existing market conditions within this State shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers.

(f) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business of title to merchandise to the purchaser for consumption or use other than resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of such purchase price.

(g) The terms "sell at wholesale," "sales at wholesale," and "wholesale sales" shall mean and include any transfer for a valuable considera-

tion made in the ordinary course of trade or the usual prosecution of the seller's business, of title to merchandise to the purchaser for purposes of resale or further processing or manufacturing. The above terms shall include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

(h) The term "retailer" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at retail within this State: *Provided*, That in the case of a person, partnership, corporation, or association engaged in the business of making sales at wholesale and at retail within this State such term shall be applied only to the retail portion of such business.

(i) The term "wholesaler" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this State: *Provided*, That, in the case of a person, partnership, corporation, or association engaged in the business of making sales both at wholesale and at retail, such terms shall be applied only to the wholesale portion of such business.

(j) In all cases where both of the functions, "sales at retail" and "sales at wholesale," are performed by the same firm or person, or where the retailer buys a portion of his supplies direct from the manufacturer or producer and thereby acts as his own wholesaler, then both the retail and wholesale minimum mark-ups plus all transportation costs, as herein defined, shall apply to sales at retail. (Id.)

Sec. 1463 (3). Sales below cost.—It is hereby declared that advertisement, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, effect, or result of unfairly diverting trade from or otherwise injuring a competitor, or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade, or tending to create a monopoly in any line of commerce, is an unfair method of competition, contrary to public policy, and in contravention of the policy of this act. (Id.)

Sec. 1463 (4). Penalties.—Any retailer who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at retail any item of merchandise at less than cost to the retailer as defined in this act; or any wholesaler who shall, in contravention of the policy of this act, advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler as defined in this act, shall be guilty of misdemeanor. Proof of any such advertisement, offer to sell, or sale by any retailer or wholesaler in contravention of the policy of this act shall be prima facie evidence of a violation of this act. (Id.)

Sec. 1463 (5). Injunction.—In addition to the penalties provided in this act, the courts of record of this State are hereby invested with

jurisdiction to prevent and restrain violations of this act. Any person shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any threatened loss or injury by reason of a violation of this act without being compelled to allege or prove that an adequate remedy at law does not exist. (Id.)

Sec. 1463 (6). Exemptions.—The provisions of this act shall not apply to sales at retail or sales at wholesale (a) where merchandise is sold in bona fide clearance sales, if advertised, marked and sold as such; (b) where the merchandise is fresh fruits or fresh vegetables or farm products when the sales are made by the producers thereof, or where perishable merchandise must be sold promptly in order to forestall loss; (c) where merchandise is imperfect or damaged, or is being discontinued and is advertised, marked, and sold as such; (d) where merchandise is sold upon the final liquidation of any business; (e) where merchandise is sold for charitable purposes or to relief agencies; (f) where merchandise is sold on contract to departments of governments or governmental institutions; (g) where the price of merchandise is made in good faith to meet lawful competition; (h) where sales are made by one wholesaler to another wholesaler or by one retailer to another retailer for the purpose of accommodation; (i) where merchandise is sold by any officer acting under the order or direction of any court, or by any fiduciary, or by any trustee in a deed of trust or deed of assignment for the benefit of creditors: *Provided, however,* Nothing in this act shall be construed to apply to fertilizer companies or their agents, or persons, or companies buying goods from fertilizer companies for the purpose of selling at retail. (Id.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Code Ann. (Michie and Sublett, 1936)

Sec. 4722 (8). Agreements in leases or sales which may substantially lessen competition or create a monopoly unlawful; what discrimination 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, and 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 discriminations in price 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 or merchandise from selecting their own customers in bona fide transactions and not in restraint of trade.) (L. 1919, p. 82.)

See **MARKETING LAWS SURVEY** volume: *State Antitrust Laws: General Anti-Trust Laws* for definitions and penalty provisions.

2. Special Prohibitory Laws

No provisions.

WASHINGTON

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE¹

Rev. Stat. Ann. (Remington, Supp., 1939)

Sec. 5854-11. "Fair Trade Act"—Citation.—This act may be known and cited as the "Fair Trade Act." (L. '37, ch. 176, sec. 1, p. 684.)

Sec. 5854-12. Sale and resale agreements respecting trade-marked or trade-named articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the label or content of which bears, or the vending equipment through which such commodity is sold bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in free and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Washington by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing dealing in any such commodity: *Provided, however,* That such stock

¹A contract fixing the resale price of a commodity is valid where the price fixed is reasonable and the plaintiff did not have a monopoly of the trade in the particular commodity. The court stated that the resale price restriction was merely ancillary to the contract for the sale of the commodity and was necessary to protect the goodwill of the manufacturer. *Fisher Flouring Mills v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913).

is first offered to the producer of such commodity at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

2. When the goods are damaged, defaced, or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court. (L. '37, ch. 176, sec. 2, p. 684.)

Sec. 5854-13. Unlawful advertisements or sales in violation of agreement.—Wilfully and knowingly advertising, offering for sale, or reselling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (L. '37, ch. 176, sec. 3, p. 685.)

Sec. 5854-14. Application of act—Agreements affected.—This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (L. '37, ch. 176, sec. 4, p. 685.)

Sec. 5854-15. Definitions of terms.—The following terms, as used in this act, are hereby defined as follows:

“Producer” means grower, baker, maker, manufacturer, or publisher.

“Commodity” means any subject of commerce. (L. '37, ch. 176, sec. 5, p. 686.)

Sec. 5854-16. Partial invalidity of act.—If any provision of this act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. (L. '37, ch. 176, sec. 6, p. 686.)

B. PROHIBITION OF SALES BELOW COST

Rev. Stat. Ann. (Remington, Supp. 1939)

Unfair Practices Act

Section 5854-21. Definitions.—As used in this act, words and terms are defined as follows:

“Person” includes any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation;

“Sell” includes selling, offering for sale, or advertising for sale;

“Give” includes giving, offering to give or advertising for the intent to give;

"Article or produce" includes any article, product, commodity, thing of value, service, or output of a service trade;

"Cost" has its usual meaning and in addition as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer, and as applied to distribution means the invoice cost or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor;

"Cost of doing business" or "overhead expense" means all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance, and advertising;

"Loss leader" means any article or product sold at less than cost as herein defined to induce, promote, or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors;

"Vendor," in addition to its usual meaning, includes any person who performs work upon, renovates, alters or improves any personal property belonging to another person;

"Ordinary channels of trade" shall mean those ordinary, regular, and daily transactions in the mercantile trade whereby title to an article or product, in no way damaged or deteriorated, is transferred from one person to another, and shall not include sales of bankrupt stocks, close-out goods, dents, sales of goods bought from a business or merchant retiring from business, fire sales, and sales of damaged or deteriorated goods, which damage or deterioration results from any cause whatsoever: *Provided*, That this last listing herein shall not be held to be all inclusive but as an example only.

Sec. 5854-22. Dealing with unlawful practices.—See *Antidiscrimination Legislation; General Prohibitory Laws, infra*.

Sec. 5854-23. Dealing with directors, officers, and agents.—See *infra*.

Sec. 5854-24. Sales below cost.—It shall be unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, or to use any article or product as a "loss leader," or in connection with any sale to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or other-

wise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or to make or enter into any collateral contract or device of any nature, whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition.

Sec. 5854-25. Forced and bankrupt sales.—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Sec. 5854-26. Cost surveys.—In any injunction proceeding or in the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts; and in any civil or criminal proceeding under this act, where a particular trade or industry, of which the person, firm, or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm, or corporation complained against within the provisions of this act; and in any such action proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition; and in any such action where it is alleged and shown that the person complained against is selling, below his cost of doing business, and said person is including labor at less than the prevailing wage scale in the trade in which such person is engaged for the locality or vicinity in which he is doing business, evidence of such prevailing wage scale shall be admissible to prove the intent or purpose of such person to violate the provisions of this act; or in any such action where it appears that persons are employed or performing services without compensation for

any person so complained against, such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered.

Sec. 5854-27. Exceptions.—The provisions of this act shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation: *Provided*, Notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, in the same locality or trade area, and in the ordinary channels of trade as herein defined; or in an endeavor made in good faith by a manufacturer, selling an article or product of his manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade as herein defined.

Sec. 5854-23. Directors and officers.—Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or which he acts.

In the prosecution of any person as officer, director, or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts.

Sec. 5854-28. Illegal contracts.—Any contract, express or implied, made by any person in violation of any of the provisions of this act is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 5854-29. Injunction.—Any person may maintain an action to enjoin a continuance of any act or acts in violation of any of the provisions of this act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled

to recover from the defendant the amount of the actual damages, if any, sustained by him. Commencement, pendency or conclusion of a civil action for injunction and/or damages shall not affect criminal liability.

Sec. 5854-30. Penalties.—Violation of the provisions of this act shall constitute a misdemeanor; and any person, whether as principal, agent, officer, or director, for himself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of this act shall be guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six (6) months or by both said fine and imprisonment in the discretion of the court; and any criminal action shall not affect the right of any person to bring civil action under section 5854-29.

Sec. 5854-31. Persons liable.—Solicitation by, or collusion or joint participation between any wholesaler, manufacturer, distributor, jobber, contractor, broker, or retailer to violate any of the provisions of this act or the use of any threat, intimidation or boycott to effectuate the violation of the act shall make all persons participating in such solicitation, collusion, or joint participation subject to civil or criminal liability under this act.

Sec. 5854-32. Evidence.—In any civil or criminal action proof of average over-all cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product as to a distributor, shall be presumptive evidence of cost, and proof of transportation tariffs when fixed and approved by the Department of Public Service of the State of Washington shall be presumptive evidence of delivery cost, as to any article or product involved in any such action.

Sec. 5854-33. Action by attorney general.—The attorney general, in any county in which the superior court has jurisdiction, and the prosecuting attorneys, in their respective counties in which the superior court has jurisdiction, shall have power to institute and maintain an action in the name of the State of Washington to restrain and enjoin any person from performing or continuing the performance of any act or conduct which is prohibited herein.

Sec. 5854-34. Severability.—If any section, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decisions shall not affect the validity of the remaining portions of the act. The legislature hereby declares that it would have passed this

act, and each section, sentence, clause, or phrase thereof, irrespective of the fact that any one or more sections, sentences, clauses, or phrases be declared unconstitutional.

Sec. 5854-35. Purpose.—The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent, and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

Sec. 5854-36. Title.—This act shall be known and designated as the "Unfair Practices Act."

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Rev. Stat. Ann. (Remington, Supp. 1939)
Unfair Practices Act

Sec. 5854-22. Discriminations.—It shall be unlawful for any person, engaged in the production, manufacture, distribution, or sale of any article or product of general use or consumption, with the intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person, who in good faith, intends and attempts to become such dealer, to discriminate between different sections of the same community, city, town, or village in this State, by selling or furnishing such article or product at a lower price in one such section than in another: *Provided*, That nothing herein contained shall prevent differentials which make allowances for differences, if any, in the grade, quality, or quantity when based and justified in the cost of manufacture, sale, or delivery, or the actual cost of transportation from the point of production if a raw product or commodity, or from the point of manufacture if a manufactured product or commodity, or from the point of shipment to the point of destination: *Provided further*, That nothing herein contained shall prevent a selection of customers or a functional classification by any person of any customer as broker, jobber, wholesaler, or retailer, or a differential in price for any article or product as between any customers in different functional classifications. Motion-picture films when licensed for exhibition to motion-picture houses shall not be deemed to be an article or product under this act. Neither shall anything in this act be deemed to apply to any service article, or product for which rates are established under the jurisdiction of the Department of Public

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Service of the State of Washington and which are sold or furnished by any public-utility corporation, or installation and repair services rendered in connection with any services, articles, or products; or to any service, article, or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Department of Public Service of the State of Washington if such service, article, or product had been sold or furnished by a public-utility corporation, or installation and repair services rendered in connection with any such service, articles, or products.

The inhibition [inhibition] of this act against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any devices of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this section: *Provided, however,* That nothing in this section shall be construed to prohibit the meeting in good faith of a legal competitive price.²

2. Special Prohibitory Laws

No provisions.

² For procedural and penalty provisions see *Prohibition of Sales Below Cost, supra.*

WEST VIRGINIA

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

Code Ann. (Michie and Sublett, 1937)

Sec. 4678 (1). Definition of terms.—The following terms, as used in this article, are hereby defined as follows:

(a) "Commodity" means any subject of commerce.

(b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, or processor.

(c) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization. (1937, c. 123, sec. 1.)

Sec. 4678 (2). Lawful contracts fixing minimum resale price.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of West Virginia by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (1937, c. 123, sec. 2.)

Sec. 4678 (3). Acts violating resale price restriction.—For the purpose of preventing evasion of the resale price restrictions imposed in respect to any commodity, by any contract entered into pursuant to the provisions of this article (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section six (sec. 4678 (6)) of this article shall be available. (1937, c. 123, sec. 3.)

Sec. 4678 (4). Who may establish minimum resale price.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this article, by any person other than the owner of the trade-mark, brand, or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name. (1937, c. 123, sec. 4.)

Sec. 4678 (5). To what resales contract does not apply.—No contract containing any of the provisions enumerated in section 2 (sec. 4678.2) of this article shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, That the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said

stock, and an opportunity to purchase such stock at the original invoice price, plus any transportation, storage, or other legitimate or regular costs.

(b) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) But nothing contained in this article shall apply to sales by executors, administrators, receivers, or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any one acting under judicial process. (1937, c. 123, sec. 5.)

Sec. 4678 (6). When offer of sale below fixed price actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1937, c. 123, sec. 6.)

Sec. 4678 (7). When article does not apply.—This article shall not apply to any contract or agreement between or among producers, except as provided in subdivision (c) of section two [§ 4678 (2)] of this article, or between or among wholesalers, or between or among retailers as to sale or resale prices. (1937, c. 123, sec. 7.)

Sec. 4678 (8). How article cited.—This article may be known and cited as the "Fair Trade Act." (1937, c. 123, sec. 10.)

B. PROHIBITION OF SALES BELOW COST

L. 1939, c. 151

Unfair Practices Act

Section 1. Legislative findings; designation of act.—The sale of goods at less than the cost thereof results in economic maladjustments and tends toward the creation of monopolies, thereby destroying fair and healthy competition and tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore, an unfair trade practice. It is hereby declared that any advertisement, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost, as defined in this act, or any

advertisement of an intent to give, any offer to give, or gift of any merchandise, either by retailers or wholesalers, for the purposes of unfairly diverting trade from or otherwise injuring competitors and destroying competition, is an unfair method of competition contrary to public policy and in contravention of the policy of this act, which shall be known and designated as the "Unfair Practices Act."

Sec. 2. Selling below cost or giving away of merchandise; penalty.—It shall be unlawful for any person, partnership, firm, corporation, joint-stock company, or other association engaged in business as a retailer or wholesaler within this State, to sell, offer for sale, or advertise for sale any article, product, or item of merchandise at less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article, product, or item of merchandise for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition. Each violation shall constitute a misdemeanor, and upon conviction thereof, any person, partnership, firm, corporation, joint-stock company, or other association violating this section shall be subject to the penalty set out in section eleven hereof.

Sec. 3. Rebates and special privileges; penalty.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, partnership, firm, corporation, joint stock company, or other association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section eleven of this act.

Sec. 4. Responsibility of director and agent.—For text see *infra*.

Sec. 5. Retailer and wholesaler defined; applicability of act to sales by.—(a) The term "retailer" shall mean and include every person, partnership, firm, corporation, joint-stock company, or other association engaged in the business of making sales at retail within this State: *Provided, however,* That in the case of a person, partnership, firm, corporation, joint-stock company or other association engaged in the business of making sales both at retail and at wholesale, such terms shall be applied only to the retail portion of such business.

(b) The term "wholesaler" shall mean and include every person, partnership, firm, corporation, joint-stock company, or other association engaged in the business of making sales at wholesale within this State: *Provided,* That in the case of a person, partnership, firm, cor-

poration, joint-stock company, or other association engaged in the business of making sales both at retail and wholesale, such term shall be applied only to the wholesale portion of such business.

(c) The provisions of this act shall be applicable to all sales at retail made by a retailer as herein defined, and shall be applicable to any transfer for a valuable consideration made in the ordinary course of trade, or the usual prosecution of the retailer's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further proceedings or manufacturing, and shall be applicable also to any transfer of such property where title is retained by the retailer as security for the payment of such purchase price.

(d) The provisions of this act shall be applicable to all sales at wholesale, and shall be applicable to any transfer for a valuable consideration made in the ordinary course of trade or in the usual prosecution of the wholesaler's business, of title to tangible personal property to the purchaser for purposes of resale or further proceedings or manufacturing, and shall be applicable also to any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

Sec. 6. How cost determined.—(a) The term "cost" when applicable to the business of retailer shall mean bona fide cost and shall mean (1) the invoice cost of the article, product, or item of merchandise to the retailer or the replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower, from either of which there shall be deducted all trade discounts, except customary discounts for cash, and (2) to either of which there shall be added the following items of expense:

1. Freight charges not otherwise included in the cost of the article, product, or item of merchandise, but which freight charges shall not be construed as including cartage to retail outlet if done or paid for by the retailer;

2. A mark-up to cover, in part, the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be seven percent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.

(b) The term "cost" when applicable to the business of a wholesaler shall mean bona fide cost and shall mean (1) the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler within thirty days prior to the date of sale, offer for sale, or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower, from either of which there shall be

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deducted all trade discounts except customary discounts for cash and (2) to either of which there shall be added the following items of expense:

1. Freight charges not otherwise included in the cost of the article, product, or item of merchandise, but which freight charges shall not be construed as including cartage to the retail outlet if done or paid for by the wholesaler;

2. A mark-up to cover, in part, the cost of doing business, which mark-up in the absence of proof of a lesser cost, shall be two percent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.

Sec. 7. Goods purchased at bankrupt, etc., sale.—In establishing the cost of a given article, product, or item of merchandise to the vendor, the invoice cost of any article, product, or item of merchandise purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of the date of said sale of said article, product, or item of merchandise replaced through the ordinary channels of trade, unless said article, product, or merchandise is kept separate from goods purchased in the ordinary channels of trade and unless said article, product, or item of merchandise is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Sec. 8. Sales exempt.—The provisions of this act shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation;

(b) When the goods are damaged or deteriorated in quality or where merchandise is sold in bona fide clearance sales, and, in each case, merchandise is advertised, marked, and sold as such;

(c) By an officer acting under the orders of any court;

(d) In an endeavor in good faith to meet the legal prices of a competitor as herein defined selling the same article, product or item of merchandise, in the same locality or trade area;

(e) For charitable purposes or to relief agencies;

(f) Where merchandise is sold on contract to departments of the government or governmental institutions.

Sec. 4. Personal responsibility of director or agent.—Any person who, either as director, officer, or agent of any firm or corporation, or as agent of any person violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm, or corporation for whom or for which he acts.

Sec. 9. Injunctions and damage suits.—Any person, firm, partnership, corporation, joint-stock company, or trade association may maintain a proceeding to enjoin a continuance of any act or acts in violation of the provisions of this act and, if injured thereby, for the recovery of damages in the circuit court of the county wherein said act is alleged to have been or is being violated. If, in such proceeding, the court shall find that the defendant is violating or has violated any of the provisions of this act, it shall enjoin such defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Sec. 10. Certifications to and duty of attorney general; jurisdiction.—Whenever any corporation or joint-stock company shall be convicted of, or shall be enjoined from violating any of the provisions of this act, it shall be the duty of the clerk of the court wherein said corporation or joint-stock company has been convicted or enjoined to certify said conviction or injunction decree, as the case may be, to the attorney general of this state. Upon the third conviction for the violation of this act by any corporation or joint-stock company, or whenever any corporation or joint-stock company shall have been enjoined three times from violating this act, it shall be the duty of the attorney general to institute proper suits in any circuit court in this state for the forfeiture of its charter, rights, franchises, or privileges and powers exercised by such corporation or joint-stock company, and to enjoin permanently such violator from transacting business within this State; and if in such suit the court shall find that the party defendant is guilty of violating said act as aforesaid, it shall enjoin said party defendant from doing business in this state, permanently or for such time as the court, in its discretion, shall order, and if the order be for permanent injunction against the transaction of business, the court shall order the forfeiture of the charter, rights, franchises, or privileges and powers exercised by such party defendant.

Jurisdiction is hereby vested in the circuit courts of this State to carry into effect the provisions of sections nine and ten hereof.

Sec. 11. Penalties.—Any person, firm, partnership, corporation, joint-stock company, or other association, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any person, firm, partnership, corporation, joint-stock company, or other association, who or which shall violate any of the provisions of this act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not exceeding ninety days or by both said fine and imprisonment, in the discretion of the court.

Sec. 12. Illegal contracts.—Any contract, express or implied, made by any person, firm, partnership, corporation, joint-stock company, or other association, in violation of any of the provisions of this act, is hereby declared to be an illegal contract and no recovery thereon shall be had.

Sec. 13. Provisions severable.—If any section, 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.

Sec. 14. Prima facie evidence of violation.—In any injunction proceeding or in any prosecution for a misdemeanor under the provisions of this act, proof of any advertisement, offer to sell, or sale of any merchandise by a retailer or wholesaler, at less than cost, or any advertisement of an intent to give, offer to give, or gift of any merchandise by a retailer or wholesaler, or any secret payment, allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, shall be prima facie evidence of a violation of this act, and proof of a violation of this act by any person as officer, director, or agent shall be sufficient proof of a violation of this act by the person, firm, or corporation for whom or for which he acts.

Sec. 15. Purpose and construction of act.—The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

C. ANTIDISCRIMINATION LEGISLATION**1. General Prohibitory Laws**

No provisions.

2. Special Prohibitory Laws

No statutory provisions.¹

¹ A former statute (Acts 1887, c. 63) which prohibited mining and manufacturing companies from selling merchandise to employees at a greater profit than is gained by selling to others is unconstitutional and void. The act being limited in scope is discriminatory and an unjust interference with the rights, privileges and property of both employer and employee. *State v. Five Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S. E. 288 (1889).

WISCONSIN

REGULATION OF PRICE COMPETITION

A. RE SALE PRICE MAINTENANCE

Rev. Stat. (1939)
Fair Trade Act

Sec. 133.25. Certain contracts not in restraint of trade; exceptions.—(1) This section may be cited as the “Fair Trade Act.”

(2) As used in this section, “producer” means grower, baker, maker, manufacturer; and “commodity” means any subject of commerce.

(3) Except as provided in subsections (4) and (6), no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed a contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce by reason of any of the following provisions contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(b) That the vendee or producer shall require that any person to whom delivery of a commodity is made for the purpose of resale shall agree that the latter will not, in turn, resell except at the price stipulated by the vendor or vendee.

(4) Every contract containing the provisions referred to in subsection (3) shall include the provision that such commodity may be resold without reference to such contract in the following cases:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(5) Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract referred to in subsection (3), whether or not the person so advertising, offering for sale, or selling is a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

(6) This section does not apply to any contract between producers or between wholesalers or between retailers as to sale or resale prices.

(7) (a) Upon complaint of any person that any contract containing the provisions referred to in subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the department of agriculture and markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the department of agriculture and markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions, said department may by special order declare such contract to be in restraint of trade.

(b) The department of agriculture and markets shall assess the costs of such proceeding against such contracting parties in case it finds such contract unfair and unreasonable and against the complainant if it finds such contract fair and reasonable: *Provided, however,* That the costs against any one complainant in any one complaint shall not exceed five dollars.

(c) Decisions in such cases shall be subject to judicial review as provided in section 93.20.

(8) This section shall not apply to any cooperative society or association not organized for profit. (1935, c. 52; 1935, c. 477; 43.08 (2).)

Judicial Decisions

Constitutionality of the Act.

The statute, sec. 523.25, is constitutional as being within the police power of the State. The provision allowing the department of agriculture and markets to review any resale price established and to declare a fair trade agreement in restraint of trade if it finds the price established to be unfair and unreasonable is not a price-fixing statute but is expressly designed to safeguard the public against the creation of monopolies. The provision exempting cooperatives from the operation of the statute is invalid because it makes no distinction between

cooperatives selling to members only and those selling to the public. In the latter case, the cooperative is in direct competition with other dealers in selling to the public and therefore the distinction between this class of cooperative and other dealers is unreasonable, discriminatory, and unconstitutional. However, under the separability clause in the statute, this does not affect the remainder of the act. *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937), overruling *Milwaukee Drug Co. v. Reed Drug Co.* (Cir. Ct. 1936), CCH 7447, 2 P-H 40150.

Application of the Act.

Notice.

In *Hiram Walker, Inc., v. Goldman*, (Cir. Ct. 1938), 3 CCH 25137, the plaintiff established the price in contracts with several retailers and then distributed schedules of the prices so established among the trade. The court stated that this constituted sufficient notice of the resale price restriction.

Parties Bound by Resale Price Restriction.

A noncontracting dealer with notice of the resale price restriction is bound by it. *Weco Products Co. v. Reed Drug Co.*, *supra*. The notice required is notice at the time of acquisition of the goods. *Hiram Walker, Inc., v. Goldman*, *supra*. But where plaintiff has proved that defendant did have notice, the burden is on the defendant to show that the notice was not received at the time of acquisition. *Ibid*.

Parties Establishing a Price Restriction.

Plaintiff, as sole distributor of a commodity bearing a trade-mark, has the right to establish a price restriction. *Ibid*.

Parties Enforcing a Resale Price Restriction.

As sole distributor of a commodity bearing a trade-mark, plaintiff has an interest in its goodwill and can enforce a resale price established to protect the goodwill of the commodity. *Ibid*.

Defenses.

Plaintiff, having made reasonable efforts to enforce the resale price restriction against other violators, can maintain an action to enjoin defendant from violating the statute. *Ibid*.

Excepted Sales.

The Fair Trade Act does not except from its operation sales made to the State and, in selling to the State, jobbers must abide by resale price restrictions established pursuant to the statute. Op. Att'y. General, March 28, 1939, 3 CCH 25249.

B. PROHIBITION OF SALES BELOW COST

Rev. Stat. (1939)

Unfair Sales Act

Sec. 100.30. A new section is added to the statutes to read: 110.15. *Unfair Sales Act.*—(1) **Policy.**—The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression.

(2) **Definitions.**—When used in this section unless context otherwise requires:

(a) "Cost to retailer" means the invoice cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one percent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and mark-up and a mark-up to cover a proportionate part of the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be six percent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a mark-up.

(b) "Cost to the wholesaler" means the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added, freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one percent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage

and mark-up, and a mark-up to cover a proportionate part of the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be two percent of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a mark-up.

(c) "Replacement cost" means the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise.

(d) "Cost to retailer" and "cost to wholesaler" as defined in paragraphs (a) and (b) of this section means bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler.

(e) "Sell at retail," "sales at retail," and "retail sale" mean and include any transfer for a valuable consideration, made in the ordinary course of trade, or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(f) "Sell at wholesale," "sales at wholesale," and "wholesale sales" mean and include any transfer for a valuable consideration made in ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(g) "Retailer" means and includes every person, partnership, corporation, or association engaged in the business of making sales at retail within this state; provided that, in the case of a person, partnership, corporation, or association engaged in the business of making both sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business.

(h) "Wholesaler" means and includes every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state; provided that, in the case of a person, partnership, corporation or association engaged in the business of making both sales at wholesale and sales at retail, such terms shall be applied only to the wholesale portion of such business.

(i) The term "retailer" and the term "wholesaler" shall both be applied to all merchants buying at wholesale and receiving the wholesalers' profit and discounts on merchandise to be sold at retail by such merchants, and both the wholesale markup of two per cent to cover in part the cost of doing business, and the retail markup of six percent to cover in part the cost of doing business, shall be added to the invoice cost on all merchandise where the wholesale function is performed by such merchants.

(j) When one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purposes of this section be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions of paragraph (a) or (b) of subsection (2) hereof.

(3) **Loss leaders.**—Any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this section with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, and are unfair competition and contrary to public policy and the policy of this section, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

(4) **Penalties.**—Any retailer who shall advertise, offer to sell or sell at retail any item of merchandise at less than cost to the retailer as defined in this section; or any wholesaler who shall advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler as defined in this section, shall be guilty of a misdemeanor punishable upon the first conviction by a fine of not less than ten dollars, nor more than fifty dollars, and upon each subsequent conviction punishable by a fine of not less than fifty dollars, nor more than five hundred dollars. Proof of any such advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this section shall be prima facie evidence of a violation hereof.

(5) **Special remedy.**—In addition to the penalties provided, the courts of this State are invested with jurisdiction to prevent and restrain violations of this section, and it shall be the duty of the several district attorneys to institute proceedings in equity to prevent and restrain violations. Any person damaged, or who is

threatened with loss or injury, by reason of a violation of this section, shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation hereof.

(6) **Exceptions.**—The provisions of this section shall not apply to sales at retail or sales at wholesale where—

(a) Merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such;

(b) Perishable merchandise must be sold promptly in order to forestall loss;

(c) Merchandise is imperfect or damaged or is being discontinued and is advertised, marked and sold as such;

(d) Merchandise is sold upon the final liquidation of any business;

(e) Merchandise is sold for charitable purposes or to relief agencies;

(f) Merchandise is sold on contract to departments of the government or governmental institutions;

(g) The price of merchandise is made in good faith to meet competition;

(h) Merchandise is sold by any officer acting under the order or direction of any court.

(7) **Invalidity of part.**—If any subsection, sentence, clause, or provision of this section shall for any reason be held invalid or unconstitutional, the validity of the remaining parts hereof shall not be affected thereby. (L. 1939, c. 56.)

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

Rev. Stat. (1939)

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 intentionally, 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 such 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 of 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. 133.26. 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 constructed so that their beneficent purposes may be subserved. (1935 c. 52, 486.)

Sec. 133.185. Secret rebates; unfair trade practice; prohibited; penalty.—(1) The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, such payment, allowance, or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited.

(2) Any person, firm, or corporation violating any of the provisions of subsection (1) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five

hundred dollars or by imprisonment in the county jail for not to exceed six months, or by both such fine and imprisonment. (1935, c. 52.)

2. Special Prohibitory Laws

Rev. Stat. (1939)

Dairy Products

Sec. 100.22. Unfair discrimination in purchase of dairy products.—(1) Any person, firm, or corporation, foreign or domestic, engaged in the business of buying milk, cream, or butterfat for the purpose of manufacture, that shall discriminate between different sections, communities, towns, villages or cities of this State, or between persons, firms, or corporations in any locality of this State, by paying for such commodity at a higher price or rate in one section, community, town, village or city, or to any person, firm or corporation in any locality of this State, than is paid for the same commodity by said person, firm, or corporation, foreign or domestic, in another section, community, town, village or city, or to another person, firm or corporation in any locality of this State, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful: *Provided*, That it shall be a justification for such a discrimination in price if the difference is merely commensurate with an actual difference in the quality or quantity of the commodity purchased or in transportation charges or other expense of marketing involved in said purchase.

(2) Proof of any justification, as described in subsection (1) of this section, may be made by the defendant but no such justification need be negatived in the information or complaint, and, if so negatived, no proof in relation to the matter so negatived shall be required on the part of the informant or complainant.

(3) Whenever the department is credibly informed that this section has been violated, it shall make investigation and shall report the results of the investigation to the attorney general and the secretary of state. The department shall cooperate with the attorney general in the securing of evidence of violations of this section. (1935, c. 550, sec. 358.)

Sec. 100.23. Contracts void.—All contracts or agreements made in violation of any of the provisions of section 100.22 shall be void. (1935, c. 550, sec. 359.)

Sec. 100.24. Revocation of corporate authority; ouster.—(1) Any corporation organized under the laws of this State which shall violate any order issued under section 100.20, or which is found guilty of unfair discrimination under section 100.22, shall forfeit all the

rights and privileges conferred by the laws of this State upon corporations and shall forfeit its charter.

(2) Upon complaint being made to the attorney general and evidence presented to him which shall satisfy him that any domestic corporation has violated any order issued under section 100.20, or has violated any of the provisions of section 100.22, he shall forthwith bring an action in the name of the state to have the charter of such corporation annulled.

(3) Any foreign corporation which shall violate any order issued under section 100.20, or which is found guilty of unfair discrimination under section 100.22, shall, upon proof thereof, in any court of competent jurisdiction, have its license or authority to do business in this State canceled.

(4) Upon complaint being made to the attorney general and evidence presented to him which shall satisfy him that any foreign corporation has violated any order issued under section 100.20, or has violated any of the provisions of section 100.22, he shall forthwith bring an action in the name of the state to have the license or authority of such corporation to do business in this State canceled, and to oust such corporation from all business of every kind and character in this State. (1935, c. 550, sec. 362.)

Sec. 100.25. Cumulative remedies.—Nothing in sections 100.22 to 100.24, inclusive, shall be construed as repealing any other law of this State, but the remedies herein provided shall be cumulative to all other remedies provided by law in and for such cases. (1935, c. 550, sec. 363.)

Sec. 100.26. Penalties.—(3) Any person violating any of the provisions of sections 100.04, 100.15, 100.19, 100.20, or 100.22, or who intentionally refuses, neglects, or fails to obey any regulation made under sections 100.04, 100.19 or 100.20, shall, for each offense, be punished by a fine of not less than twenty-five dollars nor more than five thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. (1933, c. 112; 1935, c. 55, sec. 364-368; 1937, c. 39, 369; 1939, c. 217, 471.)

WYOMING

REGULATION OF PRICE COMPETITION

A. RESALE PRICE MAINTENANCE

L. 1937, c. 58

Section 1. Definitions.—The following terms, as used in this act, are hereby defined as follows:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person selling a commodity to consumers for use.

(E) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or any unincorporated organization.

Sec. 2. Contracts relating to sale of trade-marked articles.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Wyoming by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(C) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

Sec. 3. Acts deemed a violation.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(A) The offering or giving of any article of value in connection with the sale of such commodity;

(B) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(C) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 6 of this act shall be available.

Sec. 4. Only owners of trade-marks to establish resale prices.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand, or name.

Sec. 5. Exceptions.—No contract containing any of the provisions enumerated in section 2 of this act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public: *Provided*, The owner of such stock shall give to the producer of such commodity, or to the distributor from whom same was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(B) When the trade-mark, brand, or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(C) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity:

(D) By any officer acting under an order of court.

Sec. 6. Unfair competition defined and made actionable.—Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 7. Certain contracts not affected.—This act shall not apply to any contract or agreement between or among producers or, except as provided in subdivision "C" of section 2 of this act, between or among wholesalers or between or among retailers as to sale or resale prices.

Sec. 8. Forfeiture of charter.—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 violating the terms of this Act, it shall be the duty of the attorney general, or the county and prosecuting attorney of the county in which such violation occurs to institute an inquiry as to such violation, 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 violating the terms of this act, 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.

Sec. 9. Penalties.—Any person, firm, or corporation official or employee violating any of the provisions of this act, shall be fined in any sum not more than five hundred (\$500.00) dollars, or by imprisonment in the county jail not exceeding one year or both such fine and imprisonment.

Sec. 10. Constitutionality.—If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 11. Repeal.—All acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

Sec. 12. Title.—This act may be known and cited as the "Fair Trade Act."

Sec. 13. Effective date.—This act shall take effect and be in force from and after May 1, 1937.

B. PROHIBITION OF SALES BELOW COST

L. 1937, c. 73

Unfair Practices Act¹

Sec. 2. Sale at less than cost.²—It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition.

The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution cost shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The cost of doing business or overhead expense is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor, including salaries of executives and officers, rent, legal rate of interest on capital, depreciation, selling cost, maintenance of equipment, de-

¹The Unfair Practices Act is constitutional as a valid exercise of the police power of the State, the act being designed and related to the prevention of destructive competition and the means to the desired end being reasonable. *State v. Langley*, 53 Wyo. 332, 84 Pac. (2d) 767 (1938). In a dictum, the court made the following interpretation of the statute: "The definition of cost is not too indefinite or uncertain. It means that not all costs of doing business should be added to each item but only a proportion thereof. The legislature did not and could not have fixed the proportion or have prescribed all things to be considered. A reasonable interpretation—e. g., what business men generally mean, the approximate cost arrived at by a general rule, of the act renders it sufficiently definite. The statute should not prove a burden to anyone who acts in good faith."

²For section 1 dealing with unfair competition see *Antidiscrimination Legislation: General Prohibitory Laws, infra*.

livery costs, credit losses, all types of licenses, taxes, insurance and advertising.

Sec. 3. Establishment of cost of product secured at forced, bankrupt or close-out sale.—In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Sec. 4. Proof of unlawful intent sufficient.—In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

Sec. 5. When preceding sections do not apply.—The provisions of sections 2, 3, and 4 shall not apply to any sale made:

A. In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

B. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

C. By an officer acting under the orders of any court;

D. In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another

person, firm or corporation shall be construed to be a vendor within the meaning of this act.

Sec. 6. Secret payment or allowance of rebates.—The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor.

Sec. 7. Corporation violating act to forfeit charter or permit.—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 act, it shall be the duty of the attorney general or the county and prosecuting attorney of the county in which the violation is charged 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 act, 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.

Sec. 8. Contract in violation of act declared illegal.—Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of this act is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 9. Injunction and damages.—Any person, firm, private corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of this act, and, if injured thereby, for the recovery of damages of and from the defendants named in the action.

Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

Any defendant in an action brought under provisions of this act may be required to testify under the provisions of the Code of Civil Procedure of this State, and in addition the books and records of any such defendant may be required to be brought into court and introduced, by reference, into evidence: *Provided, however,* That no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of this act.

Sec. 10. Penalty.—Any person, firm, or corporation, whether as principal, agent, officer, or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars, or by imprisonment in the county jail not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Sec. 11. Validity.—If any section, 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. The legislature hereby declares that it would have passed this act, and each section, sentence, clause, or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional.

Sec. 12. Purpose of act.—The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

Sec. 13. This act shall not amend, repeal, or change the provisions of chapter 42, Special Session Laws of Wyoming, 1933.

Sec. 14. Repeal.—Section 117-301, Wyoming Revised Statutes, 1931, is hereby repealed.

Sec. 15. Effective date.—This act shall take effect and be in force from and after April 1, 1937.

C. ANTIDISCRIMINATION LEGISLATION

1. General Prohibitory Laws

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 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 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. '11, c. 62, sec. 1, L. '23, c. 86, sec. 1, amending C. S. '20, sec. 4372.)

Sec. 117-202. Attorney general—Investigation.—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—Ouster.—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.)

L. 1937, c. 73

Unfair Practices Act

Section 1. Unfair competition and discrimination prohibited.—It shall be unlawful for any person, firm, or corporation, doing business in the State of Wyoming and engaged in the production, manufacture, distribution, or sale of any commodity, or product of general use or consumption with the intent to destroy the competition of any regular established dealer in such commodity or product to prevent the competition of any person, firm, private corporation who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities, or cities, or portions thereof, or between different locations in such

sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity or product at a lower rate in one section, community, or city, or any portion thereof, or in one location in such section, community, or city, or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.³

2. Special Prohibitory Laws

Rev. Stat. Ann. (Courtright, Supp. 1934)

Petroleum and Byproducts

Sec. 117-302. Petroleum and byproducts—Violation.—Any person, firm, company, association, or corporation, foreign or domestic, doing business in the State of Wyoming and engaged in the production, manufacture, and distribution of petroleum and petroleum products, that shall discriminate between different sections, communities, localities, cities or towns in said State, by selling petroleum, or any products of petroleum, including gasoline, fuel oil, motor oil, and grease, of the same grade, test or quality, at a price or rate lower in one section, community, locality, city, or town than in another section, community, locality, city, or town, in this State, making due allowance for the difference, if any, in the actual cost of transportation from the point or place of production, manufacture, sale, storage, or distribution of such commodities, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful. (L. '33, S. S., ch. 42, sec. 1.)

Sec. 117-303. Complaint—Attorney general—Duties.—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

³For procedural and penalty provisions, see *Prohibition of Sales Below Cost*, *supra*.

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. '33, S. S., ch. 42, sec. 2.)

Sec. 117-304. Revocation corporation rights.—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. '33, S. S., ch. 42, sec. 3.)

Sec. 117-305. Penalty.—Any person, or the official or the employee of any firm or corporation responsible for the violation of 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. '33, S. S., ch. 42, sec. 4.)

Sec. 117-306. No other laws repealed.—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. '33, S. S., ch. 42, sec. 5.)

PART TWO
SPECIAL PRICE LEGISLATION

CHAPTER 1
ADMINISTRATIVE PRICE CONTROL

CHAPTER 2
LEGISLATIVE PRICE FIXING

CHAPTER 3
MISCELLANEOUS PRICE PRACTICES

PART II

SUMMARIES OF SPECIAL PRICE LEGISLATION

DESCRIPTIVE NOTE

Part One of this volume dealt with the three principal types of State price control legislation; namely, *Resale Price Maintenance*, *Prohibition of Sales Below Cost*, and *Antidiscrimination*.

Part II presents in summary form, including annotations and judicial decisions, *Special Price Legislation* with respect to (A) *Administrative Price Control*, (B) *Legislative Price Fixing*, and (C) *Miscellaneous Legislation* relating to price practices.

Under the administrative price control section, the provisions of the 21 milk control laws¹ are summarized. The price fixing aspects are set out in detail. A complete and detailed analysis of these statutes and judicial decisions will be presented in a forthcoming volume of the Marketing Laws Survey on milk industry legislation, the first in a series of special industry studies.

Following the milk control acts are summaries of statutes in six States² providing for administrative price control of agricultural commodities and foodstuffs. The Texas statute applies to citrus fruit only. The Massachusetts act applies to fuel as well as to food. Only three courts have passed upon these provisions, namely, California, Oregon, and Texas.

Four States³ establish administrative control of fuel prices. Two of these are operative only when the Governor has declared that an emergency exists. There are no cases interpreting these statutes.

Fifteen States⁴ have adopted codes regulating the service trades, principally barbering, laundering, and dry cleaning. Five States⁵

¹Alabama, California, Connecticut, Florida, Georgia, Indiana, Louisiana, Maine, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Wisconsin.

²California, Georgia, Idaho, Massachusetts, Oregon, and Texas.

³Colorado, Connecticut, Massachusetts, and New Mexico.

⁴Alabama, Arizona, California, Colorado, Delaware, Florida, Indiana, Iowa, Louisiana, Minnesota, Montana, New Mexico, Oklahoma, Tennessee, and Wisconsin.

⁵Alabama, California, Iowa, Minnesota, and Wisconsin.

have enacted legislation enabling municipalities to provide for administrative control of service trades generally. Six State statutes⁶ cover the barbering trade and one⁷ covers cosmetology. Laundering, cleaning and dyeing control statutes have been enacted in three States.⁸ The constitutionality of the barbering and dry cleaning codes has been challenged in 10 States.⁹

The legislative price fixing provisions relate to actual price setting by statute.¹⁰ The charges for publishing legal notices and official advertising are fixed in nine States,¹¹ ticket or admission prices are set or limited in six States,¹² and the percentage of "take" by those running race tracks and race betting is fixed in four States.¹³ None of these statutes has been interpreted by a court of last resort.

The most numerous of the miscellaneous provisions relating to price practices are the trading stamp provisions. Twenty-nine States¹⁴ have enacted such statutes. Provisions prohibiting the absorption of the sales tax are found in 17 States.¹⁵

⁶ Arizona, Indiana, Louisiana, Montana, Oklahoma, and Tennessee.

⁷ New Mexico.

⁸ Colorado, Delaware, and Florida.

⁹ Acts declared constitutional:

COLORADO.—*People ex rel. Rogers v. Barksdale*, 87 Pac. (2d) 755 (1919) (injunction granted to enforce retail dry cleaning prices).

LOUISIANA.—*Board of Barber Examiners of Louisiana v. Parker*, 190 La. 214, 182 So. 486 (1938); *State of Louisiana v. Guchereau*, 190 La. 306, 182 So. 515 (1938) (Barbering Code).

MINNESOTA.—*State v. McMasters*, 204 Minn. 438, 283 N. W. 767 (1939) (Barbering Code).

OKLAHOMA.—*Herrin v. Arnold*, 183 Okla. 392, 82 Pac. (2d) 977 (1938) (Barbering Code).

Acts declared unconstitutional:

ALABAMA.—*City of Mobile v. Rouse*, 27 Ala. App. 343, 173 So. 254 (1937) aff'd 233 Ala. 622, 173 So. 266 (1937) (Barbering Code).

CALIFORNIA.—*Ex parte Kozas*, 22 Cal. App. (2d) 161, 70 Pac. (2d) 962 (1937) (Barbering Code).

DELAWARE.—*Becher v. State*, 37 Del. 454, 185 Atl. 92 (1936) (Dry Cleaning Code).

FLORIDA.—*State v. Ivese*, 123 Fla. 401, 167 So. 394 (1939) (Barbering Code).

IOWA.—*Duncan v. City of Des Moines*, 222 Ia. 218, 268 N. W. 547 (1936) (Barbering Code).

TENNESSEE.—*State v. Greason*, 124 S. W. (2d) 253 (1939).

¹⁰ The regulation of commissions to be paid to employment agencies has not been included in this compilation.

¹¹ Colorado, Idaho, Iowa, Michigan, New Jersey, New Mexico, Pennsylvania, South Dakota, and Washington.

¹² Connecticut, Idaho, Massachusetts, Minnesota, Mississippi, and New Jersey.

¹³ Arkansas, California, Illinois, and Michigan.

¹⁴ Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wisconsin.

¹⁵ Arkansas, California, Colorado, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, South Dakota, Utah, Washington, West Virginia, and Wyoming.

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The price posting provisions also fall within this miscellaneous group. Four States¹⁶ require posting of cream prices and Ohio requires posting of milk prices. Price posting for bread and bakery products is required in Oregon and Washington. Oregon also prohibits rebates and discounts on the sale of bread and bakery products. Gasoline prices must be posted in Iowa and New Jersey.¹⁷ No cases were found interpreting these acts.

Liquor prices are fixed in 17 liquor monopoly States.¹⁸

¹⁶ Minnesota, Mississippi, Montana, and North Dakota.

¹⁷ A California provision, not included in the compilation, prohibits foreign banks from attempting to fix prices in the commodity markets. Gen. Laws (Deering, 1937) act 654, sec. 1c.

¹⁸ Alabama, Idaho, Iowa, Maine, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming (fixes prices for wholesalers only).

These provisions have not been included in this compilation as a separate volume in the special industry series of the *MARKETING LAWS SURVEY* will deal in detail with all State liquor legislation.

CHAPTER ONE

ADMINISTRATIVE PRICE CONTROL

SECTION 1

MILK CONTROL ACTS

ALABAMA

L. 1939, No. 164 as amended by L. 1939, No. 553¹

Section 3 provides for the creation of a Milk Control Board consisting of 5 members appointed and serving at the will of the governor.

Section 6 provides that the board has power and duty to supervise and regulate fluid milk industry insofar as it does not abrogate any public health laws.

Section 7 provides the board may make necessary rules and orders to carry out the act.

Section 13 provides that the board may decline to grant a new license or may suspend or revoke an existing license upon due notice and opportunity for hearing, where a licensee has violated any provision of this act. The board may grant, renew, decline, suspend, or revoke a license conditionally upon agreement of licensee to do or not to do a condition relative to the act.

Section 19 provides that the board shall investigate what are reasonable costs and charges for producing, hauling, processing, and other services performed in respect to milk, and what are reasonable prices for milk, in the several localities and markets of the state, and under various conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The board shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the pur-

¹ Prior Milk Control Act [Code Ann. (Michie, Supp. 1936) secs. 1731 (1) et seq.] held constitutional. *Franklin v. State*, 232 Ala. 637, 169 So. 205 (1936).

chasing powers of the public. All meetings of the board where the fixing of prices is involved shall be open to the consuming public with an opportunity to present evidence and be heard.

The board after making such investigations may fix by official order: (a) The minimum prices, within the milk shed, to be paid by milk dealers, producers, distributors and producer-distributors to producers and others for milk in its various grades and uses. The order of the board with respect to the minimum price to be paid to producers and others shall apply to the locality or zone in which the milk is produced, the markets in which the milk so produced is sold, and may vary in different localities or zones or markets according to varying uses and different conditions. When in the judgment of the board, it is necessary or advisable, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser price for milk which is produced in excess of what is needed for fluid consumption.

The board may establish the quantity of milk which the distributor or milk dealer shall pay for at the fluid or base milk price, and may establish a lesser price for the surplus over what is needed for fluid milk consumption. For this purpose the board may compute said quantity upon a uniform system of plant usage, classifying milk according to its usage and establish prices to be paid by milk dealers for each classification, or the board may establish a base surplus system, placing all milk sold for fluid consumption in one class and establishing a price therefor and place all milk used in byproducts into another classification, and fix a lesser price therefor or the board may use a combination of both systems. The board may adopt uniform rules and regulations for the apportionment of this base or quota and may adopt such systems for the apportionment of such base or higher price classification of milk as it may determine to be just and equitable.

For this purpose the board may require any milk dealer to supply necessary information about the quantities of milk received from producers during a specified period of time, and any other information necessary.

The board may determine the prices to be received by the producers for milk within the quota of base and higher price classification and for surplus milk and for milk in excess of it. Each order fixing prices or handling charges may classify milk by forms, classes, grades, or use as the board may deem advisable and may specify the minimum or maximum prices, or both, therefor.

(b) The minimum or maximum wholesale or retail prices to be charged for milk handled within each milkshed for fluid consumption

and wheresoever produced, when sold by milk dealers, producers, producer-distributors, or stores to consumers, to stores, to hotels or restaurants, to other milk dealers, or to anyone else who purchases milk. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinary efficient and economical milk dealers, including a reasonable return upon necessary investment.

(c) The board may also fix the amount of handling or processing charges to be included in the price charged or paid by milk dealers for milk involved in transactions between dealers and between dealers and processors, as are ascertained after a hearing to be just and reasonable.

Sec. 9, as amended by L. 1939, c. 553, sec. 2, provides that any producer in any milkshed where the provisions of the act apply may file a declaration with the board that he desires to sell milk on the premises where produced to persons furnishing their own containers for consumption as fluid milk by the purchaser, and thereafter such producer may sell such milk at prices not conforming to those fixed by the board, providing all such milk conforms with the local health laws and regulations.²

Section 20 provides that in addition to the general and specific powers granted the board, it shall have the power to make and promulgate reasonable rules and regulations covering fair trade practices.

Section 22 provides that any person affected by any order or action of the board may, ten days after receiving notice of such order or action, have such order or action reviewed by filing a writ of certiorari in circuit court of the county wherein said action or order was taken or made.

Section 26 provides that it shall be unlawful for any person to violate any provision of this act, or any lawful order, rule, or regulation of the board. Any person required to be licensed by the act who shall produce, sell, or distribute or handle milk in any way except as a consumer, without a license shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500). Each day's violation of any rule, provision, order, or regulation shall constitute a separate offense.

Section 27 provides that the board may institute such action at law or in equity as may appear necessary to enforce compliance with any provisions of this act, or any rules or orders of the board,

² Price fixing provisions of prior act [*supra*] held not applicable to producer who sold output to consumers who purchased unsolicited and brought their own containers. *Taylor v. State*, 237 Ala. 179, 186 So. 463 (1939).

and in addition to any other remedy under this act, the board may apply for relief by injunction, mandamus, or any other relief in equity if necessary to protect the public interest without being compelled to allege or prove that an adequate remedy at law does not exist. Nor shall the board be required to give or post bond in any action to which it is a party, whether upon appeal or otherwise.³

CALIFORNIA

Agric. Code (Deering, 1937), as amended by Agric. Code (Deering, Supp., 1939)
Milk Control

(See Agric. Code (Deering, 1937) secs. 743-749, *Agricultural Commodities and Foodstuffs*, page 453)

Section 735 (c) provides that the director of agriculture shall have administrative authority over the milk industry in the State.

Sections 735.4 (7) (8) (9), 736.2, and 736.15 provide for the appointment by the director of a local board for any marketing area, in event he deems such board necessary or advisable.

Section 736 provides that as soon as possible after the effective date of this chapter the director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream, or both are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter.

By sections 735.4 (3) and (6), the director is "To formulate any stabilization and marketing plan as prescribed in this chapter (sec. 736.1 *infra*) and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan."⁴

Section 736.1 provides that the director, prior to the formulation of a stabilization and marketing plan for either fluid milk or cream, shall conduct a public hearing to determine whether or not producers whose

³ Where board seeks injunctive relief, violator not entitled to jury trial. *Franklin v. State*, *supra*.

⁴ This act held not unconstitutional as an improper exercise of the police power of the State in violation of the due process clause of the Federal Constitution. *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. (2d) 620, 91 Pac. (2d) 577.

⁵ This section held to prescribe sufficient standards for guidance of the director in designating various marketing areas in the State and is not an unconstitutional delegation of legislative power. *Jersey Maid Milk Products Co. v. Brock*, *supra*.

major interest is in production of fluid milk and cream,⁶ who represent not less than 65 percent of the total number of such producers and who produce not less than 65 percent of the total volume of milk (or cream) for such area, desire that such plan be formulated for said area. If, however, a petition is presented to the director by the same percentage of producers as set out above, such hearing need not be held. The director, if he finds that such plan is necessary to accomplish the purposes of this act, shall formulate such a plan for milk or cream, or both, and issue notice of public hearing upon the plan formulated. If the director determines, after the public hearing, that such plan will accomplish the purposes of this act, he shall issue an order to all producers and distributors affected, declaring such plan in effect within 30 days of such hearing.

Section 736.3 reads: "Any stabilization and marketing plan shall contain the following provisions:

"(a) *Unfair practices.*—Provisions for prohibiting distributors from engaging in the unfair practices hereinafter set forth:

"(1) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

"(2) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing the fluid milk or fluid cream business of any customer.

"(3) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream of like quantity under like terms and conditions.

"(4) The false or misleading advertising of fluid milk or fluid cream as defined in section 654a of the Penal Code.

"(5) The purchase of any fluid milk in excess of one hundred gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers stating the amount of fluid milk to be purchased for any period; the quantity of such milk to be paid for as Class 1, and Class 2, and the price to be paid for each of the several classes, but in any marketing plan where an equalization pool is in operation such contract need not specify the quantity of the several classes. The contract shall also state the date and method of payment, the charges for transportation if hauled by the distributor, and may contain such other provisions as are not in conflict with this chapter. A

⁶The phrase "whose major interest is in the production of milk and cream" construed to include all producers of milk and cream except those large distributors of milk and cream who also engage in the business of producing milk on a small scale as compared with their distribution business. *Jersey Maid Milk Products Co. v. Brock, supra.*

signed copy of such contract shall be filed by the distributor with the director within five days from the date of its execution.

“(b) *Minimum prices.*—Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers, for fluid milk in one or more of the various classes; provided, however, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk; and provided further, the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome milk.

“*Optional provisions.*—Any stabilization and marketing plan may contain the following provisions:

“(c) *Report to producer.*—Provisions whereby distributors shall report to each producer from whom fluid milk is secured, the volume of fluid milk received from such producer in pounds of milk, the milk fat test of such milk and the amount of fluid milk in milk fat pounds paid for in the several classes and the prices paid for the various classes for each month.

“(d) *Minimum prices.*—Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers for fluid cream, provided that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid cream for the marketing area involved to the price of manufacturing cream, taking into consideration the additional costs incurred in producing and marketing fluid cream; and provided further, that the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome cream.

“(e) *Uniform prices.*—Provisions whereby the director designates or prescribes methods to provide uniform prices to be paid to all producers supplying fluid milk to distributors for pasteurization purposes in the marketing area involved by pooling the returns of all such fluid milk, provided that no equalization pool shall be established unless the director, after hearing, determines that producers who supply distributors with not less than sixty-five percent of the total volume of fluid milk used for pasteurization purposes and who represent not less than sixty-five percent of the total number of such producers desire the establishment of such pool, but

no hearing shall be necessary if said sixty-five percent, by volume and production, of such producers petition the director in writing to establish such equalization pool as a part of the plan. If the director finds that an equalization pool is necessary to carry out the provisions of this chapter he shall make provision therefor. The director may designate the local control board for the marketing area as his agency to operate the equalization pool and may permit such local board to employ a pool manager and such other necessary personnel and to incur such expenses incidental to the operation of the pool as the director finds are necessary. The director is hereby empowered to require distributors to make reports to the pool manager at such intervals and in such detail as he finds is necessary for the operation of the pool which reports shall be kept confidential as to any individual distributor but shall be available to the director or his agents and the pool manager, and such employees of the pool as are necessary to the operation of the equalization pool.

"Premiums, differentials, adjustments, and deductions.—No provision of any pooling program shall prevent any distributor from paying premiums for quality provided all producers supplying fluid milk of like quality to such distributor are paid similar premiums, nor shall any provision prohibit the paying of different prices to producers based on differentials in transportation, adjustments or deductions made by a cooperative association of producers to its members, including the blending of proceeds received from the sale of fluid milk by such cooperative in other markets. Distributors who purchase fluid milk from producers for pasteurization purposes shall deduct from payments due such producers at such time and in such manner such sums as the director determines are sufficient to insure prices to all producers subject to the provisions of the equalization pool, irrespective of the usage of such fluid milk by the distributors. Distributors shall make, in addition to the deductions herein prescribed, such additional deductions per pound milk fat as the director finds necessary to pay all expenses incidental to the operation of the equalization pool, including the establishment of a reserve account to insure prompt payments to producers. The deductions herein prescribed are in addition to any other deductions prescribed by this chapter."

Section 735.4 (4) and (5) provides that the director is to prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk and classify said milk according to usage by distributors; provided that the prices so prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of

manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above such costs incurred in producing and marketing manufacturing milk.

Section 735.4 (6(a)) provides that the director may amend or terminate any plan after notice and public hearing as prescribed in sec. 736.1 (*supra*).

Sec. 736.10 states: "Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale prices and minimum prices as hereinafter set forth."

Section 736.11 provides that the director shall, as soon as possible after the effective date hereof, in all marketing areas wherein a stabilization and marketing plan is in effect under the provisions of this chapter, designate and prescribe or provide methods for designating and prescribing,

(a) *Minimum wholesale prices* which, as used herein, shall mean prices at which fluid milk or fluid cream, or both; shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries, and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor; and

(b) *Minimum retail prices* which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

At the time any stabilization and marketing plan is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, such minimum wholesale prices and such minimum retail prices: *Provided, however*, That all prices established under the terms of this article shall be such prices as are determined by the director pursuant to the provisions of section 736.12.

Section 736.12 provides that in determining minimum wholesale prices and minimum retail prices in any marketing area, the director shall first make an investigation in such marketing area to establish such facts as shall be necessary to permit him to carry out the intent of this article within the standards herein prescribed. In making such investigation, the director may examine the books and records of distributors and retail stores in such marketing area and shall hold one or more public hearings, take testimony, and may subpoena witnesses. All testimony received at such hearings shall

be under oath. Notice of any hearing held by the director, pursuant to this article, shall be given by the director to every distributor and retail store in such marketing area whose name appears upon the records of the Department of Agriculture or files a request for the same with the department, by mail or by publication, for the time and in the manner prescribed in section 736.1 of this chapter. A record of any and all hearings held by the director, pursuant to this article, shall be made and filed in the office of the director and shall, at all times, be available to inspection by any interested person.

In determining minimum wholesale and minimum retail prices for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area:

(1) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

(2) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(3) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

(4) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors and retail stores, including all costs of hauling, processing, selling, and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling, and delivery, as such costs are determined by impartial surveys or audits, or both, of the books and records of all, or such portion of the distributors and retail stores of each type or class in such marketing area as are found by the director to be sufficiently representative to indicate the costs of all distributors and retail stores in such marketing area.

In determining the cost of handling and distributing fluid milk or fluid cream, or both, by retail stores handling commodities in addition to fluid milk or cream, or both, the director shall determine the cost of doing business for each such representative retail store and for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

(4a) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors in hauling, processing, selling and delivering to restaurants, confectioneries, or other places for con-

sumption on the premises wherein it is required by law that service to customers be made from the original container. In fixing the minimum wholesale price to be paid distributors by such persons, the director shall take into consideration such legal requirements and other factors and distribution costs peculiarly affecting service to such persons, and if the director reasonably determines that such factors and costs require that the minimum wholesale prices to be paid distributors by such persons vary from the minimum prices established for other wholesale customers, the prices established to be paid by such persons may vary accordingly.

(5) The amount of the available capacity for processing and distributing fluid milk, or fluid cream, or both, of all distributors and retail stores in such marketing area and the estimated extent to which such available capacity is being used by such distributors and retail stores.

(6) The purchasing power of consumers in such marketing area.

Establishment and declaration of prices; restrictions.—Following such hearings, investigations, and examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area, and shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective, provided that the director finds, in writing, with respect to such prices.

“(1) That such prices are not more than reasonably sufficient to cover all necessary costs, according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution of fluid milk, fluid cream, or both, in such marketing area as such necessary costs of reasonably efficient distributors and retail stores are shown to the director by the facts available to the director from the investigations, surveys, audits, and hearings required in this section.”⁷

(2) That such prices will tend to maintain in the business of distributing fluid milk and fluid cream, or both, such number of reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds is necessary to insure to consumers in such marketing area sufficient distribution facilities of the several types or methods commonly used by consumers.

(3) That such prices will protect the interests of consumers of fluid milk, fluid cream, or both, in such marketing area by insuring to them adequate and efficient distribution facilities of the several

⁷This section is construed to prescribe definite areas for the fixing of prices. *Jersey Maid Milk Products Co. v. Brock, supra.*

types or methods commonly used by them without requiring such consumers to pay more for their supplies of such fluid milk, fluid cream, or both, than is necessary to maintain such adequate and efficient distribution facilities in such marketing area.

Section 736.13 provides that no distributor shall sell to any retail store, restaurant, confectionery, or other place for consumption on the premises, or consumer, and no retail store, restaurant, confectionery, or other place for consumption on the premises, shall purchase from any distributor or sell to any consumer any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article, and the use or attempted use of any method, device, or transaction whereby any distributor sells or offers to sell to any retail store, restaurant, confectionery, or other place for consumption on the premises, or consumer, or any retail store, restaurant, confectionery, or other place for consumption on the premises, buys or offers to buy from any distributor, or sells or offers to sell to any consumer, fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, whether by discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift, or otherwise and whether any such discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift applies directly to fluid milk or fluid cream or is allowed upon or in connection with the sale or handling of any other commodity or product, is hereby prohibited. The director may, for the purpose of enabling him to enforce the provisions of this section, require every distributor in any marketing area to file with him schedules and any amendments thereto setting forth the prices at which each such distributor is selling or offering to sell dairy products in such marketing area.

Section 737.11 (a) provides: "The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require, when he is satisfied that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter." * * *

*The inclusion of the word "applicant" in sec. 737.11 (a) clearly implies that the proceedings therein provided for apply to a person making application for a license as well as a licensee whose license is sought to be revoked or suspended. *Jersey Maid Milk Products Co. v. Brock, supra.*

*Subdivision (b) of sec. 737.11 (now repealed) which provided that an order of the director may determine the amount of damages a complainant was entitled to by reason of the failure of a dealer to pay for fluid milk and cream purchased was held to be an unconstitutional delegation of judicial power. *Jersey Maid Milk Products Co. v. Brock, supra.*

Section 735.6 provides that any order affecting rights of any interested party may be reviewed by any court of competent jurisdiction within thirty days of the effective date of order.

Section 737.7 provides that parties violating any of the provisions of the act or of any orders, rules, and regulations issued by the director shall be guilty of a misdemeanor. Such violation may also be ground for suspension or revocation of the license. The section further provides for payment of stipulated damages for violation of any of the provisions of the plans formulated.¹⁰

CONNECTICUT

Gen. Stat. (Supp., 1935), c. 107a amended by Gen. Stat. (Supp., 1937), amended Gen. Stat. (Supp., 1939)

Sec. 797c provides that the Governor, with the consent of the general assembly, shall appoint a milk administrator who shall hold office for a term of two years.

Section 800c (g) amended by section 713e provides that the milk administrator has power to establish, subject to the authority of the public utilities commission, rates and charges for the transportation of milk from producers to the dealer's plant.

Section 715e empowers the administrator to define unfair trade practices after public hearing, and to prohibit their use in the State.

Section 801c, amended by section 493d provides that the administrator shall have power to establish, from time to time, a minimum price for the different milk areas of the state for each class and grade of milk or milk products sold to dealers and shall have power to define the number and type of classes of milk for the purposes of this chapter.

To stabilize specific markets, the administrator shall also have power to establish, from time to time, in any market area, a minimum price for a fixed time for each class and grade; (a) to be paid to the producers; (b) to be paid, at wholesale or retail, by consumers; such minimum wholesale and retail prices to cover sales by dealers and licensees, other than stores, to consumers; (c) to be paid to dealers and licensees by stores and other wholesale purchasers, including such price for sales to other dealers or licensees who are shippers or distributors; (d) to be paid to stores by consumers; (e)

¹⁰ Provisions of the act which protect the producer by establishing a fair price to him and afford him security for payment of the price due him for milk and cream by means of a bond are incident to the broader purpose of the act to protect the public milk supply. *Ex parte Willing*, 12 Cal. (2d) 591, 86 Pac. (2d) 663 (1939) aff'g 27 Cal. App. (2d) 367, 80 Pac. (2d) 1027 (1928).

to be paid to dealers and licensees by subdealers or store dealers; (f) to be paid to dealers by other dealers.

Section 717e provides that in establishing minimum prices for milk under the provisions of section 801c the milk administrator shall take into consideration, and be guided by available information relative to costs of production, hauling, handling, processing, storage, distribution, type of container used, and other cost factors which should influence the determination of such prices, including compliance with sanitary regulations. He must consider the balance between supply and consumption and the price in different areas of the State to insure an adequate supply of pure and wholesome milk.

Section 808c as amended by section 724e provides that the milk administrator may make, and, from time to time, revise, such rules and regulations as may be necessary for the administration of this act.

Section 802c as amended by section 719e empowers the milk administrator to issue, refuse to issue, or revoke milk dealers' licenses after due notice and hearing.

Section 810c as amended by section 726e provides that any person or any officer of any firm or corporation who shall violate any provision of this chapter or any rule or regulation of the administrator made in conformity thereof shall be fined not more than five hundred dollars or imprisoned not more than six months or both. Repeated violations shall be cause for the revocation of a license by the administrator.

FLORIDA

Comp. Gen. Laws Ann. (Skillman, Supp.,¹¹ 1940)
Milk Control

Section 3219 (40) provides for the creation of a milk commission composed of the milk administrator, the State health officer or some employee of the board of health, commissioner of agriculture or some employee of the department of agriculture, a citizen not connected with the milk industry, and three members of the milk industry. The milk administrator and other members of the board are appointed by the Governor.

Section 3219 (41) provides that the commission is vested with power to supervise and regulate the entire milk industry in the State.

¹¹ The provisions of a prior milk control act [L. 1935, c. 17103] regulating the milk industry with the power in the milk control board to fix minimum and maximum prices was held by the court as constitutional, the court passing only on the temporary nature of the act and specifically reserving any opinion on what the holding would be if the act had been passed as a permanent expression of legislative policy. *Miami Home Milk Producers Ass'n v. Milk Control Board*, 124 Fla. 797, 169 So. 541 (1936).

Section 3219 (42) provides that the commission may adopt and enforce all rules and orders necessary to carry out the provisions of this law.

Section 3219 (46) provides that a milk dealer may not engage in the milk business unless licensed and he may deal only with licensed persons.

The commission may decline to grant or may suspend or revoke a license or permit when satisfied that the licensee has violated any of the provisions of this law. The commission on petition may impose a fine in lieu of revocation or suspension.

If aggrieved by any action of the commission, petition may be made to the circuit court.

Section 3219 (50) provides that the commission shall ascertain by such investigations and proofs as the emergency permits and requires what prices for milk in the several localities and markets of the State, and under varying conditions, will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk to adults and minors in the State, having special regard to the health and welfare of children, and be most to the public interest. The commission shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer. In determining what is a reasonable return to the producer the commission shall take into consideration the necessary cost incurred in that particular locality in maintaining dairy animals in a healthy condition, paying wages and supplying working conditions to employees sufficient for the subsistence at levels generally obtained, and for the safe-guarding of their health in defraying the ordinary fixed charges and operating expense incidental to the ownership, control, and management of a herd of average numerical size, including a reasonable amount representing annual rent of land and equipment necessarily utilized therein and in addition to afford such producers a reasonable return in excess of their cost of production. In determining the reasonable return to the milk dealer, the commission shall take into consideration reasonable average operating expense in processing, storage, transportation and delivery charges, and all necessary reasonable expenses connected therewith.

The commission, after making such investigation, shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the State for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers for consumption on the premises where sold.

4. By stores to consumers for consumption off the premises where sold.

5. When, pursuant to statute, regulations adopted thereunder, or ordinances, various grades of milk are specified the commission shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable. And in construing this section it shall be done taking into consideration for fixing the price, the healthfulness and grade of milk produced, and whether or not the sale price gives a fair return to the producer.

It is the intent of the legislature that the public emergency requires that the producers and milk dealers receive a fair return for their products. To that end, if the commission after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from the producers or from or through a cooperative corporation of producers organized under the laws of the State of Florida, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall upon due notice and after a hearing suspend or revoke the license or permit of the milk dealer so offending.

The commission after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of various forms included within the definition of milk as used in this law and its various grades and uses. The order of the commission with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and different conditions. Each such order may classify such milk by forms, classes, grades, or uses, as the commission may deem advisable and may specify the minimum prices therefor.

After the commission shall have fixed prices to be charged or paid for milk in any form included in the definition of milk as used in this law whether by class, grade, or use, it shall be unlawful for a milk

dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

It shall be unlawful for any person, firm or corporation to knowingly aid or abet any violation of this law or any order of the commission whatsoever or by the use of any advertising method of any character or description whatever on pain of being subject to being temporarily enjoined by a court of equity without notice and without the furnishing of a bond by the commission.

The commission may upon its own motion or upon application from time to time, alter, revise, or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising, or amending any order fixing the price to be charged or paid for milk, the commission shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the commission shall afford sufficient notice and publicity. Such order of the commission may be reviewed by appeal to the circuit court on petition in error at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced outside of the State becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this law respecting such milk so produced shall apply and the powers conferred by this law on the commission shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State by a licensed milk dealer required by this law to be licensed, or any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State purchased under similar conditions, shall be unlawful.

Section 3219 (45) provides that the commission may institute such actions at law or in equity as may appear necessary to enforce com-

pliance with provisions of the act or any rule or order of the commission, and in addition may apply to any circuit court for injunctive relief to protect the public interest.

Section 7677 (5) provides that any violation of the provisions of sections 3219 (38) et seq. or of any rule or order of the commission, lawfully made, shall be a misdemeanor punishable by a fine not exceeding 500 dollars, or by imprisonment not exceeding one year, or both, and each day during which such violations shall continue shall be a separate offense.

Section 7677 (5-c) provides that any violation of the price fixing provisions of sec. 3219 (50) shall render such persons subject to the provisions of sec. 7677 (5).

GEORGIA

Code Ann. (Park, et al., Supp., 1939)¹²

Section 42-525 creates milk control board consisting of seven members who are appointed by the Governor and who shall serve at his pleasure.

Section 42-526 provides for the appointment of a director of the milk control board by the Governor and such director shall serve at the pleasure of the Governor.

Section 42-527 provides that the board shall designate natural marketing areas within the State, each of which shall constitute a milkshed, and may from time to time thereafter designate additional sheds or combine two or more milksheds in which this law is effective.

Section 42-528 provides that after designation of a milkshed, an election shall be held in such shed to determine whether or not the provisions of this act shall be made applicable. Producers, producer-distributors and distributors having a municipal or county permit to sell in such shed are entitled to one vote only, and if a majority of votes shall be favorable, the provisions of this act shall be in force and apply throughout the remaining life of this law.¹³ The provisions of this law shall not apply within any part of the State unless a favorable election has been held.¹⁴

¹² Act expires August 15, 1941.

¹³ The provisions that make the operation of the act contingent upon majority vote of producers, producer-distributors, and distributors is not an unconstitutional delegation of legislative power. *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S. E. (2d) 705 (1939).

¹⁴ If the first election held is unfavorable, a second election may be held, but no second election may be held if the first is favorable. *Gibbs v. Milk Control Board*, 185 Ga. 844, 196 S. E. 791 (1938).

Section 42-529 provides that the board, with the assistance of the director, shall enforce the provisions of this law and that the director, with the approval of the board, is empowered to supervise and regulate the production, transportation, manufacture, storage, distribution, delivery, or sale of milk.

Section 42-531 provides that the board may make and enforce all rules and regulations and all orders necessary to carry out the provisions of this law.

Section 42-551 provides that the board may determine, after public hearing, what prices for milk in a milkshed within which this law is applicable, will adequately protect the milk industry and insure a sufficient quantity of pure and wholesome milk to adults and minors, having special regard to the health and welfare of children, and be most in the public interest; the board shall take into consideration all conditions affecting the milk industry, including the amount necessary to yield a reasonable return to the milk producer and to the milk dealer. In determining what is a reasonable return to the producer, the board shall take into consideration that necessary cost incurred in maintaining dairy animals in a healthy condition, paying wages and supplying working conditions to employees sufficient for their subsistence at levels generally obtained, and for the safeguarding of their health in defraying the ordinary fixed charges and operating expenses incidental to the ownership, control, and management of a herd of average numerical size, including a reasonable amount representing annual rent of land and equipment necessarily utilized therein and in addition to afford such producers a reasonable return in excess of their cost of production. In determining the reasonable return to the producer-distributor and distributor, the board shall take into consideration reasonable average operating expenses in processing, storage, transportation, and delivery charges, and all necessary reasonable expenses connected therewith.

Section 42-552 provides that the board after making such determination and based thereon, may fix by official order the minimum prices, and may likewise fix the maximum prices to be charged for milk handled within any milkshed to which this law is applicable and wheresoever produced. Such prices so fixed by the board may vary according to the kinds, grades, classes and usages of milk; to the types of sales thereof; and to the localities in which such prices shall apply, but each price-fixing order issued by the board shall be uniformly applicable to all persons subject thereto, and shall define the various classifications established by such order. When in the judgment of the board, it is necessary or advisable, in order to promote a proper balance, between the supply of and the demand for milk, to

fix a lesser price for milk which is produced in excess of what is needed for fluid consumption, the board may establish a quantity or quota applicable to each producer, or to certain classes of producers, or to producers producing for a certain market or markets. For that purpose the board may require any distributor to supply necessary information about the quantities of milk received from producers during a specified period of time, and to determine a quota or quantity for each producer in accordance with rules to be adopted by the board. The board may determine the prices to be received by producers for milk within the quota and for milk in excess of it.

Section 42-553 provides that after the board shall have fixed prices to be charged or paid for milk as aforesaid, it shall be unlawful and in violation of this law for a producer, producer-distributor, distributor, or store to sell, or buy, or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and any method or device whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, rebate, free service, advertising allowance, donation, financial aid, free equipment, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, shall be unlawful and in violation of this chapter.

Section 42-554 provides that the board may, after public hearing, from time to time, alter, revise, or amend an official order heretofore made with respect to the prices to be charged or paid for milk: *Provided*, That in no case shall the price of milk paid the producer be less than one-half of the price paid by the ultimate consumer for standard fluid milk.

Section 42-555 provides that before making, revising, or amending any order fixing the price to be charged or paid for milk, the board shall cause to be held a public hearing thereon, upon at least 10 days' notice to the public by publication in the newspaper or newspapers (in which the sheriff's advertisements are inserted) of the county or counties within which the order may be effective. Such hearing shall be at such time and place as the board may set and shall designate in the notice. The board shall cause a verbatim record of each such public hearing to be kept and transcribed for the records of the board.

The board shall give notice to each licensee affected thereby of any price change at least 10 days prior to the time said price change becomes effective.

Section 42-544 provides that the board may decline to grant or renew a license, or may suspend or revoke a license, upon due notice and opportunity of hearing, when the board has become convinced that the applicant has violated or is violating any provision of this law, or has failed to comply with any requirement.

Section 42-556 provides that the writ of certiorari by petition to the superior court having jurisdiction shall lie, as in other cases provided by law, for the correction of errors committed by the board under authority of this law.

Section 42-559 provides that the director, with the approval of the board, may institute such action at law or equity as may be necessary to enforce compliance with any provision of this law, or to enforce compliance with any rule or order of the board made pursuant to the provisions of this law, and in addition to any other remedy may apply to any superior court for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that an adequate remedy at law does not exist.¹⁵

Section 42-560 provides that this law shall not be applicable to producers not having more than six cows from which he is actually selling milk.

INDIANA *

Stat. Ann. (Burns, Supp., 1939)¹⁶

Section 15-1705 provides that the milk control board is vested with power to supervise and regulate the entire milk industry in the State, exclusive of the manufacture of milk products not sold or intended for sale as milk.

The board appoints for any marketing area, or for two or more contiguous marketing areas, one or more local milk committees. Any such local milk committee or committees acting in conjunction in any marketing area, may submit to the board recommendations with respect to rules and regulations to be adopted by the board for the effectuation of the purposes of this act in such marketing area. The board is to adopt and enforce all rules, regulations, or orders necessary to carry out the provisions of this act, including rules and regulations governing the following:

*This act expires June 30, 1941.

¹⁵ Act held not to be violative of the due-process and equal-protection clauses of the Federal Constitution. *Bohannon v. Duncan*, 185 Ga. 840, 196 S. E. 897 (1938).

¹⁶ Milk Control Act held to be constitutional regulation of a business affected with a public interest and within the police power of the State. *Albert v. Milk Control Board*, 210 Ind. 286, 200 N. E. 688 (1936).

(a) The determination of the proportion of the product of the entire herd of a producer, which shall be accepted and paid for pursuant to such price or prices as may be established by the board under authority of this act.

(b) The establishment of reasonable trade practices affecting the classification of milk sold by producers.

(c) The establishment of reasonable trade practices between producers or distributors or producers and distributors in any market [marketing] area.

(d) The marketing of milk at wholesale or retail in any marketing area.

(e) Schedules of prices to be paid producers of milk in each of the several marketing areas.

The section further provides that the board may either on its own motion or through its own agency and the local milk committee or through a producers' cooperative furnishing milk for any marketing area or any distributor or distributors therein, insofar as practicable, provide methods and practices whereby producers shipping to individual distributors in said area shall receive the same price for milk so shipped or whereby producers shipping to the marketing area shall receive the same price for milk so shipped or sold, subject to reasonable differences for quality and location and subject to gains or losses, deduction or extra payments reflected in blended prices paid by a cooperative corporation to its producers, and subject also to the right of a cooperative corporation operating in more than one market further to blend the proceeds of its sales in all of its markets. For the purposes of such equalization, the board shall have power to require reports from milk dealers at such intervals and in such detail as the board may from time to time prescribe.

It is recognized that, due to seasonal fluctuations in milk production, and other causes, there occurs in certain markets in the state a surplus of fluid milk suitable for human consumption under the laws and ordinances in force in such markets, in excess of the quantities sold as fluid milk for human consumption, and that such surplus varies from day to day and from season to season; that such surpluses must be sold for factory or other purposes at prices usually lower than would be received if sold in the fluid-milk trade; and that to stabilize and promote the milk industry, it is necessary that uniform prices be paid to all producers who, either directly or through any corporation or cooperative association, furnish milk to any distributor or to any marketing area. To accomplish these necessary purposes the board shall have power:

(a) Under uniform rules and regulations to determine what proportion of the milk produced by each producer shall be considered as

marketed as fluid milk for human consumption and what proportion so produced shall be considered as surplus; and

(b) To provide for suitable pooling and averaging of all returns from the sales of fluid milk purchased by each distributor or by all distributors in the marketing area and the payment to all producers of each distributor or of the marketing area of a uniform pool price for all milk so produced, subject to such equitable adjustments as shall be made by the board and subject to such rules and regulations as may be imposed for the control of surplus production by the establishment of basic averages or other methods.

The board may also, in the equalization of producer prices for any marketing area, provide for the payment by milk dealers of reasonable check-offs to its own agency, the local milk committee or a producer cooperative furnishing milk for such marketing area, to be used and expended by or under the direction of the local milk committee in checking the quality, butterfat content, and quantity of milk purchased from producers by milk dealers, in providing a market and payment for milk to producers and in increasing the quantity and quality of milk consumed by the public, provided that wherever in any marketing area a producer cooperative is furnishing more than fifty (50) percent of the milk sold or consumed in such marketing area, the check-off authorized by the members of such cooperative and the purposes for which the same may be used, the quotas assigned to each member's herd, shall be prima facie evidence of the reasonableness of such amount and the uses to be made thereof, and the board or the local milk committee, if so authorized by the board, may contract with such producer cooperative to conduct and equalize all producer prices and to render like services to and for nonmember producers as is being rendered to member producers of such cooperative in said marketing area.¹⁷ Nothing in this act shall be deemed to limit or abridge the right or authority of a producer cooperative to make additional deductions for its corporate purposes in relation to its own members.

The board shall have power, either by general or special order, from time to time, to fix and determine the minimum price or prices to be paid by all licensed milk dealers for such classification of milk

¹⁷ Order promulgated by the Board establishing an equalization fund under the surplus milk provisions was held by the court to be an administrative method adopted by the board that accomplishes the legislative purpose with a sufficient degree of exactness and comes within constitutional authority. *Milk Control Board v. Crescent Creamery*, 214 Ind. 240, 14 N. E. (2d) 588, 15 N. E. (2d) 80 (1938) appeal dismissed, 305 U. S. 559, 59 Sup. Ct. 143, 83, L. Ed. 352, reh. den. 305 U. S. 671, 59 Sup. Ct. 143, 83 L. Ed. 435 (1938).

to producers for milk produced and furnished for consumption in any marketing area. All prices to be paid producers fixed and determined by the board shall be just and reasonable.

The board may adopt general rules or orders which shall be posted for public inspection in the main office of the board and a copy filed in the office of the secretary of state. The board may also provide for such news release or advertisement as it may deem advisable in each instance. The posting and filing shall be deemed sufficient notice of such general rules and orders as to each licensee and when properly posted and filed shall have the force and effect of law.¹⁸

Section 15-1710 provides that in determining the reasonableness of prices to be paid to producers for milk furnished to any licensee in any marketing area, the board shall be guided by the cost of production including compliance with all sanitary regulations in force in such market or markets, the value of milk in terms of its basic products, butter, cheese, and evaporated milk, the supply of milk in such market or markets and the welfare of the general public; but any prices fixed pursuant to this act and approved by the board as herein required shall be deemed to be prima facie reasonable. In approving, disapproving, or amending schedule of prices to producers, the board shall require that the same shall be uniform as among the several licensees in any market for each grade, quantity, and class of milk.

Section 15-1712 provides that a license may, at any time during the period covered by his license, file with the board an amended schedule of prices to be paid to producers of milk furnished him for the remainder of such period or any other lawful amendment of his existing license. The board may decline to approve such amended schedule of prices to producers, or may provide other schedule prices to producers for said market, as provided in this act.

Section 15-1715 provides that it shall be the duty of the board to keep constantly informed concerning the milk industry in each marketing area. In case the board shall find after investigation either upon complaint or its own action that an emergency exists in any marketing area and that there is imminent danger that the application and enforcement of the provisions of this act in such marketing area are endangered and that the public interest so requires, the board shall have power to declare the existence of an emergency in such marketing area. Before the board shall declare the existence of an emergency in any marketing area, it shall cause notice to be published in a newspaper of general circulation in

¹⁸None of the powers granted the board under this section are beyond the powers of the legislature. *Albert v. Milk Control Board*, *supra* (p. 404).

such marketing area by two publications, one week apart; and it shall hold a public hearing thereon not less than ten days after the first publication. During the period in which the board shall find that such an emergency exists, then on request of not less than thirty (30) percent of the distributors by number distributing not less than seventy (70) percent of the milk by volume in the marketing area or on request of not less than seventy (70) percent of the distributors by number distributing not less than thirty (30) percent of the milk by volume in the marketing area the board may fix and determine for such market a fair and equitable price, both wholesale and retail, at which each licensee shall sell milk either to another licensee or to the consuming public. After such request shall have been filed with the board, at least ten days' notice of hearing upon such request shall be given by mailing a copy thereof in a postpaid sealed wrapper addressed to each licensee or any applicant for license who may be affected thereby in such marketing area, as such addresses appear on their respective applications for license on file with the board. Any orders adopted by the board pursuant to the powers granted in this section shall become void, whenever the board shall find such emergency has ceased to exist.

Section 15-1716 provides that anything in the common or statute law of this state to the contrary notwithstanding, it shall be lawful:

(1) For any two (2) or more distributors purchasing milk in the same market from producers to associate and to meet, confer and agree with one (1) or more cooperative agricultural associations organized under the law of this state, or cooperative law of other states, or with any group of producers whether members of such association or not, selling in the same market upon prices to be paid by distributors to producers for milk in such market and upon rules and regulations governing the method of determining the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices or establishing other reasonable trade practices affecting the relations between producers and distributors in such market. Such agreement may also contain provision for a committee or committees to carry out or enforce the provisions of the agreement. No such agreement, however, shall be effective unless and until a copy thereof, signed by all persons and parties thereto shall have been filed with and approved by the board, as provided herein. Whenever such copies shall have been filed with the board, the board shall give notice of the filing of said agreement by mail to all applicants or licensees as milk dealers, distributors or producer-distributors in the market affected thereby, excepting those shown by such document to be parties to such agree-

ment. Such notice shall specify a time not less than ten (10) days after the date thereof and the place at which the objections to any terms and conditions of such agreement will be heard by the board. If after such hearing the board finds that such an agreement has been fairly entered into without fraud and that the terms and conditions thereof are fair, equitable and in the public interest and that the proportion of the normal fluid milk supply of the market covered by such agreement is more than sixty (60) percent of the normal fluid milk distributed and consumed in such marketing area and that such agreement is approved by not fewer than ten (10) percent in number, and sixty (60) percent, in amount of milk handled, by the distributors in the area affected, the board may approve the same and such agreement as to prices, practices, terms, and conditions shall become effective and binding as to all producers and licensees in such market until modified or amended by the board upon hearing.

(2) For any local milk committee in any marketing area, constituted and approved by the board as provided by this act and consisting both of producers and distributors, to adopt for such marketing area or for individual distributors therein uniform schedule of prices to producers for milk supplied to licensees in such market, and rules and regulations governing the method of determining the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices, or establishing reasonable trade practices affecting the relation between licensees or producers and between licensees and producers. The action of such local milk committee shall be submitted to the board in the form of written recommendations.

Upon receipt of any such written recommendations, the board shall give notice as prescribed in paragraph (1) of this section to all applicants or licensees in the market affected thereby and by publication of suitable notice in a newspaper of general circulation to all producers and afford a hearing, as provided in said paragraph (1). Upon such hearing, the board may approve or modify such recommendation and thereupon such schedule of prices and rules and regulations as so approved or modified shall become effective and binding as to all producers and licensees in said marketing area. When any price schedule to producers, rules, or regulations as to fair practices are adopted or approved by the board, pursuant to the provisions of this section, any price to be paid or charged and any rule or regulation mentioned in this section shall apply to all licensees and producers affected thereby doing business in such marketing area to which the same relates, whether parties to the agreement whereby the same shall have been fixed or adopted, or not.

Section 15-1706 provides that it is unlawful for any milk dealer doing business in the area or any producer-cooperative to purchase milk from producers except according to the rules and regulations of the board or for less than the producer prices fixed or approved by the board for the marketing area. It is made unlawful to sell or deliver milk to any unlicensed dealer or to any dealer for consumption except for at least the prices approved or fixed by the board. Violation of the act or any lawful rule or order of the board carries a fine of fifty dollars and each day's violation and each violation from a separate independent business location constitutes a separate offense.¹⁹

The board also has power to enforce the act or any rule or order by injunction, mandamus, or any appropriate remedy in any court of record having jurisdiction of the subject matter.²⁰

Section 15-1708 provides that the board may decline to grant a license or condition or limit the granting of a license or may suspend or revoke a license when satisfied that the schedule of prices to be paid by the applicant is not reasonable or that an applicant or licensee has either directly or indirectly deviated or attempted to deviate from his schedule, without complying with the provisions of the act, or from any prices established by the board.²¹

Section 15-1705 also provides for appeal from any order or decision of the board to the circuit or superior court of any county in which the subject matter of the hearing is situated and the board can call upon the attorney general or prosecuting attorney to act.

LOUISIANA

Gen. Stat. Ann. (Dart. 1939)

Section 3262.1 provides that the regulation of the production, manufacture, and sale of milk, milk products, and all substitutes for milk, shall be, and the same is, hereby placed under the supervision of the Louisiana milk commission as hereinafter created (sec. 3262.2, *infra*), which said commission shall have the power and authority to make,

¹⁹ The exemption made by this section held not to be unconstitutional as unreasonable, arbitrary or capricious. *Gibbs v. Milk Control Board, supra*. This section does not deprive one charged with violating the act of a jury trial, nor are the penalties so excessive as to amount to a deprivation of property without due process of law. *Albert v. Milk Control Board, supra*.

²⁰ The board is entitled to seek injunctive relief. *Albert v. Milk Control Board, supra*.

²¹ Dealer selling milk for human consumption under label "Pete's Pure Pasteurized Cat and Dog Milk" was found guilty of evasion "by indirection" and the board was entitled to injunctive relief. *Milk Control Board v. Phend*, 104 Ind. App. 207, 9 N. E. (2d) 121 (1937).

²² This section held constitutional. *Albert v. Milk Control Board, supra*.

publish, and enforce all regulations necessary to secure to the public a pure, clean, wholesome, and sanitary milk supply, and to promote and encourage the production and manufacture of milk and milk products throughout the State, including the right to make such regulations as will protect the production of milk in the quality and price of milk to be sold by them to distributors, pasteurizers, and other wholesalers, and to provide such means for the protection of said producers in the collection of the amounts due and to become due them from such distributors, wholesalers, or pasteurizers of milk, or milk products as may be deemed advisable.

Section 3262.2 provides that the Louisiana milk commission shall be composed of three designated State officials and four members to be appointed by the governor.

Section 3262.3 provides that the said commission is authorized and empowered to make all necessary rules and regulations for the carrying out of the purposes of the act, and to promulgate the same by issuance, from time to time, of necessary regulations which shall be mailed to all producers of milk and all others engaged in production, sale, or manufacture of milk or milk products, and any violation of such regulations shall be a misdemeanor and shall be punished by fine or imprisonment or both as provided by section 3262.8 (*infra*).

Sections 3262.4 and 3262.5 provides that the commission shall have power to appoint an experienced dairy inspector and such trained assistants as are necessary to carry out the provisions of the act. Also that such inspector, assistants, and the commission shall have full power to investigate and inspect all places handling milk or milk products, and the prevention of such access shall be a violation of this act.

Section 3262.8. Any person who shall violate any provisions of this act, or any of the rules and regulations adopted by the Louisiana milk commission under the provisions of this act, shall be punished upon conviction, by a fine of no less than ten dollars, nor more than two hundred dollars, or by imprisonment in the parish jail for no less than ten days nor more than six months, or by both, such fines and imprisonment at the discretion of the court.

MAINE

L. 1935, c. 13 (p. 210), as amended, L. 1939, c. 138
Milk Control

Section 2 provides that the Governor, with the advice and consent of the council, shall appoint a milk control board of 5 members, 2

producers, a dealer, a producer dealer, and the commissioner of agriculture.

Section 3 provides that the board has power to supervise, regulate, and control the distribution and sale of milk for consumption in the State (sec. 4), but not in any market except upon written application of a producers', dealers', or producer-dealers' association supplying a substantial proportion of milk consumed in such market or if the community is not of sufficient size to support such association, the board may act on petition of individual producers, dealers, or producer-dealers supplying a substantial proportion of the milk in the community.

Section 5 provides that the board shall hold meetings and is vested with power to establish and change after investigation and public hearing, minimum wholesale and retail prices to be charged for milk distributed for sale within the State for fluid consumption, wherever produced, including the following classes:

1. By producer to consumer, dealer, or producer-dealer.
2. By dealer or producer-dealer to stores either for consumption on the premises or resale to consumers.
3. By dealer or producer-dealer to consumer.
4. By stores to consumer.
5. By wholesaler to retailer.
6. By any person not included in the foregoing classifications to another person for commercial purposes.

No price shall be established for any one or more of said classes unless at the same time a price shall be established for all of said classes in any market.

Prices so fixed shall be just and reasonable, taking into consideration the insuring of an adequate supply of pure and wholesome milk and conditions affecting the milk industry, including a reasonable return to the producer, producer-dealer, and dealer.

Upon fixing said minimum prices in any market which shall apply to the various grades and classes of milk and which may vary in the several markets and localities of the State, the board shall furnish all dealers and producer-dealers registered in said market with a schedule of such prices, and shall publish a schedule thereof in appropriate newspapers in said market, and such publication shall constitute an official order with respect to minimum prices and thereafter no dealer, producer-dealer, wholesaler, store, or other person handling milk in such market for commercial purposes shall buy or sell milk for prices less than the scheduled minimum applicable to the particular transaction.

No method or device shall be lawful whereby milk is bought or sold at prices less than the scheduled minimum applicable to the

transaction, whether by any discount, rebate, free service, advertising allowance, combination price for milk with any other commodity, or for any other consideration.

Section 6 as amended by chapter 138, section 3, of Laws, 1939, provides that the board may suspend, revoke, or withhold any license for the violation of any of the provisions of this act or of any order, rule, or regulation made hereunder, or conviction of violating any other law or regulation of the State relating to the production, distribution, and sale of milk. This section provides further that no order of the board suspending, revoking, or withholding a license or refusing to renew an existing license shall be effective until 10 days after the same has been issued and a copy thereof mailed to the holder of or applicant for such license. Within said period of 10 days any party believing himself aggrieved by the order of the board may appeal to the superior court in the county wherein the holder of or applicant for such license resides, in term time or in vacation. Such court shall affirm or reverse the order of the board, or any modification thereof by the board.

Section 8 provides that whoever violates any of the provisions of this act or of any rule or order of the board shall be punished by a fine of not more than \$100, or by imprisonment for not more than 11 months, or by both such fine and imprisonment.

MASSACHUSETTS

Ann. Laws (Supp., 1939), c. 94^a (L. 1934, c. 376, amended L. 1937, c. 428, L. 1939, c. 302)^b

Milk Control

Section 48E provides for a milk control board in the department of agriculture consisting of three persons appointed by the Governor with the advice and consent of the council.

Section 48F provides that the board, subject to the approval of the Governor and council, may appoint an administrator who may be a member of the board.

Section 48G provides that the board shall administer the act and have power to designate and maintain market production zones, to enforce all orders, rules, and regulations relating thereto, and to supervise and regulate the milk industry.

^a This act expires June 30, 1943.

^b The court stated (dictum) that the Milk Control Act of this State [L. 1934, c. 376, L. 1937, c. 428] is of the same general class as was held constitutional in *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940, *Milk Control Board v. Gosselins' Dairy, Inc.*, 1938 Adv. Sh. 1470, 16 N. E. (2d) 641 (1938).

Section 48J provides that the board may adopt and enforce all rules, regulations, and orders, not inconsistent with law, necessary or desirable to administer the act.

Section 48M (B) provides that no milk dealer shall distribute or sell in any market within the Commonwealth milk obtained from a producer or from another milk dealer if such milk was acquired from the producer at a cost less than the price fixed by the board to be paid for milk to be distributed in such market.

Section 48P provides that (a) the board shall ascertain, by such examination or investigation as the situation may permit or warrant, what prices, terms, and conditions relative to milk in the several localities and markets in the Commonwealth, under the varying conditions therein, will be most beneficial to the public interest and will best protect the milk industry. In every such examination or investigation the board shall take into consideration all the conditions affecting the milk industry, including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board, after making an examination or conducting an investigation as provided by paragraph (a) of this section, shall by its order fix the minimum prices to be paid by milk dealers to other milk dealers, and to producers and other persons, for milk purchased, stored, manufactured, processed, or distributed within the Commonwealth for sale and the terms and conditions under which such prices are to be paid. Such orders relative to such minimum prices shall apply to the locality in which the milk in question is produced and to the market or markets in which such milk is sold, and may vary in different localities, market production zones or markets, according to the varying and differing conditions therein. Each such order may classify such milk by forms, classes, grades, or uses as the board may deem advisable and may specify the minimum prices therefor, and each producer of such milk shall be paid for all such milk on the basis of the class, grade, or use in which it is ultimately sold by the milk dealer.

Each such order may provide rules and regulations for the sharing of the value of the milk sold, used, or disposed of in each class, grade, or use, between milk dealers who are also producers and the producers from whom milk is received or purchased by such dealers, in proportion to their respective deliveries of milk.

(c) If twenty-five percent of the Massachusetts producers within any market production zone, by petition in writing, request the board to establish minimum resale prices for milk for the market or markets within such market production zone, and if, in the judgment of the board, after making such examination and investigation as is author-

ized by this act, the price to the producer established under authority of this act or by any agreement, license, regulation, or order made or issued pursuant to any Federal law, cannot be maintained, the board may, after a public hearing, fix, by official order, minimum wholesale or retail prices for milk sold within the market or markets affected irrespective of where such milk is produced. The board may, in like manner, but without petition as aforesaid, alter, revise, amend, or rescind the prices so fixed. The prices so fixed, altered, revised, or amended shall be fair, just, and reasonable, and shall be given publicity by the board by advertising the same in the principal newspapers, and otherwise, in the zone or zones affected.

(d) After the board shall have fixed prices to be charged or paid for milk, whether by form, class, grade, or use, no milk dealer shall sell or buy, or offer to sell or buy, milk at any price less than such price or prices as shall have been so made applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold, or offered to be bought or sold, at a price less than such price or prices whether by discount, rebate, free service, advertising allowance, or by a combined price for such milk together with another commodity or commodities, or service or services, as a result of which the total price for the milk and such other commodity or commodities, or service or services, is less than the aggregate of the prices for the same when sold or offered for sale, or performed, separately or otherwise.

(e) No person shall sell within the Commonwealth any milk or render any service in connection with milk at a price less than the cost of such milk or service, including in the case of milk sold the original purchase price thereof, and in every instance all regular direct and indirect elements of cost of service, physical handling, and financial investment in the milk in question. No milk dealer shall use any method or device, whether by discount or rebate, free service, advertising allowance, or by a combined price for such milk together with another commodity or commodities, or service or services, as a result of which the total price for the milk and other commodity or commodities, or service or services, is less than the aggregate of the prices for the same when sold or offered for sale, or performed, separately or otherwise. In the case of any person effecting sales of milk which he has not purchased, there shall be included as a part of the cost of such milk, in lieu of the original purchase price thereof, an amount equal to the purchase price which would have been payable under the terms of this act and the orders, rules, and regulations of the board made thereunder if such person had purchased such milk within the Commonwealth.

(f) The board, upon its own motion or upon application, may from time to time alter, revise, or amend any order at any time made by it with respect to the prices to be paid for milk, and the terms and conditions upon which such prices shall be paid. After making such investigation as it deems necessary, and before making, revising, or amending any such order, the board shall hold a hearing thereon after having given reasonable notice thereof to interested parties of whom the board has notice, and, in addition, to the public by advertisement in such newspaper or newspapers as, in the judgment of the board, will afford sufficient notice and publicity thereof.

(g) The handling within the Commonwealth of milk from any market production zone or any other source by a milk dealer licensed or required to be licensed under this act shall be deemed to be affected with a public interest and to be a subject of regulation by the Commonwealth in the exercise of its police power and the provisions of this act and all orders, rules, and regulations made thereunder shall apply to all such milk, and any sale within the Commonwealth by any such milk dealer of any such milk acquired at a price less than the minimum price fixed by the board to be paid to producers for such milk shall be a violation of this act. Continued violation of any provision of this act by any person may be enjoined by the supreme judicial or superior court upon petition therefor by the board.

Section 48Q provides that (a) no sale of milk by a cooperative association, corporation, or sales agency to a milk dealer in any marketing area shall be made at less than the applicable minimum prices, terms, and conditions of sale as set forth in the orders of the board for milk bought directly from producers who are nonmembers of a cooperative association, corporation, or sales agency.

(b) When the net return to be made for milk by a cooperative association, corporation, or sales agency to its members is below the net applicable return for milk is fixed by the orders of the board for a nonmember of a cooperative association, corporation, or sales agency, said cooperative association, corporation, or sales agency shall submit in writing to the board a full and complete statement in detail, setting forth the amount of the deductions which have been made from the fixed minimum prices of the board and, in addition, a detailed statement of such deductions shall accompany every such payment to the member.

Section 48L provides that whoever violates any provision of this act or of any rule, regulation, or order of the board lawfully made thereunder, except as herein otherwise expressly provided, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than one year, or both, and such fine may

be imposed for each day during which such violation shall continue. A violation of any provision of this act may be reported to the board by any person and every such complaint shall be acted upon by the board, which may institute such action at law or in equity as may be necessary to enforce compliance with any provision of this act or any rule, regulation, or order of the board made thereunder, and, in addition to any other remedy, may seek relief by injunction, if in the opinion of the board necessary to protect the public interest, without being compelled to allege or prove that an adequate remedy at law does not exist.

Section 48M also provides that the board may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when it is satisfied that he has committed any act or engaged in any course of conduct tending to reduce the price of pure milk to such an extent as to interfere with the supply thereof produced in the commonwealth, which supply is hereby declared to be necessary for the public health, public welfare, and trade and commerce; or that he has violated any provision of the act or any rule.

MICHIGAN

Stats. Ann. (Henderson, Supp., 1939)

Section 12.805 (5) provides for a milk marketing board to consist of five members.

Section 12.805 (11) provides that the board shall have the power to supervise and regulate the entire milk industry of the State, exclusive of the manufacture of milk products not sold or offered for sale as milk, as defined by the act. The board may adopt general rules or orders which shall be posted for public inspection in the main office of the board.

Section 12.805 (17) provides that the board after due notice and a reasonable opportunity to be heard, may determine and designate, or redetermine and designate, an area of the State as a natural marketing area.

Section 12.805 (18) provides that it shall be the duty of the board to keep constantly informed concerning the milk industry in each marketing area. In case the board shall find that an emergency exists in any marketing area and there is imminent danger that the application and enforcement of the provisions of this act in such marketing area are endangered and that the public interest so requires, the

board shall have the power to declare the existence of an emergency in such area. The board may fix and determine for such market a fair and equitable price, both wholesale and retail at which each licensee shall sell milk either to another licensee or to the consuming public and the board shall have the power to issue a cease-and-desist order against the practices complained of or to revoke its license subject to the procedure on investigations, complaints, hearings, and judicial review as provided in section 53 of this act.

Section 12.805 (19) provides that the board may fix by order the minimum prices to be paid to producers by distributors for milk or the minimum prices paid by distributors according to the classification for milk sold, in any marketing area.

The board may classify prices by the utilization of milk, quality, form, classes, grades, or by any other reasonable standard. Such minimum prices may vary in the different marketing areas.

All prices fixed shall be just and reasonable. All necessary or required milk in a marketing area shall be considered in arriving at a reasonable minimum price. In determining the reasonableness of such prices, the board shall be guided by the cost of production, including cost of complying with sanitary regulations, the supply and demand in the area and the welfare of the general public; prices so fixed shall be deemed *prima facie* reasonable.

Before issuance of an order by the board fixing prices due notice of a hearing shall be given to those who may be affected, and a reasonable opportunity to be heard, including the right to be confronted with any and all adverse testimony, and an opportunity for cross-examination. The board shall have the right, where reasonable to compel attendance of witnesses and the production of books, records, and the recording of testimony. Publication in a newspaper in general circulation in the area at least one week before the day set for the hearing shall be deemed due notice.

Section 12.805 (21)-(23) provides for the appointment of local marketing committees in marketing areas of the State. Such local committees may recommend to the board rules prescribing unfair methods of competition and unfair trade practices. Before adoption of such a rule the board must conduct a hearing of which due notice has been given as provided in section 12.805 (19).

Section 12.805 (24) provides that the local marketing committee may recommend, for adoption by the board, methods and practices whereby all producers or producer-cooperative marketing associations in a particular marketing area or areas shall receive the same price for milk sold, subject to reasonable differences for quality and location, and whereby all distributors shall pay according to class

use the same price for milk purchased subject to reasonable differences for quality and location.

To accomplish this the board shall have power:

(a) To provide for the pooling and averaging of all returns from sales of milk made by producers or producers' cooperative marketing associations to all distributors in such areas and the payment to all producers or producers' cooperative marketing associations of a uniform pool price for all milk so sold, subject to such equities as shall be imposed by the board and subject to rules and regulations as may be imposed by the establishment of basic averages or other methods.

(b) The board, in the equalization of producer prices for any marketing area, may provide also for the payment by distributors of reasonable check-offs to the local marketing committee or a producer cooperative marketing association furnishing not less than 50 percent of the milk for such marketing area, to be used and expended by or under the direction of the local committee in providing a market for, in checking the quality, butterfat content and quantity of, milk purchased from producers and sold by dealers to defray necessary expenses of the local milk marketing committee, and in increasing the quantity of milk consumed by the public: *Provided*, That wherever in any marketing area a producer cooperative marketing association is furnishing more than 50 percent of the milk sold or consumed in such marketing area, the check-off authorized by the members of such cooperative the purposes for which the same is used, shall be prima facie evidence of the reasonableness of such amount and the uses to be made thereof. The board or the local committee if so authorized by the board, may contract with such cooperative to compute and equalize all producer prices and to render like services to and for nonmember producers as is being rendered to member producers. Nothing in this act shall be deemed to limit or abridge the right or authority of a producer cooperative to make additional deductions in order to carry out contractual obligations with its own members.

(c) The board on its own initiative or, upon recommendation of the local committee, may determine the proportion of the product of the entire herd of a producer, which shall be accepted and paid for pursuant to such price or prices as may be established under the provisions of this act.

Section 12.805 (26) provides that it shall be unlawful for any person to act as or engage in any of the functions of a milk dealer, as defined in this act, except as provided in this act. No milk dealer shall buy milk from producers or offer such milk for sale, or distribute, unless duly licensed, nor buy from or sell to a dealer whose is not licensed. Milk may be sold for manufacturing purposes to a person not required to be licensed.

Section 12.805 (27) makes it unlawful for any distributor or producers' cooperative to purchase milk for less than the producer prices fixed. Section 12.805 (29) makes it unlawful for a producer to sell or deliver milk to an unlicensed milk dealer, except one not required to be licensed, or to sell to any dealer at less than the prices fixed.

Section 12.805 (30) provides that it shall be lawful for any two or more distributors purchasing milk in the same market to associate and to meet, confer, and agree with one or more producer cooperative associations, or with any group of producers whether members of such association or not, upon prices to be paid by distributors to producers for milk in such marketing area and upon rules and regulations governing the method of determining the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices, or establishing other reasonable trade practices affecting the relations between producers and distributors in such marketing area. Such agreements may also contain provision for a committee or committees to assist in carrying out or enforcing the provisions of the agreement. No such agreement, however, shall be effective unless and until a copy thereof, signed by all persons and parties thereto, shall have been filed with the board.

The board shall give notice of the filing of said agreement by mail to all milk distributors, or producer-distributors in the marketing area affected thereby excepting those shown by such document to be parties to the agreement.

If after a hearing the board finds that such agreement has been fairly entered into without fraud and that the terms and conditions thereof are fair, equitable, and in the public interest and is approved by at least 51 percent of the producers of the fluid milk normally distributed and consumed in such market, or marketing area after one has been designated, and that such agreement has also been approved by the distributors of at least 51 percent of the milk normally distributed and consumed in such market, or marketing area, the board may approve the same and such agreement as to prices, practices, terms, and conditions shall become effective and binding as to all producers and distributors in such market, or marketing area, until modified or amended by the board: *Provided*, That upon petition in such area by not less than 25 percent of the producer members, the board shall within 30 days call a meeting by notification of all producer members, and at such meeting it shall require a vote of 51 percent of the producer members, as above required, to repeal this agreement and in this area it shall be null and void.

Section 12.805 (53) provides for hearings on orders of the board, after notice. It further provides for appeal from such orders to the

Supreme Court. The findings of fact made by the board shall be conclusive, but the supreme court shall have the power to review questions of law involved in any such final decision or determination of the board. While such appeal is pending the board may make application to said court for a temporary restraining order.

Section 12.805 (52) provides that any person who violates any of the provisions of this act, or of any rule or order of the board, shall be liable in the penal sum of not to exceed \$100. Each day's violation shall constitute a separate offense.

Section 12.805 (16) provides that the board shall have the power to enforce any provisions of the act, or any provision of any rule or order by injunction, mandamus, or any other appropriate remedy in any court of record having jurisdiction of the subject matter.

MONTANA

Rev. Codes Ann. (Anderson and McFarland, Supp. 1939)

Section 2640.4 provides for the creation of a milk control board of five members, four of whom shall be appointed by the Governor, and the fifth shall be the executive officer of the Montana Livestock Sanitary Board.

Section 2640.5 empowers the board to supervise, regulate and control the fluid milk industry of the State of Montana, including the production, transportation, processing, distribution, storage, and sale of milk within the State.

Section 2640.6 provides that this board shall exercise its powers only within and in relation to markets already designated and established or such markets as shall be established in accordance with the provisions of this act.

All natural marketing areas heretofore designated by the prior milk board shall be subject to the provisions of this act.

This board may designate, at its discretion, a new market in any natural marketing area of the State provided that before such designated market shall be established, the board shall canvass all producers, producer-distributors, and distributors in such area who are licensed by the Montana livestock sanitary board and who have been actually engaged in the milk industry for not less than 90 days prior to the canvass. When it is evident to the board that a majority of all the above designated dealers, representing a majority of the fluid milk sold in the area, approve, the board shall proceed to establish the market.

The board may disestablish a market and withdraw from functioning therein, at its discretion, provided that the board shall first conduct the same type of canvass with the same persons and under the same conditions as set out above for the establishment of a new market.

Section 2640.13 provides that the board may adopt and enforce all rules and all orders necessary to carry out the provisions of this act.

Section 2640.7 provides that prior to the fixing of prices in any market the board shall conduct a public hearing and admit evidence under oath relative to the matters of its inquiry, at which hearing the consuming public shall be entitled to offer evidence and be heard the same as persons engaged in the milk industry. The board shall by means of such hearing and by other means available or from facts within its own knowledge, investigate and determine what are reasonable costs for producing, hauling, handling, processing, and other services performed in respect to milk and what price for milk in the several localities and the markets of the State, and under varying conditions, will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk to adults and minors in the State, and be most in the public interest.

The board must take into consideration the balance between the production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

The board after making such investigation shall fix by official order:

(a) The minimum prices to be paid by the milk dealers to producers and others for milk. The orders of the board with respect to the minimum prices to be paid to producers and others shall apply to the locality or zone in which the milk is produced in respect to the market or markets in which milk so produced is sold, and may vary in different localities or zones or markets according to the varying uses or conditions. Each order fixing prices or handling charges may classify milk by forms, classes, grades, or uses as the board may deem advisable and may specify the minimum prices therefor.

(b) The minimum wholesale or retail prices to be charged for milk in its various grades and uses handled within the State for fluid consumption and wheresoever produced when sold by milk dealers whether licensed or unlicensed, to consumer; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers.

A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment.

The board may, upon its own motion, or upon any application in writing from any market, or from any party at interest, alter, revise,

or amend any official order theretofore made by the board provided that before making, revising, or amending any order fixing prices to be paid or charged for milk in any of its grades or uses, the board shall hold a public hearing on such matter in the same manner provided herein for the original fixing of prices.

The retail price to be charged for milk in quart bottles shall not be more than twice the price paid by the distributor to the producer for the same grade and butterfat content of fluid milk purchased from the producer by the distributor. The board shall make adjustment from the basic rate in prices of milk sold in less quantities than quarts and at wholesale.

Section 2640.11 provides that the board may decline to grant, suspend, or revoke a license to handle milk upon the violation of any of the provisions of this act or upon violation of any of the rules or orders of the board.

Section 2640.14 provides that the board may make and formulate, in any established market, reasonable rules and regulations as to fair trade practices.

Section 2640.18 provides that the board may designate local boards in an established market whose specific function with relation to the board is to provide an instrumentality to cooperate with the board in the determination of facts and findings relative to the costs of production, costs of distribution, and other factors upon which price schedules shall be based.

Section 2640.24 authorizes the board to institute any action in law or equity to enforce compliance with any provision of the act or with any order, rule, or regulation, of the board pursuant to the provisions of the act.

Section 2640.22 provides that any violation of any provision of the act shall be deemed a misdemeanor and punishable by a fine not exceeding six hundred dollars (\$600.00).

NEW HAMPSHIRE

L. 1937, c. 107, amended L. 1939, c. 146 *

Milk Control

Section 2 provides for a milk control board of 3 members appointed by the governor with the advice and consent of the council.

* In the opinion of the Supreme Court this act, except in the respects indicated (note 2, *infra*), does not violate any provision of the State Constitution. In re Opinion of the Justices, 88 N. H. 497, 190 Atl. 713 (1937).

Section 5 provides that the board has power to supervise, regulate, and control the production, distribution, and sale of milk within the State.²⁵

Section 6 provides that whenever the board shall determine, either upon complaint or upon its own initiative, after public notice and hearing, that the public health is menaced, jeopardized, or likely to be impaired or deteriorated by the loss or substantial lessening of a supply of milk of proper quality in a specified market, the board shall fix the just and reasonable minimum or maximum prices, or both, that shall be paid producers or associations of producers by distributors, and the manner of payment and the prices charged consumers and others for milk by distributors, as long as such condition is found to prevail in such market. The prices so fixed need not be uniform in all markets and may be changed from time to time after such notice and public hearing as deemed by the board in the public interest. Nothing herein shall be construed to prohibit a producers' cooperative, organized under chapter 224 of the Public Laws or similar laws of other states, from blending the proceeds from the sale of its milk in all markets and all classifications, and distributing such to its members in accordance with a contract with its members, or in making deductions from sums due members of such sums as may be authorized by the membership to be so deducted.²⁶

Section 7 provides that the board may accept established and defined classes and grades of milk or may establish and define such classes and grades, and shall specify to what classes or grades the prices fixed pursuant to section 6 hereof shall apply.

Section 8 provides that the board may, upon proper evidence, decline to grant or may, after due notice and public hearing, suspend or revoke a license. Violation by a distributor of the provisions hereof shall be sufficient cause.

Section 10 provides that the board shall have power to make orders hereunder, conduct hearings and adopt, promulgate, and enforce such reasonable rules and regulations as are deemed necessary to carry out the provisions of this act.

Section 12 provides that, anyone violating any provision of this act or order hereunder, or any rule or regulation of the board made hereunder, or failing to answer a subpoena or to testify before the board, shall be fined not exceeding one hundred dollars or

²⁵ In so far as sections 5 and 10 of this act purport to confer upon the board general authority to regulate and control the milk industry in the state, they are invalid as an unrestricted delegation of legislative power. In re Opinion of the Justices, *supra*.

²⁶ This section held to sufficiently establish "policy and standard" requirements for guidance of the board and is valid. In re Opinion of the Justices, *supra*.

be imprisoned for not more than one year, or both, and each day during which such violation shall continue shall be deemed a separate violation. The court imposing such penalty, within five days of the receipt of such fine, shall send the same to the board.

Section 14 provides for a rehearing within 20 days after any order or decision of the board.

Section 17 provides for appeal by petition to the supreme court after denial of rehearing or after decision on rehearing.

Section 33 provides that no proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any order of the board, except as otherwise specially provided.²⁷

NEW JERSEY

Rev. Stat. (Supp., 1939)*

Milk Control Act ²⁸

Sec. App. A: 8-2 to 8-20 provides that the Milk Control Board consists of 5 members to be appointed by the Governor. It is from time to time to fix prices for which milk is to be bought, sold or distributed and to supervise and regulate the entire milk industry, including production, importation, transportation, sale for manufacture, storage, distribution, delivery, sale; to issue licenses to persons engaged in the industry; to establish and require observance of fair trade practices. Further, the board is authorized to make the necessary orders, rules and regulations to carry out the intent and policy of this act to control or prevent unfair, unjust, destructive and demoralizing practices.

Sec. App. A: 8-24 provides that no milk dealer, processor, sub-dealer or store distribute or sell milk in this State which is obtained from any producer or other dealer, subdealer or processor where the milk has been purchased either directly or indirectly for a price less than the price fixed by the board to be paid for milk to be distributed in a given market.

Sec. App. A: 8-34 provides that the board may ascertain, determine, and fix by investigations and proof, as the emergency permits,

²⁷ Sections 14 to 33 held to be valid. In re Opinion of the Justices, *supra*.

* This act expires June 30, 1941.

²⁸ Prior milk control act, L. 1933, c. 169, held by the court to be constitutional. *State v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (E. & App. 1935); *State v. Richman Ice Cream Co.*, 117 N. J. Eq. 296, 175 Atl. 796 (1939). Present act of 1937 (Rev. Stat. (1937) App. A: 8-1 et seq.), similar to the former act, was held to be constitutional, the decision in *State v. Newark Milk Co.*, (*supra*) controlling. *Rock Milk Co. v. Humphreys*, 119 N. J. L. 526, 197 Atl. 279 (1938).

the minimum prices to be paid to the producer, the minimum prices to be charged by milk dealers to other milk dealers, processors, subdealers and stores, the minimum prices to be charged by processors to subdealers, the minimum prices to be charged by subdealers to stores, and the minimum prices to be charged the consumer for milk in the several municipalities or markets of this State, under varying conditions, as will best insure a sufficient quantity of fresh, pure and wholesome milk to the inhabitants of this State. The board may take into consideration the various grades of milk produced, the varying percentages of butterfat, plant volume, seasonal production, and other conditions affecting the cost of production, cost of transportation and marketing, and the amount necessary to yield a reasonable return to the producer and to the milk dealer, processor, or subdealer. The term grades as used herein shall be for the purpose of fixing prices only and shall not supersede or abrogate or affect the status of standard or requirement for milk as are or may be established in ordinances of boards of health or other bodies exercising the powers thereof in any municipality. It may, in its discretion, hold a public hearing or hearings in this State and invite producers, consumers, dealers, stores, processors and public health officials in this State to submit such proofs as they may desire.^{29 30}

Sec. App. A: 8-35 provides that no licensee or other person, association, or corporation shall hereafter, contrary to the public interest, operate in any municipality under any mutual or secret agreement, arrangement, combination contract, or common understanding, with any other licensee or person, firm, association, or corporation, whereby the price for fluid milk to be paid to producers in this State is reduced or the price to be paid by dealers, processors, subdealers, stores, or consumers for such milk is decreased in pursuance of such mutual or secret agreement, arrangement, combination contract, or common understanding, and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall subject the violator or violators to the penalty in this act prescribed: *Provided, however*, That the right may be granted to deduct a check-off to be paid an association or corporation with consent of producer and approval of the board.

Sec. App. A: 8-36 provides that the board upon its own motion, or upon application may from time to time, upon such notice as it

²⁹ Provision similar to this in a prior act (L. 1933, c. 169) empowering board to hold hearings, at its discretion, and without notice to issue a price order, was held by the court not to be in violation of the due process clauses of the Federal and State Constitutions. *State v. Newark Milk Co., supra.*

³⁰ The board in setting prices to be paid for milk must establish such prices only after making proper investigation. *State v. Newark Milk Co., supra.*

shall by rule and regulation determine, alter or modify any official order theretofore made with respect to the price of milk to be paid to producers, by and between milk dealers, subdealers, or processors or stores and the price to be paid by consumers.³¹

Sec. App. A: 8-28 provides that any aggrieved person may appeal from a general or price order, rule or regulation of the board within 30 days after the effective date of such order by applying to the supreme court for a writ of certiorari.

Sec. App. A: 8-37 provides that it is the intent of the legislature that the instant, whenever that may be, that the handling within the State, by a milk dealer, of milk produced outside of the State, becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this act respecting such milk so produced shall apply and the powers conferred by this act on the board shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State, by a licensed milk dealer, processor, subdealer or store, or a milk dealer required by this act to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the State, purchased under similar conditions, shall be unlawful and deemed a violation of this act, and for continued violations the board may apply to the court of chancery for its writ of injunction to restrain such further unlawful acts.³²

Sec. App. A: 8-26 provides that the board, after hearing, may decline to grant a license or may suspend or revoke a license where certain acts have been committed, including the commission of any act injurious to trade or commerce, or any act which may demoralize the price structure of milk or interfere with an ample supply of milk for the inhabitants of the State and where the licensee has been a party to a combination to fix prices contrary to the provisions of this act.³³

Sec. App. A: 8-38 provides that any person violating any of the provisions of the act or orders of board duly issued is subject to payment of fine of not more than \$50 for the first offense and not more than \$200 for second and subsequent offenses.

³¹ On hearing to review order revising prior price fixing order presumption arises that prior order was founded on investigation and proof. *Supplee-Wills-Jones Milk Co. v. Duryee*, 116 N. J. L. 75, 181 Atl. 908 (1935).

³² Similar provision in former act (L. 1933, c. 169) prohibiting the sale in New Jersey of milk purchased from out-of-state producers at prices lower than those paid local producers was held by the court to be unconstitutional. *State v. Newark Milk Co.*, *supra*.

³³ Refusal of board to renew license because of violation of price fixing orders was held justified. *Reck Milk Co. v. Humphreys*, 119 N. J. L. 526, 197 Atl. 279 (1938).

³⁴ Selling to the United States government at prices lower than those fixed was held to be a violation of the act. *Paterson Milk & Cream Co. v. Milk Control Board*, 118 N. J. L. 383, 192 Atl. 838 (1937).

Sec. App. A: 8-40 empowers the district courts and courts of common pleas, upon filing of a verified complaint alleging violation of the act, to issue process in the nature of summons, and the court shall proceed in a summary manner without a jury to hear testimony and give judgment without the filing of any pleadings. If judgment is entered for board for recovery of penalty and costs and defendant refuse or neglect to pay, defendant may be committed to the county jail for any period not exceeding 100 days.

Sec. App. A: 8-43 provides that the board may file a bill for an injunction in the court of chancery in county where violations are occurring, restraining persons habitually violating provisions of the act or orders issued.²⁴

NEW YORK

Agriculture and Markets (McKinney)²⁵ Milk Control

Section 254 provides that the commissioner of agriculture has power to supervise and regulate the entire milk industry of the State.

Section 258l provides that incorporated producers' associations operated under a cooperative corporations law may establish producers bargaining agencies for the various production areas of the State designated by the commissioner of agriculture who appoints a director of the division of milk control.

Section 258m provides that upon the petition of a producers' bargaining agency of the production area supplying a marketing area,

²⁴The board may obtain an injunction to restrain persons violating provisions of the act or orders promulgated thereunder. *State v. Newark Milk Co.*, *supra*.

²⁵Prior milk control acts held constitutional: *Nebba v. New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934); *Royce v. Rosaseo*, 159 Misc. 236, 287 N. Y. S. 692 (1936).

Price fixing orders valid: *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. Ed. 259 (1934); *Muller Dairies, Inc., v. Baldwin*, 242 App. Div. 296, 274 N. Y. S. 975 (1934); *Ten Eyck v. Eastern Farm Products*, 290 N. Y. Supp. 477, 160 Misc. 401 (1936).

Provision as to out-of-state milk held unconstitutional: *Baldwin v. Seelig*, 294 U. S. 511, 55 Sup. Ct. 497, 79 L. Ed. 1032 (1935).

Section establishing price differential between dealers as to time of entry into business held unconstitutional. *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. Ed. 675 (1936).

Price differential between dealers with well established trade names and other dealers held constitutional. See *Borden Co. v. Ten Eyck*, 297 U. S. 25, 56 Sup. Ct. 453, 80 L. Ed. 669 (1936). See *Borden Co., Inc., v. Baldwin*, 293 U. S. 194, 55 Sup. Ct. 187, 79 L. Ed. 281 (1934).

such agency representing at least thirty-five per centum of the producers of milk therein, alleging the existence of conditions so affecting the orderly marketing of milk in such area that public interest requires regulation of prices of milk in such area and equalization of the burden of surplus milk and expense of hoarding it, and sharing the benefits of the fluid market in order that the public policy declared in section 258k of this chapter shall be effective, it shall be the duty of the commissioner to call a public hearing for the consideration of said petition and to give notice thereof by advertising such call in such newspaper or newspapers of general circulation in such marketing area as the commissioner deems advisable. Such notice shall specify a time not less than ten days after the date thereof and a place within the marketing area at which the hearing will be held and at which the applicants and other persons, including producers, distributors, and consumers and associations thereof, may be heard. If after such hearing the commissioner shall find, either upon the testimony given at the hearing that conditions referred to in section 258k exist, so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section 258k of this chapter shall be effective and that it is necessary for prices to producers and associations of producers be fixed by the commissioner, and that it is favored by at least seventy-five per centum of the producers of milk produced in the production area for said marketing area, he may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers. Such price-fixing order or orders shall be rescinded effective at the end of the current month after a public hearing whenever the commissioner shall find either that such conditions have ceased to exist or that such termination is favored by at least thirty-five per centum of the producers of milk handled within such market.

The commissioner may, from time to time upon like petition, during the existence of such conditions revise the prices so fixed, after holding a hearing thereon.

Before fixing any prices pursuant to the provisions of the two preceding paragraphs, the commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing or other services performed in respect of milk and what prices for milk in the market or markets affected by such prices and under varying conditions will be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the cost of production and distribution, including compliance with all sanitary regulations in force in the market or markets affected, the cost of feeding stuffs used

in the production of milk, the supply of milk in such market and the purchasing power and welfare of the public. The commissioner shall fix prices to producers on the basis of the use thereof in the various classes, grades, and forms. Any prices fixed or approved by the commissioner shall be deemed to be prima facie reasonable.

In determining the approval or request for an order as herein provided or the termination thereof on the part of producers the commissioner shall consider the approval, request, or favor in respect thereto by any bona fide cooperative association of producers engaged in marketing milk within such marketing area as the approval, request, or favor either of making an order or of termination thereof of the producers who are under contract with such cooperative association of producers.

The section also provides that it shall be lawful for a producers' bargaining agency of the production area supplying a marketing area and a distributors' bargaining agency for such marketing area to enter into marketing agreements as to the prices to be paid by distributors to producers for milk sold or otherwise utilized in said marketing area, as to rules and regulations covering the method of determining the proportion of the product of the entire dairy herd of a producer which shall be accepted and paid for pursuant to such price or prices, as to reasonable trade practices affecting the relations between producers and distributors in such market. Such agreement may also contain provisions for a committee to administer the provisions of said marketing agreement. No agreement, however, shall be effective until a copy thereof signed by all persons parties thereto shall have been filed with the commissioner.

If the commissioner shall have 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 by reason thereof, he shall serve upon the parties to such agreement a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing specifying a date and place, not less than thirty days after the service thereof, requiring the parties to such marketing agreement to show cause why an order should not be made directing them to cease and desist from such monopolization or restraint of trade. The parties so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given at such a hearing shall be taken under such rules and regulations as the commissioner shall prescribe, reduced to writing and made a part of the record therein. If upon such hearing the commissioner shall be of the opinion that such marketing agreement results in monopoly or restraint of trade to such an

extent that the price of milk in the marketing area affected by such agreement is unduly enhanced, he shall issue and cause to be served upon the parties to said agreement an order reciting the facts found by him and directing them to cease and desist from such undue enhancement of prices. If such order is not obeyed by the parties to such agreement, the commissioner shall file with the attorney general a certified copy of the order, evidence of such disobedience and all of the records in the proceeding, and the attorney general may apply to the supreme court for an order or decree affirming, modifying, or setting aside such order or for making such other order or decree as the court may deem equitable in the premises.

Upon application of the parties to said marketing agreement and after a hearing, as provided in subdivision 1 of this section, the commissioner may by order make the provisions of said marketing agreement, relative to prices to producers and other provisions thereof, effective as to all producers, distributors, and handlers in said market notwithstanding that they may not have approved of said agreement if he shall find that the terms and conditions of said agreement are fair, equitable, and in public interest, that the agreement has been fairly entered into without fraud, that public interest so requires, in order to effectuate the declaration of policy contained in section 258k of this chapter, that the proportion of the producers and distributors who have executed such agreement or shall have approved same upon the hearing is equal to that required for an order under subdivision 1 of this section, and further provided that the commissioner shall determine that the prices set forth in said marketing agreement are reasonable and proper prices, as required by this section for prices fixed by an order of the commissioner. Any order so issued shall terminate effective on the last day of the current month, and in the same manner and upon the same request after a hearing, as provided for the termination of an order in subdivision 1 of this section.

If approved by seventy-five per centum of the producers affected, any order or marketing agreement fixing the price to producers under either subdivision 1 or subdivision 5 of this section for market or markets, may provide for an equalization of prices to all producers of the production area of the market affected so that each producer or cooperative association shall receive the same base price for all milk delivered subject to reasonable differentials for quality and location and for services.

In order to effect such equalization of prices to producers the commissioner shall require a monthly report from each dealer receiving milk from producers for such market showing the disposition of all milk handled by the reporting dealer in such market and shall there-

after require payment by each dealer, to a trust company designated as a fiscal agent by the commissioner, of any amount by which the sum otherwise due by such dealer to its producers in accordance with the prices fixed by such order exceeds the equalized base price as determined by the commissioner from such reports, which amounts so paid to said fiscal agent, the commissioner shall direct it to pay to those dealers whose reports show that the base prices they will pay their producers in accordance with such order are less than the equalized base price as so determined by the commissioner, for repayment in turn by such dealers to their producers so as to bring all lower rates of payment up to the equalized base price. Such payments to said fiscal agents shall not be deemed to be included within the provisions of section 258i of this chapter and shall not be deemed to be State funds. Such equalization shall include milk of all grades and produced by all breeds of cows and may include milk approved by a board or boards of health (having jurisdiction in a marketing area designated in an order under this section) which was produced by a dealer.

The provisions of this subdivision shall not become operative as to the New York State metropolitan market production area, however, until pursuant to Federal or State statutes, or by action of authorities duly constituted and authorized thereunder, prices to producers are so equalized and made effective throughout all the production area of the New York State metropolitan market area.

After the commissioner shall have fixed prices in any area or approved prices in a marketing agreement to be charged or paid for milk in any form included in the definition of milk as used in this article whether by class, grade, or use, it shall be unlawful for a milk dealer to buy or offer to buy milk at any price less than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less than such price, or prices, as shall be applicable to the particular transaction, whether by a discount or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise.

It is the intent of the legislature that the instant, whenever that may be, that the handling within the State by a milk dealer of milk produced outside of the State becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions

set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach.

No marketing agreement or order shall prevent a cooperative association from blending as heretofore the proceeds of all sales and distributing to its producers the resultant blended price subject to deductions and differentials as provided by its contracts with its producers, but no such cooperative association shall sell milk at prices lower than the prices fixed by the commissioner in an order for the markets affected.⁵⁶

Section 258c provides that the commissioner may decline to grant or renew a license or may suspend or revoke a license upon due notice and hearing when satisfied that the licensee has violated any of the provisions of this act.⁵⁷

Section 258d provides that the action of the commission in regard to granting, renewing, conditioning, or limiting licenses may be reviewed by certiorari.

Section 258e provides that the commissioner may institute such action at law or in equity as may appear necessary to enforce compliance with the provisions of the statutes, rules, and orders, and in addition to any other remedy, may apply for relief by injunction if necessary to protect the public interest, without the limitation of alleging or proving that no adequate remedy at law exists. Such application may be made to the district or county superior court.

Section 39 provides that every person violating any law, the enforcement of which is within the jurisdiction of the department, shall be subject to a penalty of not less than \$25 nor more than \$100 for the first violation, nor more than \$200 for the second or subsequent violations.

Section 40 provides that the penalty for violation of any order or rule made by the commissioner shall not exceed \$200 for each and every offense.

Section 41 provides that any person who violates the provision of any law, the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and shall be punished by a fine of not less than \$25, nor more than \$200, or by imprisonment for not less than one month, nor more than six months, or both, for the first offense; and by not more than one year's imprisonment for the second offense.

⁵⁶ This section is not unconstitutional as being confiscatory, nor is it an unconstitutional delegation of legislative power. *Noyes v. Eris & Wyoming Farmers Co-op. Corp.*, 281 N. Y. 187, 22 N. E. (2d) 334 (1939), rev'g. 170 Misc. 42, 10 N. Y. Supp. (2d) 114 (1939).

⁵⁷ This section was held constitutional. *Application of Linden Farms Milk and Cream Co.*, App. Div. 737, 15 N. Y. Supp. (2d) 658 (1939).

OREGON

Code Ann. (Supp., 1935), amended by L. 1935, c. 67 and c. 69, and by L. 1939, c. 197²⁰

Section 41—2002 provides for the appointment by the Governor of a milk control board of three members.

Section 41—2003 provides that the board has power to supervise and regulate the milk industry of the State, and to adopt and enforce all rules, regulations and orders necessary to carry out the provisions of the act.

Section 41—2015 provides that the board may make all necessary rules, regulations and orders.

Section 41—2012 provides that the board shall ascertain, as far as feasible, what prices for milk in the several localities and markets of the State will best protect the milk industry and insure a sufficient quantity of pure and wholesome milk in the public interest. The board shall take into consideration all conditions affecting the milk industry, including the price necessary to produce a reasonable return to the producer and to the milk dealer.

After making such investigation the board shall, by order, fix the minimum wholesale and retail prices to be charged for milk handled and sold within the State for human consumption in fluid form, and including the following classes: (a) By producers or associations of producers to milk dealers; (b) by milk dealers to stores for consumption on the premises, or for resale to consumers or to others; (c) by stores to consumers or to others except for consumption on the premises where sold; (d) by producer-distributor and distributor for deliveries to homes of consumers: *Provided*, That based upon differences in cost of said various services, if any, the board, upon facts found by it, may establish differentials in prices between house-to-house sales by dealers, house-to-house deliveries by stores, and sales on credit and over-the-counter sales by stores for cash.

Where by statute, regulation adopted thereunder, or municipal ordinance, various grades of milk are specified, the board shall fix the minimum price as aforesaid, applicable to each grade. Orders fixing minimum prices may vary in different markets, and each shall designate the market to which it is applicable.

In fixing minimum prices and the standards or grades to which they apply the board shall in each market area and production area take into consideration costs of production and distribution and the market conditions in the particular sales and production area to be affected by the order applying to such sales and production area.

²⁰ Act held constitutional, *Savage v. Martin*, 28 Adv. Sh. 917, 91 Pac. (2d) 273 (1939).

In those sales areas or production areas supplying the same where the dealers do not have adequate facilities for the blending or standardizing of whole milk, sold in its form as whole milk and where said blending or standardizing is not required under applicable ordinances of the city or town in the sales area or laws of the State of Oregon, the minimum prices for milk sold in the form of whole milk shall not be graduated according to butterfat content.

After the board shall have fixed the prices to be paid to the producer or association, and the prices at which milk shall be sold as provided in the preceding paragraph hereof, it shall be unlawful to buy or offer to buy, sell, or offer to sell, any milk at prices other than the prices fixed by order of the board; and any method, device or transaction whereby any person buys or offers to buy, sells or offers to sell at a price less than that fixed by order of the board applicable to the grade of milk involved in the transaction occurred, whether by discount, rebate, free service, advertising allowance, gift, or otherwise, hereby is declared unlawful.

The board may on its own motion or upon application, from time to time, alter, revise, or amend any order theretofore made with respect to prices to be charged or paid for milk, designating and defining the limits of markets, milksheds, or upon any other matter within the jurisdiction of the board. After making any such investigation and before making, revising, and amending any such order, the board shall give notice to interested parties and the public generally of the time and place of hearing thereon, in such newspaper or newspapers as in the judgment of the board shall afford reasonable notice and publicity; provided, however, that before any order is made denying an application for a license or revoking a license which has been issued, the board shall fix the time and place for hearing of such matter and give notice to the applicant or licensee, as the case may be, of the time and place so fixed, with reasonable notice to such applicant or licensee to be heard and present evidence. Such notice shall be in writing and may be served either personally or by mail at least five days in advance of the time set for said hearing. Any hearing held prior to the refusal to grant any license or to the revocation of any license already issued, shall be held at some convenient place selected by the board or its examiner in the county where is located the residence or principal place of business of the applicant or licensee unless such privilege is waived by the applicant or licensee, in which event the hearing may be held at the election of the board or its examiner either in such county or in the county of the principal office of the board.

Section 41-2013 provides that it is recognized that, due to seasonal fluctuations in milk production, and other causes, there occurs in cer-

tain markets in the state a surplus of fluid milk suitable for human consumption, under the laws and ordinances in force in such markets, in excess of the quantities sold as fluid milk for human consumption, and that such surplus varies from day to day and from season to season; that such surpluses must be sold for factory or other purposes at prices usually lower than would be received if sold in the fluid-milk trade; and that to stabilize and promote the milk industry it is necessary that uniform prices be paid to all producers who, either directly or through any corporation or cooperative association, furnish milk to any specified market.

To accomplish these necessary purposes the board shall have power (a) to define and limit the geographical area from which the fluid milk trade shall be produced for any given market or sales area as fixed and designated by the board: *Provided*, That producers, producer-distributors or their successors now shipping to any market may continue so to do until they voluntarily discontinue shipping to designated milkshed; and (b) under uniform rules and regulations to determine what proportion of the milk produced by each producer shall be considered as marketed as fluid milk for human consumption and what proportion so produced shall be considered as surplus; and (c) to provide for the pooling and averaging of all returns from the sales of fluid milk produced in the geographical area from which fluid milk shall be produced for a designated market or sales area, and the payment to all producers of a uniform pool price for all milk so produced, subject to such equitable adjustments as shall be made by the board and subject to such rules and regulations as may be imposed for the control of surplus production by the establishment of basic averages or other methods; and (d) to appoint, set up, select, and employ agencies for the handling and disposal of the surplus fluid milk, keep, or supervise the keeping of all accounts and records necessary in connection with such transactions, and receive and disburse the funds received in connection therewith; and (e) to make reasonable deductions from the funds so received to pay all necessary expenses incidental to the performance of the duties and the execution of the powers herein conferred; and (f) make any other and further order, rule, or regulation and exercise any such further power that may be deemed necessary by the board for the full accomplishment of the aforesaid objects.³⁹

Section 41-2006 provides that the board may decline to grant the license, or may suspend or revoke a license upon due notice and opportunity to the applicant to be heard when it appears that a milk dealer has violated any of the provisions of this act.

³⁹ Surplus control orders promulgated by board were construed and held valid in *Savage v. Martin, supra* (page 434).

Section 41-2008 provides that any order of the board refusing, suspending, or revoking a license may be reviewed by a circuit court.

Section 41-2017 provides that any person violating any provision of this act shall be guilty of a misdemeanor, punishable by fine of not less than \$25 nor more than \$1,000 or by imprisonment in the county jail not less than 30 days nor more than 90 days, or both fine and imprisonment.

PENNSYLVANIA

Stat. Ann. (Purdon, Supp., 1938), tit. 31^a
Milk Control

Section 700j-201 provides for a milk control commission of three members, to be appointed by the Governor with consent of two-thirds of the members of the senate.

Section 700j-301 provides that the commission is the instrumentality for the purpose of administering the act and is vested with power to supervise, investigate, and regulate the entire industry of the Commonwealth.

Section 700j-404 provides that the commission may decline to grant a license or may suspend, revoke, or refuse to transfer a license or may prohibit a dealer exempted from the license requirements from continuing to operate if a dealer has violated any of the provisions of this act or any rules, regulations, or orders of the commission or any stipulation between the dealer and the commission.

Section 700j-801 provides that the commission shall ascertain, after a hearing in which all interested parties shall be given reasonable opportunity to be heard, the logical and reasonable milk marketing areas within the Commonwealth, shall describe the territorial extent thereof, shall designate such areas by name or number, and shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth, and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein.

The commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

^aThe milk control act was held constitutional. *Calteryahn Sanitary Dairy v. Milk Control Commission, Keystone Dairy Co. v. Same*, 332 Pa. 15, 1 Atl. (2d) 775 (1938); *Commonwealth v. Ortwoen*, 132 Pa. Super. 166, 200 Atl. 859 (1938); *Prior act, Rohrer v. Milk Control Board*, 322 Pa. 237, 186 Atl. 336 (1938).

The commission shall file at its office, with each order issued, a general statement in writing of the findings of fact in support of, and the reasons for, such order.

The commission may, upon its own motion or upon application in writing, from time to time, alter, revise, or amend an official order defining milk marketing areas or fixing prices to be charged or paid for milk. Before making, revising, or amending any order defining milk marketing areas or fixing prices to be charged or paid for milk, the commission shall hold a hearing, after giving reasonable notice thereof to interested persons, of whom the commission has notice, and, in the case of any order affecting the public, after giving reasonable notice thereof to the public in such newspaper or newspapers as, in the judgment of the commission, shall afford sufficient notice and publicity: *Provided, however,* That upon application in writing from a person aggrieved by an order of the commission hereunder, filed within fifteen (15) days after the issuance of the order complained of, or upon its own motion, the commission may, within twenty (20) days after the effective date of such order, issue an order revising or amending such order without a further hearing, if such revision or amendment is based on the record of the hearing held prior to the issuance of such order.

Every order made pursuant to this article, and any revision or amendment thereof, in which the commission fixes or changes the price of milk to producers or to consumers, or both, shall be subject to the approval of the Governor.

Section 700j-802 provides that the commission shall fix, by official order (except as hereinafter provided in this section), the minimum wholesale and retail prices, and may fix, by official order, the maximum wholesale and retail prices to be charged for milk sold within any milk marketing area of the Commonwealth, wheresoever produced, including milk sold by:

- (1) Milk dealers to other milk dealers;
- (2) Milk dealers to consumers;
- (3) Milk dealers to stores, either for consumption on the premises or resale to consumers;
- (4) Stores to consumers, except for consumption on the premises where sold.

Nothing herein contained shall be construed to empower the commission to fix the price at which milk may be sold by any milk dealer or producer to consumers for consumption on the premises of such milk dealer or producer.

The fixing of minimum wholesale or retail prices for skimmed milk, condensed or concentrated whole or skimmed milk, bulk cream

handled between milk dealers other than stores, and ice-cream mix, shall be discretionary with the commission.⁴¹

Section 700j-803 provides that the commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: *Provided, however*, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission.

Section 700j-804 provides that when, pursuant to any statute or regulations or orders adopted thereunder, or any ordinance or reasonable trade practice, various grades of milk are specified, orders of the commission fixing minimum or maximum prices may be applicable to each grade. Orders of the commission fixing minimum or maximum prices may vary in different markets, and shall designate the markets to which applicable. Such orders may likewise classify milk and milk dealers in any reasonable manner which the commission deems advisable, and may vary according to the classes to which they are applicable. The orders of the commission with respect to the minimum prices to be paid to producers and others shall apply to the area in which the milk is produced, or to the area in which the milk so produced is sold, and may vary in different areas according to varying uses, grades and conditions. Each such order may classify such milk by forms, classes, grade or uses, as the commission may deem advisable, and may specify the minimum prices therefor. Other reasonable methods of classification may be prescribed by the commission.

Section 700j-805 provides that it is hereby declared to be the legislative intent that the benefits of any increase of prices received by milk dealers, by virtue of the minimum price provisions of this article, shall be given to producers, except in any case where the commission deems a deviation from this policy necessary in order lawfully to maintain proper milk markets and outlets for producers and consumers. The commission shall, whenever it deems such action necessary, issue orders, rules or regulations to effectuate this intent.

Section 700j-806 provides that the commission may likewise fix, by official order, the terms upon which milk dealers shall pay producers and others for milk, may prescribe the method of computing payment therefor, and may prescribe a form of written statement to be sent to producers with each payment.

Section 700j-807 provides that after the commission shall have fixed prices to be charged or paid for milk, whether by class, grade,

⁴¹ Price fixing and other provisions of the act were upheld in *Milk Control Board v. Eisenberg Farm Products*, 308 U. S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752, (1939) rev'g 332 Pa. 34, 200 Atl. 854 (1938).

use or otherwise, it shall be unlawful for a milk dealer or producer to sell or buy, or offer to sell or buy, milk at any price below the minimum price or above the maximum price applicable to the particular transaction.

No method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold, at a price less than the minimum price applicable to the particular transaction, whether by any discount, premium, rebate, free service, advertising allowance, or extension of credit, or by a combined price for such milk, together with another commodity or a service which is less, or is represented to be less, than the aggregate of the price of the milk and the price or value of such commodity or service when sold or offered for sale.

It shall be unlawful for any dealer to sell any milk for which he has paid, or agreed to pay, a price lower than that fixed by the commission for milk of that class or grade.

It shall be unlawful for a milk dealer to sell or buy, or offer to sell or buy, milk at a price computed upon false or erroneous weight, butterfat test, grade or classification; or at a price from which have been made deductions not authorized by law or in excess of any deductions so authorized, whether such illegal deductions be in the form of excessive transportation charges or otherwise.

Section 700j-808 provides that it is hereby declared to be the legislative intent that the instant (whenever that may be) that the handling by a milk dealer of milk produced outside of the Commonwealth becomes a subject of regulation by the Commonwealth in the exercise of its police powers, the restrictions set forth in this act respecting such milk so produced shall apply, and the powers conferred on the commission by this act, and particularly by this article, shall attach; but such restrictions shall not apply to condensed or concentrated whole milk contained in hermetically sealed cans.

It is also hereby declared to be legislative intent that the prices prescribed by the commission for milk produced and sold in this Commonwealth for shipment into and sale in another state, shall not be destructive of the price structure of producers in such other State.

Section 700j-1001 provides that, except as otherwise provided in this act, any person violating any provision of this act or any rule, regulation, or order of the commission lawfully made, shall for each offense, upon conviction in a summary proceeding, be sentenced to pay costs of prosecution and a fine of not less than twenty-five dollars nor more than three hundred dollars, and in default, to undergo imprisonment of not less than ten days nor more than thirty.

Section 700j-1002 provides that for a third or subsequent offense, a person is guilty of a misdemeanor and subject to a fine of not less

than five hundred dollars nor more than one thousand dollars or to undergo imprisonment not exceeding one year or both.⁴²

Section 700j-1003 provides that the commission or any person, marketing committee, or association composed of persons affected, may institute such action at law or in equity as may appear necessary to enforce compliance.

Section 700j-1004 provides that in addition to any other remedy the commission may apply to the Court of Common Pleas of Dauphin County for relief by injunction or to the court of common pleas of the county wherein defendant resides or has his principal place of business.

RHODE ISLAND

Gen. Laws Ann. (1938), c. 215, as amended by L. 1939, c. 660, 674, 731

Section 2 provides that within the Department of Agriculture and Conservation there shall be set up a Milk Control Board independent of the director of said department and not subject to his jurisdiction. Such board shall consist of the said director and the director of public health and a milk producer, milk distributor, and a milk consumer to be appointed by the Governor with the advice and consent of the senate.

Section 4 (i) empowers the board to investigate and regulate all matters pertaining to the production, importation, storage, transportation, disposal, distribution, and sale of milk within the State as may be necessary or convenient to carry out the provisions of this chapter.

Section 4 (a) empowers the board to supervise and impose reasonable regulations with respect to the distribution and sale of milk within the State in such a manner as to supplement such supervision and regulations as are now imposed by existing statutes or by the lawful ordinances or rules and regulations of the several towns and cities of the State, and to alter, amend, or revoke such regulations as may be promulgated by the board of milk control and any minimum price schedules or orders hereinafter referred to after notice of intention so to do, published in such newspaper as in the judgment of the

⁴² Sales under a contract that antedates an order of the board constitutes a violation of the act, if the contract price is less than the price fixed by the board. *Zenger Milk Co. v. School District of Pittsburgh*, 334 Pa. 277, 5 Atl. (2d) 885 (1939).

One not convicted or tried for violation of the act cannot attack its constitutionality. *Eisenhart v. Milk Control Board*, 125 Pa. Super. 483, 190 Atl. 405 (1937).

board will sufficiently notify parties in interest, and after a public hearing thereon.

Section 4 (c) empowers the board to establish, after investigation and public hearing, minimum wholesale and retail prices to be charged for milk distributed for sale within the State for fluid consumption, wheresoever produced, including the following classes:

1. By producer to consumer or dealer.
2. By dealer to stores either for consumption on the premises or resale to consumers.
3. By dealer to consumer.
4. By stores to consumer.
5. By wholesaler to retailer.
6. By any person not included in the foregoing classification to another person for commercial purposes.

Upon fixing said minimum prices, which shall apply to the various grades and classes of milk and which may vary in the several markets and localities of the State, the board shall furnish all dealers registered in the State with a schedule of such prices, and shall publish a schedule thereof in appropriate newspapers throughout the State, and such publication shall constitute an official order with respect to minimum prices and thereafter no dealer, wholesaler, store, or other person handling milk in this State for commercial purposes shall buy or sell milk for prices less than the scheduled minimum applicable to the particular transaction.

No method or device shall be lawful whereby milk is bought or sold at prices less than the scheduled minimum applicable to the transaction, whether by any discount, rebate, free service, advertising allowance, combination price for milk with any other commodity, or for any other consideration.

Section 4 (j) further empowers the board to include, in any order specifying minimum prices to be paid producers, when petitioned to do so in writing by fifty-one per centum of the Rhode Island producers delivering fluid milk or cream for consumption as fluid milk or cream within the marketing area and of producers delivering fifty-one per centum of the volume of fluid milk or cream in such market, such terms and provisions as will insure that for each payment period all milk dealers receiving fluid milk or cream from producers for sale or distribution as fluid milk or cream within such market shall pay therefor a uniform price or cost of fluid milk or cream on the basis of grade, and of the use in which it is ultimately sold, used or disposed of, and that all producers delivering fluid milk or cream for consumption as such in such market shall receive

a uniform return for all fluid milk or cream delivered by them in each grade. In making such uniform price or cost order said director may provide for the determination of a base or quota for each such producer who sells to dealers for resale and said board may provide for the payment by dealers of a fee not to exceed two cents per hundred weight of such milk or cream, in addition to the fees provided for in section 6 of this chapter. Upon receiving petition in writing of fifty-one per centum of the Rhode Island producers delivering fluid milk or cream for consumption as fluid milk or cream in such market, requesting rescission and termination of any order issued under this subparagraph, said board shall rescind and terminate such order. Such termination shall become effective not later than thirty-one days after said board shall have ascertained such petition to have been signed by the number of Rhode Island producers, or by producers delivering the volume of milk so required.

Section 10 provides that the board may decline to grant a license, or may suspend or revoke a license, whenever said applicant or licensee shall have violated or failed to comply with the requirements of this chapter, or whenever it shall be established that a person selling or purchasing milk within the State has violated the minimum price schedule relating to the transaction involved.

Section 16 provides that any person aggrieved by any decision, ruling or action of the board, may within 30 days, appeal to the superior courts within the county of Providence.

Section 15 provides that any person violating any provision of this chapter may be fined not exceeding \$50.00 for the first violation; and for any subsequent violation may be fined not exceeding \$500.00 and, in addition thereto, have his license refused, suspended, or revoked.

UTAH

Rev. Stat. Ann. (Supp. 1939)*
Milk Control Act

Section 3-15-2 provides that the production, processing, and distribution of fluid milk for consumption is vested with a public

* The provisions of this act giving the State Board of Agriculture the power to fix milk prices and control surplus milk was held to be void as an unconstitutional delegation of legislative power because there was no legislative finding that price regulation was in the public interest and because there were no standards to guide the department in the control of surplus milk. *Rowell et al. v. State Board of Agriculture*, 99 Pac. (2d) 1 (1940).

interest. In the interest of insuring to the people of the State of Utah an adequate and continuous supply of milk it is recognized that the production and distribution must be stabilized to the end that unfair practices heretofore existing in the industry be eliminated and that a fair price be maintained to avoid monopolies and insure to the producer, distributor, and consumer of market milk a fair price for the commodity.

Section 3-15-4 provides that the State Board of Agriculture shall administer and enforce provisions of this act, and in addition to its other powers and duties shall have the following powers:

(a) Upon written application of sixty percent in number and eighty percent in volume of the producers and sixty percent in number and eighty percent in volume of the distributors of market milk within a market area order the following:

1. That a market area be established. In determining this question the board shall consider the established marketing practices and competitive conditions existing in said area.

2. That an administrative agency shall be elected by the members of the milk producing and distributing industry of the market area established to administer the orders of the board. The administrative agency herein provided for shall be truly representative of the milk producing and milk distributing industry in the market area and shall be elected by the members of the industry as provided by order of the board. The administrative agency shall be constituted of such number as the board may designate, but the representation of producers and distributors shall be equal. The administrative agency shall administer all orders promulgated by the board and shall have power to do all things necessary to make the orders of the board effective. If the board should provide for the licensing of milk producers, distributors, and milk dealers the administrative agency shall have the power to cancel any license upon finding that the holder of said license has violated any of the orders issued by the board. No license, however, shall be canceled until after a public hearing of the administrative agency of which hearing the alleged violator has had actual notice.

(b) After the designation of any market area in the State of Utah the board may, upon the written petition of any producer, distributor, milk dealer, organization representing producers or distributors, any consumer of market milk, or any group of consumers of market milk, residing within said trade area:

1. Provide for fair trade practices within said market area. Any fair trade practice rule promulgated by the board for any trade area

under this subsection must be designed to and for the purpose of correcting some existing unfair practice in the industry which unfair practice militates against the best interests of the producers, consumers, distributors, or any combination of the aforementioned groups resulting in or likely to result in giving some individual or group of individuals some unfair advantage in the market milk industry or which may have a tendency to reduce or lower the quality of milk being produced and distributed in the area or having a tendency to create a surplus or shortage of suitable market milk.

2. Provide for the control of surplus market milk, provided that such order shall be fair so as to give to all producers and distributors of market milk an equal opportunity to produce and distribute market milk; the orders to be made under this section should have for their ultimate end the providing of an adequate supply of pure, wholesome milk and at the same time prevent the creation of any surplus of market milk in the trade area for which the order is promulgated.

3. To provide that each producer and distributor of market milk in the market area shall pay to the administrative agency theretofore provided by order of the board such sum as may be ordered by the board not to exceed one-fourth of one cent per pound of butterfat for each pound of butterfat produced, processed, and sold by the producer or distributor in the market area. The board shall not, however, at any time require the payment of any larger amount than is actually necessary to defray the necessary expenses of the administrative agency in carrying out, operating, and administering the orders of the board in the market area.

4. Provide by order for the licensing of producers and distributors and other purchasers of milk for resale in any given market area and to provide for payment of a license fee in connection therewith sufficient to defray the actual expense incident to the issuance of said license; make rules and regulations whereby any license issued pursuant to this subsection may be canceled by the administrative agency of the market area. Should the board require the licensing of producers, distributors, and other purchasers of milk for resale within a designated market area, as provided by this subsection, it shall be a violation of this act for any producer, distributor, or milk dealer for resale to sell milk at wholesale or retail in the market area without having first procured such license.

5. Provide, fix, and regulate a minimum market price for market milk. Such a minimum market price shall be construed to include the price paid by distributors to producers for their product and the

price paid by purchasers of milk for resale to distributors as well as the ultimate retail and wholesale prices to consumers. This price shall be the current market price and in determining this price the board shall consider the prices of other dairy products as well as the cost of producing, handling, pasteurizing, and distributing the product which is ultimately sold to the consumer.

6. To amend, modify, or cancel any existing order.

Section 3-15-8 provides that after the hearing of all the evidence the board shall make such order as comes within the province of the petition as is supported by competent evidence. Such order when made and promulgated by the board shall be binding upon all producers, distributors, milk dealers, and consumers of market milk within the area to which the petition and order relate.

Section 3-15-10 provides that the violation of any order issued by the board shall constitute and be a misdemeanor.

Section 3-15-11 provides that the orders and action of the board may be reviewed by an action in the district court.

VERMONT

L. 1937, act 99, amended by L. 1939, act 102⁴
Milk Control Act

Section 3 provides for a milk control board of 3 members, one of whom shall be the commissioner of agriculture, another the commissioner of public welfare, and the third appointed biennially by the governor.

Section 4 provides that the board shall have the power to supervise, regulate and control the distribution and sale of milk within the State.

Section 9 provides that the board may adopt, promulgate and enforce such reasonable rules as are deemed necessary to carry out the provisions of this act.

Section 5 provides that whenever the board shall determine, either upon complaint or upon its own initiative, after public notice and hearing, that the public health is menaced, jeopardized, or likely to be impaired or deteriorated by the loss or substantial lessening of the supply of milk of proper quality in a specified market, the board shall fix the just reasonable minimum or maximum price, or both,

⁴ Act held constitutional. *State v. Auclair*, 110 Vt. 147, 4 Atl. (2d) 107 (1939).

that shall be paid producers or associations of producers by distributors, and the manner of payment, and the prices charged consumers and others for milk by distributors, as long as such condition is found to prevail in such market. In fixing such prices, the board shall investigate and ascertain what are reasonable costs and charges for producing, hauling, handling, processing, and any other services performed in respect to milk, and determine what prices for milk in the several localities and markets of the State, and under varying conditions, will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk to adults and minors in the State, and will best promote the public interest. The board shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public, and the amount necessary to yield a reasonable return to the producer and to the milk dealer. Prices so fixed need not be uniform in all markets and may be changed from time to time after such notice and public hearing as deemed by the board in the public interest. Nothing herein shall be construed to prohibit a producers cooperative, organized under the public laws, from blending the proceeds from the sale of its milk in all markets and all classifications, and distributing such to its members in accordance with the contract with its members, or from making deductions from sums due members of such sums as may be authorized by the membership to be so deducted. Purchases by or sales to authorized officials of any town or city charity or public welfare department or by charitable organizations approved by such city or town officials for charitable uses shall be exempt from the price fixing provisions of this act.⁴⁵

Section 6 provides that the board may accept established and defined classes and grades of milk or may establish such classes and grades, and shall specify to what classes or grades the prices fixed pursuant to section 5 hereof shall apply.⁴⁶

Section 7 provides for the licensing, fees, and revocation of licenses for all distribution in the State. The board may decline to grant, suspend, or revoke any license when convinced that the distributor has or is violating any of the provisions of this act.

Section 13 provides for a rehearing before the board by any person affected by any order of the board within 20 days after the order or decision of the board.

⁴⁵ Exemptions for charitable use held not to be an unconstitutional discrimination. *State v. Auclair, supra.*

⁴⁶ The sections giving the board the power to fix milk prices were held by the court not to be arbitrary nor discriminatory. *State v. Auclair, supra.*

Section 11 provides a fine for violation of not exceeding \$100 or imprisonment for not more than 1 year or both. Each day during which such violation shall continue shall be deemed a separate offense.

VIRGINIA

Code Ann. (Michie and Sublett, 1936)^a Milk Control Act

Section 1211x (a) provides for the creation of a milk commission consisting of three members, two of whom shall be producers to be appointed by and at the will of the Governor.

Section 1211y provides that the commission shall have power to supervise the milk industry and to make, adopt, and enforce all rules and regulations and/or orders to carry out purpose of act, and the granting of general powers shall not be qualified by granting special powers.

The commission shall not exercise its power in any market until a public hearing is held for such market to determine that public interest requires an exercise of its power. A hearing may be called on its own motion, or on written application of a cooperative association which in the commission's judgment supplies a substantial proportion of milk consumed in that market or if there is no association, the commission shall call a hearing on the written application of producers supplying a substantial portion of milk in that market. Such hearing may be held at such time and place, after notice, as the commission shall determine.

The commission may withdraw the exercise of its powers from a market if after public hearing it determines it will be to the interest of the public to do so.

The Commission, after public hearing and investigation, may fix the prices to be paid producers and/or association of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and dis-

^a Constitutionality of the act upheld. *Reynolds v. Milk Commission*, 163 Va. 957, 179 S. E. 507 (1935), cited and followed in *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. Ed. 835.

tribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

In a designated market the commission may require licensing of all distributors. The commission may decline to grant, or may suspend or revoke a license already granted upon due notice and hearing.

The commission may define what constitutes a national market area, and may define a milkshed to supply such market area, exempting producers or producer distributors now shipping to a market area.

The commission may delegate such powers, as it sees fit, to a milk board in any particular market area.

Section 1211z provides that no distributor shall buy from a producer not licensed or deal with another distributor who is not licensed.

Section 1211bb provides that any order of the commission refusing to issue a license, or suspending or revoking a license may be reversed on appeal to the supreme court of appeals.

Section 1211dd provides that on refusal to obey any rule, regulation, or order of the commission or obey any subpoena, or on refusal of any witness to testify on matter on which he may lawfully be interrogated, it shall be the duty of the hustings court of city of Richmond upon application of the commission to compel obedience by attachment proceedings for contempt.

Section 1211hh provides that in event of violation of any provisions of sections 1211w to 1211mm in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 1211ii provides that any person violating any provisions of sections 1211w to 1211mm or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and, upon conviction, shall be punished by a fine of not less than \$25.00 or more than \$100.00, or by imprisonment in the county jail for not less than 30 days nor more than 1 year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. Prosecution for violating the provisions of sections 1211w to 1211mm shall be instituted by the commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of sections 1211w to 1211mm are in effect.

WISCONSIN

Rev. Stat. (1939)^aMilk Control Act ^b

Section 100.03 provides that the department of agriculture and markets (a) shall have jurisdiction upon its own initiative or upon petition in writing to inquire into and determine the regulated milk markets of the State, and to inquire into any matter pertinent to regulation under this section in any such market and to prescribe such terms and conditions for the purchasing, receiving, handling, or selling of regulated milk in any such market as it shall find necessary to eliminate unfair methods of competition or unfair trade practices, which terms and conditions may include schedules of prices for producers, dealers, and consumers, or either, and labeling. The department may include in its orders provisions reasonably necessary to prevent circumvention of such terms and conditions. In prescribing such terms and conditions the department shall consider among other things the terms of any collective bargaining agreement arrived at between producers and dealers.

(b) Each dealer shall deduct from the price to producers an amount sufficient to administer this section, to be at the same rate for all markets and to be determined from time to time by the department, not exceeding one cent per hundred pounds of fluid distribution. Fluid distribution is the part of the producer's deliveries that is equal to the proportion of the entire receipts of the dealer distributed in actual fluid form plus the milk equivalent of fluid cream distributed, including milk produced by the dealer.

(c) The department may order a further deduction, not exceeding one-half cent per hundred pounds of fluid distribution, in any regulated milk market when conditions in such market show need for such expenditure to promote increased consumption.

(d) The dealer shall hold deductions in trust for and pay them to the department, together with an amount, as his share, equal to deductions under paragraph (c).

(e) The department, with the advice of a local committee of producers and dealers, shall use the advertising fund created by the deductions under paragraph (c) and dealer payments under paragraph (d) for the purpose of promoting increased consumption of regulated milk in such market.

^aThis act expires December 31, 1941, or earlier if the department determines that economic conditions no longer warrant it.

^bAct held to be constitutional. *State ex rel. Finnigan, Atty. Gen. et al. v. Lincoln Dairy Co.*, 221 Wis. 1, 285 N. W. 197 (1936), reh'g. den. Id. 265 N. W. 851 (1936).

No person shall engage in business as a dealer without a license therefor under this section, except a producer distributing milk only and not to exceed ten quarts daily, and except that a dealer not bottling milk or cream in any fluid form shall not be required to be licensed for the operation of a grocery or delicatessen store, meat market, bakery, confectionery store, or restaurant.

Application for license shall be made in writing and under oath, giving such pertinent information, in such form, as the department shall require, and accompanied by a fee of ten dollars, which shall be retained whether or not a license is issued. All licenses shall expire on December 31 in the year for which issued.

The department shall issue license to each person making proper application and who is fit and equipped for the business. License may be denied, suspended, or revoked by special order after notice and hearing as provided in section 93.18, when the applicant or licensee is unfit or unequipped for the business.

The department shall consider, in addition to other matters, the character and conduct, including past compliance or noncompliance with law, of the applicant or any person to be connected with the business, and the financial responsibility of the applicant. The department may at any time require an applicant or licensee to file with it a surety bond conditioned for the prompt delivery of the price to producers.⁵⁰

Such license is not transferable. Sale or other transfer of the regulated milk business of any dealer to another person shall void such dealer's license as of the day of transfer.

Actions to enjoin violation of this section or any order thereunder may be commenced and prosecuted by the department in the name of the State in any court having equity jurisdiction, whether or not the equity jurisdiction specifically conferred upon such court is broad enough to cover actions under this section. This remedy is not exclusive.⁵¹

⁵⁰This section construed to imply a legislative intent to empower the Department to deny renewal of a license if applicant was found to have failed to comply with orders of the Department. *Buhler v. Department of Agriculture and Markets*, 229 Wis. 133, 280 N. W. 367 (1938).

⁵¹Dealer who sold milk to a hospital at prices lower than those fixed by the Department was held to be guilty of unfair trade practices. Renewal of license was properly denied. *Gagnon v. Department of Agriculture and Markets*, — Wis. —, 286 N. W. 549 (1939). See also *Golden Harvest Dairy Co. v. Department of Agriculture and Markets*, — Wis. —, 286 N. W. 865 (1939); *National Guernsey Dairy, Inc. v. Department of Agriculture and Markets*, — Wis. —, 286 N. W. 868 (1939).

SECTION 2

AGRICULTURAL COMMODITIES AND FOODSTUFFS

CALIFORNIA

Agric. Code (Deering, Supp. 1939)
Agricultural Commodities

Section 1300.13 provides that the Director of Agriculture is authorized to administer provisions of this Act. In order to effectuate the declared policy of the act, the director is further authorized after due notice and opportunity of hearing to enter into marketing agreements with processors, distributors, producers, and others engaged in the handling of any agricultural commodity.

Section 1300.14 reads: "(a) After such notice and hearing the director shall issue a marketing order if he finds and sets forth in such marketing order that such order will tend to:

"(1) Reestablish or maintain prices received by producers for such agricultural commodity at a level which will give to such commodity a purchasing power, with respect to the articles and services which farmers commonly buy, equivalent to the purchasing power of such commodity in the base period. The base period shall be such prior period in which the director finds that (a) the volume of production of such commodity was adequate to supply the requirements of consumers thereof and (b) the returns to producers thereof were sufficient to provide an adequate standard of living to the farm operator and his family.

"(2) Approach such equality of purchasing power at as rapid a rate as is feasible in view of the market demand for such commodity.

"(3) Prevent the unreasonable or unnecessary waste of agricultural wealth because of improper preparation of such agricultural commodity for market, lack of uniform grading and inspection, or excessive shipments to markets.

"(4) Protect the interests of consumers of such commodity, by exercising the powers of this chapter only to such extent as is necessary to establish the equality of purchasing power described in subsection (1) of this section.

"(b) In making the findings set forth above in this section, the director shall take into consideration any and all facts available to him with respect to the following economic factors:

"(1) The quantity of such agricultural commodity available for distribution.

"(2) The quantity of such agricultural commodity normally required by consumers.

"(3) The cost of producing such agricultural commodity as determined by available statistics and surveys.

"(4) The purchasing power, of consumers as indicated by reports and indices.

"(5) The level of prices of other commodities which compete with or are utilized as substitutes for such agricultural commodity.

"(6) The level of prices of commodities, services, and articles which farmers commonly buy."

Section 1300.19 provides that any person violating any order, rule, and regulation or any of its provisions, shall be guilty of a misdemeanor punishable by fine or imprisonment or both, and that the attorney general on complaint or on his own initiative may bring an action enjoining violations or threatened violations of any of the provisions of the act in the superior court in any county where such violations are occurring.

Agric. Code (Deering, 1937)
Agricultural Marketing
Dairy Products

Sections 743 and 744 provide that the Director of Agriculture is authorized to issue licenses and enter into marketing agreements with manufacturers, processors, producers, associations of producers, distributors, and retailers of manufactured dairy products for any dairy product. Representative persons or groups engaged in production, manufacture, or distribution of dairy products, may make application to formulate such agreements.

Section 745 provides that such marketing agreements contain such provisions as may be necessary to carry out the policy of this chapter, and may include provisions:

1. For the appointment of local control boards with such powers as are specified in the agreement.
2. For the raising of funds, derived equitably from all producers, distributors, and manufacturers participating in any marketing

agreement, for the purposes of and to be used to the extent specified in the marketing agreement. From such assessments, there shall be paid to the director such sum, as may be necessary to defray the expenses incurred by the director in carrying out the provisions of this article.

3. For the establishment of price levels and margins, and the fixing of prices to be paid producers, and the fixing of resale prices, in such manner as the agreement may provide.

4. For the establishment of a code of fair practices.

5. For sales stimulation and educational activities.

Section 746 provides that an agreement signed in accordance with provisions of the Act is to be approved by the director. If it is approved, the director is to issue an order establishing the agreement, whereupon it becomes effective.

Section 747 provides that after due notice and opportunity for hearing, licenses issued under the act may be revoked by the director for violation of any provisions of the agreement; persons violating any of the provisions of the act or agreement may also be subject to civil liability for damages actually sustained.

Section 749 provides that upon application of 51 percent or more of persons and production eligible to participate in the initiation of the agreement, the director may order the agreement revoked.

Gen. Laws (Deering, 1937), Act 2666
Foodstuffs¹

Section 3 provides that the director of agriculture shall administer and enforce the provisions of this act. He is authorized to issue, administer, and enforce marketing orders regulating the processing and marketing of processed foodstuffs by processors or distributors within the State; after giving due notice, the director shall call a public hearing to determine whether the issuance of proposed marketing orders will tend to effectuate the declared purposes of the act.

Section 4 reads: "Upon or after the completion of any hearing, as provided in section 3 of this act, the director may issue a marketing order for such processed foodstuff if he finds and sets forth any or all of the following facts:

"(a) The conditions in the processing or marketing of such particular processed foodstuff tend to deceive the purchasing public,

¹ In a suit for injunction to restrain the Director of Agriculture from enforcing the Foodstuffs Marketing Act, with respect to fixing a minimum sale price, the court held that the act was not an unconstitutional delegation of legislative powers. The director's power to fix minimum prices is discretionary and, until price is fixed, the court cannot determine whether it violates the Federal Constitution. *West Coast Macaroni Mfg. Co. v. Brock*, 24 Fed. Supp. 442 (1938)

develop monopoly, impede free and open competition, or decrease the consumption of superior qualities of such foodstuff.

“(b) The lack of uniform grading or inspection results in the inefficient and disorderly marketing of the particular processed foodstuff and in wasteful distribution.

“(c) The marketing order will tend to (1) eliminate the use of unfair practices and the sale of processed foodstuffs below cost, (2) prevent the deception of the purchasing public and the development of monopoly, (3) promote free and open competition, and (4) encourage the consumption of superior qualities of such foodstuff.

“(d) The marketing order will tend to result in the efficient and orderly marketing of such processed foodstuff and in the use of more economic methods of distribution.

“(e) The marketing and processing order will adequately protect the interests of consumers and will not result in the undue enhancement of prices paid by consumers for such processed foodstuff.

“(f) The marketing order will not be detrimental to or injure the interests of producers, if any, within this State, who may be affected by the provisions of such order.”

Section 5 provides that when issuing a marketing order, the director is empowered to make provision for the prohibition of any or all of the following unfair practices:

(a) The payment or allowance of rebates, refunds, or other unearned commissions or discounts of any kind to any customer, whether in the form of money or other goods or services of value.

(b) The giving of any product for the purpose of obtaining business or trade of a customer: *Provided*, That gifts of any product to recognized charities shall not be prohibited.

(c) The false or misleading advertising of any processed foodstuff.

(d) The disparagement falsely by any statement, written or oral, or by any other act whatsoever of the weight, substance, grade, or quality of a competitor's goods, prices, or products.

(e) The inducement or attempt to induce the breach of existing contracts between competitors and customers by interference with the provisions of such contract with the purpose and effect of embarrassing competitors in their business.

(f) The malicious enticement of employees of competitors with the purpose and effect of hampering, injuring, or embarrassing competitors in their business.

(g) The imitation of trade-marks, trade names, slogans, or other marks of identification of competitors in any case in which such imitation has the tendency or capacity to mislead or deceive purchasers or prospective purchasers.

(h) The failure by any processor or distributor to file an open price schedule as required or to sell or offer to sell processed foodstuffs at the current open price filed by such processor or distributor. The director is authorized to prescribe methods (a) whereby processors or distributors of a processed foodstuff shall, from time to time, file with the Department of Agriculture or with the advisory board, open price schedules which will designate the prices at which such processor or distributor is selling such processed foodstuff, and (b) whereby rules and regulations may be established with respect to the modification of such filed open price schedules. The director may include, among other provisions for such filing of open price schedules the following:

(1) Each processor or distributor in the industry shall file within a designated period from the date of the issuance of the processing and marketing order, either with the Department of Agriculture of the State of California or with the advisory board, a price list stating the prices at which he sells or offers to sell such processed foodstuff. In the event that the processor or distributor thereafter desires to change such price list, he shall file a revised price list with said department or with said board in the manner and at the time designated by said order.

(2) Said price list so filed shall declare each and every price, allowance, term, and condition of sale or offer to sell any processed foodstuff covered by such order.

(3) Such open price list shall be uniform to all buyers purchasing under similar conditions of sale and delivery from such distributor or processor. Any direct or indirect price concession from such open price list, whether by rebate, allowance, payment, free deal, gift, or by any other means whatsoever, by such processor, his agent, sales representative, or any person acting on his behalf, shall be prohibited.

(4) Such price list shall not contain any price or offer of any discount for the quantity of processed foodstuffs sold unless such price or discount is based upon and reasonably measured by a substantial difference in the quantity of such foodstuffs so sold and delivered.

(i) The sale or offer to sell processed foodstuffs at less than the cost of such processor or distributor as defined by the provisions of this act. At any hearing upon a marketing order or thereafter, the director may provide for the submission to him of a cost survey which shall show the minimum costs, determined pursuant to the definition and provisions relating to costs in this act, that prevail in the processing or marketing of a processed foodstuff for the State or portion thereof in which such order is, or is to be, effective. In the event the director finds that such cost survey completely sets forth the

matters hereinabove specified, the director may append the results of such cost survey to the marketing order. Said cost survey when so appended shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act; provided that the provisions of paragraph (i) shall not apply to any lot of processed foodstuffs which is being sold in a bona fide sale to close out a business, or by order of any court to discharge a debt or, in the event such lot of processed foodstuffs has become damaged, to avoid further loss or deterioration, provided such lot of damaged foodstuffs is plainly marked with the words "Damaged Goods," in which event it shall be the duty of the seller of any such lot to notify the State Department of Agriculture of his intention to sell such lot or to conduct such sale of such lot prior to the sale thereof.

Section 6 provides that the director may suspend, amend or terminate any marketing order issued by him whenever he finds that such order does not tend to effectuate the declared purpose of this act.

Section 9 provides that every person violating any provision of the act or any order duly issued by director shall be guilty of a misdemeanor; and, upon complaint of any person, or on his own initiative, the attorney general may institute proceedings to enjoin continued violations of any provision of this act or order duly issued.

GEORGIA

Code Ann. (Park, et al., 1936)
Agricultural Marketing

Section 5-211 provides that the commissioner of agriculture is hereby authorized to make such rules and regulations as in his judgment may be necessary to properly conduct such farmers' markets, both wholesale and retail.

Section 5-217 provides that the commissioner of agriculture is authorized to fix from time to time, as he may deem necessary, minimum prices on the different grades and classes, as herein provided for, and to enforce the same by not permitting any one to sell any fruits, vegetables, or truck crops within the bounds of any market established, at a lower price than the minimum price fixed by him.

Section 5-221 provides that in carrying out the provisions of sections 5-208 to 5-223, inclusive, the commissioner of agriculture shall, and is hereby authorized to use every division of the department of agriculture, including the bureau of markets, and to exercise powers heretofore granted in other laws to the commissioner of agriculture,

the department of agriculture, and to any other subdivision of the department of agriculture, in addition to the powers and duties prescribed in said sections.

IDAHO

L. 1935, c. 113

Agricultural Marketing

Section 2 provides that the agricultural adjustment board shall consist of five members, one of whom shall be the commissioner of agriculture. The others are to be appointed by the Governor. The board is authorized to make the necessary orders, rules, and regulations for the discharge of duties imposed upon them.

Section 3 provides that the board may approve any agreement or code for carrying out the purposes of this act among producers, associations of producers, manufacturers, processors, distributors, and others handling any agricultural commodity, or the food derivatives thereof, produced or marketed within the State of Idaho, submitted to the board for approval under this act, if the board, after such hearings and investigations as it may deem necessary, finds that (1) the agreement or code has been executed or is approved by persons, or the representatives of persons, producing, processing, manufacturing, distributing, or handling a substantial majority, to be determined by the board, of the volume or output of the business within the State of Idaho, measured in dollars and units, of the commodity or industry covered by such agreement or code; and that (2) the provisions of such agreement or code are not inequitable to the producers, manufacturers, processors, distributors, or other handlers of such product or products produced or marketed within the State of Idaho nor contrary to the interests of the consumers thereof and of the general public; and that (3) the conditions proposed to be remedied by such agreement or code are detrimental to the public health, or tend to impair the solvency of the industry and to cause substantial defaults in the payment of taxes levied for carrying on the functions of government, or are a menace to the welfare or reasonable comfort of the inhabitants of the State.

Agreements and codes under this act may include such provisions regulating trade and marketing practices and prices in the industry covered and subject to the provisions thereof as may reasonably be calculated to aid in accomplishing the purposes of such agreements or codes and the purposes and policies of this act, but the board

may require that the price to be paid by consumers shall not be increased by the terms of any agreement or code until after a public hearing has been held thereon after such notice to the public as the board may deem reasonable under the circumstances. Each agreement and code shall define clearly the territory embraced within and covered by the provisions thereof, and, subject to the supervision of the board, it shall be administered by the code authority for the industry. The members of the code authority shall be resident taxpayers and have such other qualifications and be selected in such manner and serve for such time as may be provided in the code as finally approved by the board, and they may be removed from office by the board for neglect of duty and failure to cooperate with the board in the enforcement of the code. The duties and powers of such code authority shall be such as are delegated to it under such agreement or code, and the board may delegate to such code authority, from time to time as the board may deem necessary or proper for carrying out the purposes of this act, additional power and authority within the powers vested in the board over such industry by this act. The board may by order duly entered in its minutes extend the provisions of any code, so approved as aforesaid, over all engaged in the industry within the territory embraced in the code, and it may by its order extend the limits of the territory covered by such code.

Section 5 provides that the provisions of agreements and codes approved by the board, relative to fair competition and fair trade practices for any industry shall, so long as such agreement or code is in effect, constitute the legal standard of fair competition and fair trade practices for such industry in all of the intrastate business and intrastate transactions within the State. Violations of such standards by any person engaged in such industry within the State shall be deemed unfair competition, contrary to the public policy and general welfare of this State and shall be a violation of this act.

Section 14 provides that any person who violates any provision of this act, or any order, rule, or regulation promulgated by the board, including the provisions of any code or agreement approved by the board is guilty of a misdemeanor, and may be enjoined in any of the district courts of the State in county where defendant resides.

MASSACHUSETTS

Sections 9E and 9H of Chapters 23 [Ann. Laws (1933)] provide that whenever the Governor shall determine that an emergency exists in re-

spect to food and fuel, he may designate the director of the division on the necessaries of life to act as emergency food and fuel administrator. The Governor shall have the power to promulgate such orders, rules and regulations with respect to supply, distribution and prices of such commodities as may be necessary to carry out the purposes of the act. See Fuel, Price Fixing, *infra*.

OREGON

L. 1st Ex. 1935, c. 65 Agricultural Marketing Act

Section 1 provides that (1) through the exercise of the administrative powers conferred upon the Director of Agriculture under this act, to establish and maintain such balance between the marketing and consumption of the agricultural commodities hereinafter specified, and such marketing conditions and practices therefor, as will reestablish prices to producers thereof at a level that will give said commodities a purchasing power (hereinafter referred to as "exchange value") with respect to articles that said producers buy, equivalent to the purchasing power of said agricultural commodities in the base period of August 1909 to July 1914, including current interest, payments per acre on farm indebtedness secured by real estate, and tax payments on farm real estate, as contrasted with such interest payments and tax payments during said base period.

(2) To protect the interest of the consumer by approaching the level of prices which it is declared to be the policy of the legislature to establish, by gradual correction of the current level at as rapid a rate as may be in the public interest and feasible in view of the current consumptive demand in local and other markets, and authorizing no action under this title which has for its purpose the maintenance of prices to producers above the level which it is herein declared to be the policy of the legislature to establish.

Section 4 provides that (a) If upon the basis of such investigation the director at any time finds that (1) the current average farm price for any such agricultural commodity is less than the fair exchange value thereof, or that the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of that commodity during the then current or next succeeding marketing year is normally, or will be, marketed; and (2) the conditions of and factors relating to the production, processing, manufacture, marketing, and consumption of that commodity are such that the exercise of any one or more of the administrative

powers conferred upon the director hereunder would effectuate in whole or in part the declared purpose of this act, the director shall immediately proclaim that determination in the form of written findings of fact, and shall institute, make effective, administer, and enforce as to that agricultural commodity as provided in this act marketing standards which shall include such one or more of the regulations by this act authorized by the director to be made effective as the director shall find administratively practicable and best calculated to effectuate the declared purpose of this act: *Provided, however,* That no such standards shall be made effective under this act without a public hearing thereon first being called and held by the director with not less than 10 (10) days notice to all interested persons, such notice to be given by posting the same conspicuously in the offices of the state director of agriculture in Salem and Portland, Oreg., mailing a copy thereof to each of such persons and organizations as in the discretion of the director are likely to be interested in the matters involved, and releasing the same to the press generally within this State.

(b) In addition to any such investigation made under this act on the director's initiative, the director shall cause to be made a further investigation and shall hold public hearing, as aforesaid, to determine whether or not there should be made effective under this act marketing standards for any agricultural commodity, in the event written petition for such investigation, hearing and standards shall be filed with the director, signed by not fewer than one hundred (100) producers of the agricultural commodity involved, or by producers, distributors, or processors of said commodity numbering not fewer than thirty per centum (30%) of the total known number of such producers, distributors, or processors in this State. The director's written ruling on such petition shall be issued not later than thirty (30) days following his receipt of the petition.

Section 5 provides that (a) except as otherwise provided in this act, any marketing standards prescribed under this act as to any commodity or product shall include such one or more of the following regulations as are found by the director to be necessary to effectuate the declared purpose of this act, and no others:

(1) Limiting, or providing methods for limitation of, the total quantity of any such commodity or product, or of any grade, size or quality thereof, produced during any specified period or periods, which may be marketed or transported for market within this state, during any specified period or periods.

(2) Allotting, or providing methods for allotting, the amount thereof which each handler, processor, or distributor may purchase

from or distribute, process, or handle on behalf of any and all producers thereof, during such period or periods, under a uniform rule based upon the amounts produced or sold by such producers in such prior period as the director determines to be representative, or upon the current production or sales of such producers, or both, to the end that the total quantity thereof to be so purchased, distributed, processed or handled during any specified period or periods shall be apportioned equitably among such producers.

(3) Allotting, or providing methods for allotting, the amount of any agricultural product, or any product thereof, or any grade, size or quality thereof, which each handler or processor may market or transport for market within this state, under a uniform rule based upon the amounts which each such handler or processor has available for current marketing or upon the amounts marketed by each within this state in such prior period as the director finds to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size or quality thereof, to be marketed or transported for market within this state during any specified period or periods, shall be equitably apportioned among all persons marketing the same.

(4) Determining, or providing methods for determining, the existence and extent of the surplus of any agricultural commodity or product thereof, or of any grade, size or quality thereof, and providing for the control and distribution of such surplus and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(5) Establishing, or providing for the establishment of, reserve pools of any agricultural commodity or product thereof, or of any grade, size or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(6) Regulating prices, charges and terms at or for which such commodity, or product, or any grade, size or quality thereof, may be sold by or purchased from or handled for the producer thereof, for processing or resale within this State, and/or at which such commodity or product or any grade, size or quality thereof may be handled, offered for sale or sold within this State at wholesale or at retail.

(7) Regulating the price margins or price spreads of processors, handlers and distributors.

(8) Providing that such commodity or product or any grade, size or quality thereof, shall be sold or offered for sale by the handler thereof only at prices filed thereby with the director in the manner by him prescribed.

(9) Specifying and prohibiting in the handling, marketing and distribution of such commodities or products, or any grade, size or quality thereof, such trade practices or methods of competition as are unfair or fraudulent as to consumers, producers or competitors.

(10) Such further provisions, incidental to and not inconsistent with the foregoing, as may be necessary to effectuate the prescribed standards.

(b) Any price regulation by the director hereunder may include or consist of the establishment of minimum and/or maximum prices; and establishment of minimum and/or maximum margins, markups or spreads; and the establishment of minimum and/or maximum discounts and terms and conditions of sale and purchase. Only such price, price spread, discount, or other term or condition of sale or purchase shall be established or prescribed by the director as is reasonable, taking into consideration, among other factors, the following: Reasonable average cost of production, handling, processing and/or distribution of the commodity or product involved and the amount necessary to produce a reasonable return to the producer, processor, and/or handler, as nearly as the same may be determined; consumptive demand and market conditions, both local and otherwise; and the prices at which available markets may absorb the maximum quantity; prices or costs of other and competitive commodities or products; and proper maintenance of an adequate and reasonably efficient production and marketing system. Such regulations for price spreads, discounts, terms and conditions of sale and purchase may vary in different parts of the State according to varying conditions and costs of production, transportation, processing, manufacturing, marketing, and distribution.

(c) While there shall be in effect under this act any regulation of charges or price or of price spreads, it shall be unlawful for any person to buy or offer to buy, handle or sell, the commodity or product involved at any price, charge or price spread other than in accordance with said regulation; and any method, device or transaction whereby any person buys or offers to buy, handles, sells or offers to handle or sell, at a price, charge, or a price spread other than in accordance with the regulation applicable to the commodity or product or grade, size or quality thereof, whether by discount, rebate, free service, advertising allowance, gift or otherwise, hereby is declared unlawful.

(d) In any exercise of the authority specified in paragraphs (1), (2), (3), and (4) of this section, or any thereof, the total marketable quantity of the commodity involved shall be the greatest quantity which the director shall determine may be so marketed at reasonable prices to the consumers, and at the greatest net returns to the pro-

ducers thereof which are not in excess of the fair exchange value or parity price to the producer, of that commodity: *Provided, however,* That in no event shall such total quantity be less than that necessary to meet the reasonable requirements of the people of this State. In establishment or administration under said paragraphs of any individual marketing allotments or quotas, whether for producers or others, no person shall be precluded from obtaining such quota by reason of not having previously engaged in the production or marketing of the commodity involved.²

TEXAS

Stat. (Vernon, Supp., 1938), art. 5764a
Agricultural Marketing—Citrus

Section 1 provides that this act is intended to eliminate the unreasonable waste and inefficient use of citrus resources in this State, while at the same time preserving to citrus producers of the areas covered by this act an equality of opportunity.

Section 3 provides that Commissioner of Agriculture is empowered to execute marketing agreements and issue licenses to persons engaged in transactions of intrastate commerce.

Section 4 provides that whenever the commissioner has reason to believe the execution of a marketing agreement or issuance of a license will tend to effectuate the declared policy of this act, he shall on his own motion, or upon application of producer of such commodity, hold a hearing within the citrus area and shall hear evidence offered by any interested party.

Section 5 provides that if upon such hearing it shall be found by the commissioner that the following facts actually exist:

1. The supply of citrus fruit available for marketing exceeds or is likely to exceed the demand therefor at prices which will provide a reasonable return to representative producers of such citrus fruits.
2. The return to producers of such citrus fruits will tend to be increased through the operation of the marketing plan.
3. The marketing plan may be operated without permitting un-

² Plaintiffs who processed and distributed 75 percent of butter in Oregon could not maintain an action for declaratory judgment regarding constitutionality of Agricultural Marketing Act, purporting to authorize director of agriculture, under certain conditions, to promulgate and enforce rules and regulations establishing marketing standards, where director had promulgated no rules. Mere existence of act did not of itself create a justiciable controversy. *Oregon Creamery Mfrs. Ass'n. v. White*, 78 Pac. (2d) 573 (1938).

reasonable profits to producers of such citrus fruits and without unreasonably enhancing prices of such citrus fruits to consumers.

4. The plan will tend to advance public welfare and conserve the agricultural wealth of the State by preventing threatened economic or agricultural waste; and will tend to prevent disorderly marketing of citrus fruits. He shall make written findings to that effect and shall enter into a market agreement or agreements and issue licenses, or both. If he shall find against the existence of any of the facts required to be present under this section, he shall not issue such marketing agreement or license.

Section 6 provides that the commissioner shall take the following factors into consideration in making his findings:

(a) The quantity of the various grades, varieties, and qualities of the particular fruit under consideration and available for distribution to consumers in the marketing seasons during which the proposed program is to be effective.

(b) The quantity required by consumers.

(c) Cost of production.

(d) General purchasing power of consumers.

(e) General level of prices of commodities which farmers buy.

Section 7 provides that marketing agreements executed and licenses issued shall contain one or more of the following terms and conditions:

(1) Provide methods for the limitation of the total quantity of fruit produced during a specified period.

(2) Provide methods for allotting the amount of citrus fruits which each handler may market in or transport based upon (a) the amounts which each handler has available for current shipment, or (b) upon the amounts shipped by each handler in such prior period as the commissioner determines to be representative to the end that the total quantity of such fruits to be marketed in or transported shall be equitably apportioned among all the handlers thereof.

(3) Provide methods for determining extent of surplus and provide for the control and disposition of such surplus.

Section 8 provides that additional terms and conditions of marketing agreement shall provide for the selection of a committee with power to make rules and regulations to effectuate the terms and provisions of such license; to receive, investigate, and report to commissioner complaints of violations; to recommend amendments; to collect from each handler a fee representing his pro rata share of such estimated expenses, including expenses incurred in hearings and expenditures to be incurred by administrative agency.

Section 9 provides that no license issued pursuant to this act shall become effective (a) unless the handlers of not less than 51 percent of the volume of the commodity covered by such license or 51 percent of the number of such handlers have assented thereto in writing, and (b) unless and until the commissioner determines that the issuance of such license is approved by at least 66 $\frac{2}{3}$ percent of producers engaged in production of such fruits, or, by producers who during a representative period have produced for sale at least 66 $\frac{2}{3}$ percent of the volume of such fruits produced for market within the area covered by such license.

Section 11 provides that the commissioner upon investigation may terminate or suspend for a specified period the operation of such marketing agreement or license.

Section 13 provides that the commissioner may adopt and enforce all rules, regulations, and orders necessary to carry out the provisions of this act.

Section 14 provides that the commissioner may revoke or suspend the license for violation thereof, and that every person who violates any provision of any marketing agreement or license who after revocation of license engages in a transaction mentioned therein, shall be guilty of a misdemeanor and upon conviction, punished by a fine of not less than \$50.00 nor more than \$500.00 or by imprisonment of not less than 10 days nor more than six months or by both fine and imprisonment.

Any person wilfully exceeding any quota fixed for him under any license shall become civilly liable to the State. Attorney general of State or any district attorney of this State may bring an action for injunction against any person violating any provisions of the marketing agreement or license.

Section 19 provides that the antitrust laws shall be unaffected by this act.

Section 21 provides that this act shall be effective only in areas of any 3 citrus fruit producing counties whose boundaries are contiguous to each other and whose aggregate population is not less than 165,043 inhabitants.³

³ Commissioner of Agriculture threatened to suspend the license of the petitioners to handle citrus fruit because they were alleged to have violated an order made by the commissioner fixing a minimum price for citrus fruit on the tree. Petitioner questioned the commissioner's authority to issue such order. The court held that the Citrus Marketing Act did not authorize fixing of minimum price for citrus fruit on the tree and did not confer the right of price fixing on the Commissioner of Agriculture or authorize him to fix minimum prices on citrus fruits. The orders of the commissioner are void, and therefore declared the orders invalid. *McDonald v. American Fruit Growers*, 126 S. W. (2d) 83 (1939).

SECTION 3
COAL AND FUEL

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COLORADO

Stat. Ann. (Michie, Supp., 1939), c. 11c
Coal

Section 167 (1) provides that the mining and marketing of coal is hereby declared to be a business affected with a public interest. The purpose of this article is to eliminate unfair trade practices in the production and marketing of coal within the State of Colorado.

Section 167 (2) provides that the public utilities commission has jurisdiction to enforce provisions of this article.

Section 167 (3) provides that there shall be two producing districts.

Section 167 (4) provides that the commission shall approve or prescribe a code of fair competition to regulate the sale and distribution of coal produced within the district and shall prescribe the minimum prices for such coal. The commission shall prescribe such orders, rules, and regulations as it finds necessary to carry out the purposes of this article and to maintain conformity of such district codes to the corresponding national codes. The commission may utilize services of agencies created under the National Bituminous Coal Act of 1937.

Section 167 (5) provides that upon approval of the code, the commission shall mail a copy to each coal producer in district.

Section 167 (6) provides that violation of the provisions of this article shall constitute a misdemeanor and shall subject the offender to a fine of not more than \$500.

Section 167 (8) provides that every contract for the purchase of coal shall contain provision that the seller will comply with any code approved by the commission.

Section 167 (11) provides that from and after the effective date of this article and during the continuance here of all contracts made

for the sale of coal in Colorado shall specifically provide that they are subject to the provisions of any code which may be adopted hereunder affecting the price of such coal, and the making of any contract without such provisions shall constitute a violation of this article.

CONNECTICUT

Gen. Stat. (1930)

Fuel

Section 2306 provides that the term "hoard," as used therein, shall mean that any person, firm, or corporation dealing in fuel withholds the same from sale or delivery at a reasonable price during an emergency. The term "profiteer," as used herein, shall mean any person, firm, or corporation which holds for sale, or sells, fuel at an excessive profit, or charges an excessive rate or places unreasonable restrictions or conditions upon the sale, delivery or transportation of fuel.

The section further provides that whenever the governor shall, by public proclamation, declare that an emergency exists because of a fuel shortage the provisions hereof may be enforced from the date of such proclamation until, in like manner, he shall declare the emergency at an end.

During such emergency, no person, firm, or corporation, and no employee of any person, firm, or corporation shall hoard or profiteer in fuel, or hinder or obstruct or in any way interfere with its prompt sale, distribution, or transportation. Each person, firm, or corporation dealing in fuel shall make and keep accurate and complete written record of all transactions concerning the same.

During any emergency, the commissioner, any member of the state police under his direction and any local fire marshal shall have the power to enforce this section.

Any person, firm, or corporation violating any provision of this section shall be fined not more than one thousand dollars or imprisoned not more than six months or both.

MASSACHUSETTS

Ann. Laws (1933) c. 23

Food and Fuel

Section 9E provides that the division [on the necessities of life] shall study and investigate the circumstances affecting the prices of

fuel, gasoline, and refined petroleum products and other commodities which are necessities of life. It may inquire into all matters relating to the production, transportation, distribution, and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices, and the method pursued in the conduct of the business of any persons, firms, or corporations engaged in the production, transportation, or sale, of the said commodities, or of any business which relates to or affects the same. It shall also study and investigate the circumstances affecting the charges for rent of property used for living quarters, and in such investigation may inquire into all matters relating to charges for rent.

Section 9H provides that whenever the Governor shall determine that an emergency exists in respect to food or fuel, or both, he may, with the approval of the council, by a writing signed by him, designate the director of the division on the necessities of life to act as an emergency food or fuel administrator, or both, and thereupon the director shall have, with respect to food or fuel, or both, as the case may be, all the powers and authority granted by the Commonwealth Defense Act of 1917, being chapter 342 of the General Acts of 1917, to persons designated or appointed by the Governor under section 12 of said chapter 342; and the Governor may revoke such written authority at any time. During such an emergency, the Governor, with the approval of the council, may make and promulgate rules and regulations, effective forthwith, for the carrying out of the purposes of this section and for the performance by the Commonwealth and the cities and towns thereof of any function affecting food or fuel authorized under article XLVII of the amendments to the constitution. Violation of any such rule or regulation shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or by both. The provisions of said chapter 342 are hereby made operative to such extent as the provisions of this section may from time to time require.

NEW MEXICO

Stat. Ann. (Courtright, 1929)
Coal and Oil

Section 24-101 provides for the creation of a commission of three members to be appointed by the Governor. The commission is empowered to issue licenses, and make such orders, rules, and regulations as it deems essential to carry out the purposes of this act.

Section 24-102 provides that no corporation shall engage in the business of producing or refining petroleum or coal oil, or products thereof without first obtaining a license from the commission. The section further provides that licenses issued to persons or corporations may be revoked when found guilty of violating sections 1685 (35-2901), 1686 (35-2902), or 1687 (35-2903) dealing with monopolies or acts in restraint of trade.

Section 24-104 provides that no person shall sell, dispose of, or offer to sell or dispose commodities produced or refined as defined in section 24-102, *supra*, without obtaining a license from the commission. Whenever the commission is satisfied that the licensee to whom such license has been granted has entered into any combination with the producer, refiner, or dealer from whom such commodity has been purchased in violation of section 1686 (35-2902) the commissioner is empowered to forthwith revoke such license.

Section 24-108 provides that the commission shall have power to inquire into the cost of production and transportation of the products above mentioned, and from time to time shall fix the minimum and maximum prices at which the same may be sold in the State; and whenever it shall appear that any corporation, its agents or employees are selling such products at less than the minimum price fixed therefor, or for more than the maximum price fixed therefor, such fact shall be deemed evidence of the violation of section 1686 (35-2902), for the purpose of the revocation of any license which may have been granted, and it shall be the duty of the said commission, upon ascertaining such fact, to revoke the license of said corporation.

Section 24-109 provides that it shall be the duty of the attorney general of the State upon the request of said commission, whenever, any corporation, copartnership, or person persists in doing business in said State in violation of the preceding sections, to proceed by injunction to prevent them from so doing, and it shall be the duty of the court to whom such application is made, having jurisdiction thereof, whenever it appears that business is so being unlawfully done, to grant such injunction: *Provided*, That the provisions of the said sections shall not apply to petroleum, coal oil, or the products thereof shipped or transported into this State from any other State or Territory, and disposed of in the original package.

SECTION 4
SERVICE TRADES

ALABAMA

(General Acts of 1935, pp. 746-748)

Section 1 declares that an emergency situation exists among the service trades in this State which effects commerce and the public welfare. Because of ruinous price cutting and widespread unemployment prevailing in the trades it is necessary to authorize the adoption of ordinances providing for fair competition.

Section 2 provides that the act applies only to those trades where personal services are rendered upon a person or persons or their clothing without sale of merchandise as such.

Section 3 provides that in cities whose population is not less than 60,000 nor more than 250,000, the owners of not less than 60 percent of the business establishments in any such service trade may apply to the governing body of such city for the enactment of an ordinance providing for fair competition.

Section 4 provides that the violation of any provision of any ordinance adopted under the provisions of this act shall constitute a misdemeanor. Every day's continuance of such violation shall constitute a separate offense, and each offense is punishable by a fine of not more than \$100 or imprisonment for not more than 30 days.

Section 5 provides that the application for an ordinance providing for fair competition shall state the number of business establishments in such city or town engaged in the trade petitioning for such ordinance.

Section 6 provides that the governing body of the city or town may approve or reject the application for such ordinance. Upon adoption, such ordinance shall regulate the conduct of every person engaged in such service trade within its jurisdiction.¹

¹ A city ordinance fixing minimum prices for barber services pursuant to statute was held valid as not being a justifiable exercise of the police power and as being discriminatory. *City of Mobile v. Rouse*, 27 Ala. App. 343, 173 So. 254 (1937), *aff'd*, 233 Ala. 622, 173 So. 266 (1937). The court held that the legislature exceeded its power in attempting to authorize cities and towns to fix prices for personal services which are not affected with public interest. The service of barbering is not official in character, nor rendered in connection with a business affected with the public interest.

ARIZONA

Rev. Code Ann. (Supp., 1936), amended by L. 1939, c. 38
Barbering Code

Section 2599 (w) creates a state board of barber examiners consisting of three members appointed by the Governor.

Section 2599 (z) 2 provides that the board shall have authority to make all reasonable rules and regulations for the administration of this article and to prescribe any sanitary requirements in addition to those specified herein, in aid or in furtherance of the provisions of this article.

Section 20 (a) added by chapter 38 of 1939 session laws provides:

(a) The board shall have power to establish minimum prices to be charged for barbering, subject to conditions hereinafter prescribed.

(b) Upon receipt of an application and agreement signed by not less than 75 percent of the registered barbers in any district, to establish minimum prices for barbering therein, the board shall set a hearing. Notice of the date and place of such hearing shall be given by the secretary, by registered mail, to every registered barber in such district not less than 10 days prior thereto. The board shall, prior to the hearing, investigate the conditions in such district. At the hearing every barber or other person affected by the proposed agreement may testify or present arguments. After the hearing and investigation, the board may approve or disapprove the agreement as submitted or recommend such changes therein as it may deem proper, including a change of the boundaries of the district, and shall issue an appropriate order. Thereafter, no barber, hair cutter, or apprentice in the district shall charge or collect any price less than that ordered by the board for any barbering work.

(c) The board, upon its own initiative or upon application of 75 percent of the registered barbers affected, may order a new investigation and hearing regarding the minimum prices theretofore established in the district. Such hearing, and any order issued pursuant thereto, shall be subject to the provisions of this section.

(d) In establishing minimum prices for any district, the board shall consider only: (1) reasonableness of the proposed prices; (2) local conditions affecting the relation of the barbering industry to the public health and safety; (3) minimum prices required to provide sanitary services and appliances necessary to minimize danger to public health, and, (4) costs necessarily incurred in such district in maintaining a barber shop in an healthful and sanitary condition.

(e) In this Act, unless the context otherwise requires, "district" means any city, town, or village, or any clearly defined, contiguous

portion thereof or territory in addition thereto, in which two or more barber shops are located.

Section 20 (b) added by chapter 38 of 1939 session laws provides that any person aggrieved by order of the board establishing minimum prices for barbering in any district may appeal therefrom within 20 days after the order complained of by filing notice of the appeal with the clerk of the superior court of the county in which such district is located.

Section 2599 (s) as amended by chapter 38, session laws of 1939, provides that the board shall refuse to issue or renew, or shall suspend or revoke a certificate for the violation of any of the provisions of this act and for a violation of a lawful order of the board regulating the minimum prices to be charged by the registrant.

Section 2599 (v) provides that the violation of any of the provisions of this act shall constitute a misdemeanor, punishable upon conviction by a fine of not less than \$25.00 no more than \$200.00, or by imprisonment not to exceed 30 days, or both.



CALIFORNIA

Gen. Laws (Deering, 1937)

Act 8784 provides that city governments are empowered to establish codes of fair competition on application of 65 percent of the persons engaged in a service trade or industry, including barber shops, beauty shops, cleaning and dyeing plants, rug cleaning plants, and hat renovating establishments, to the governing body of such city or county. Each code shall contain such fair trade practice provisions as conditions in the industry may require.

Violations of any such provisions shall constitute a misdemeanor and persons violating may be enjoined from continuing or threatening to continue such violations. In instituting proceedings for a restraining order, actual damages to the plaintiff need not be alleged or proved. Plaintiff, however, may recover damages actually sustained.²

² An ordinance of city of Bakersfield establishing a code of fair competition for barbers, fixing minimum prices pursuant to statute was held invalid as not being a proper exercise of police power in promoting the "general welfare." The trade of barbers is not "affected with public interest or clothed with a public use." *Ex parte Kacas*, 22 Cal. App. (2d) 161, 70 Pac. (2d) 962 (1937).

COLORADO

Stat. Ann. (Michie, Supp., 1939), c. 36 A
Cleaning and Dyeing Code

Section 1 provides that the industrial commission is given power to regulate the dry cleaning and dyeing industry in the State of Colorado.

Section 7-1 and 2 provide for the creation of a State administrative board of eleven members, six of whom are elected by the members of the six trade areas, one executive chosen by these six members, and four labor commissioners appointed by the industrial commission.

Section 7-3 empowers the board, under rules and regulations laid down by the industrial commission, to control and regulate the cleaning and dyeing trade in the State of Colorado.

Section 10 empowers the industrial commission to make all rules and regulations, orders, findings, and approvals as are deemed necessary to effectuate the purposes of this act.³

Section 7-3 (e) empowers the State administrative board—

(1) To make investigations and surveys in this State relative to determining the fair and reasonable average cost for performing the various services regularly performed by cleaning and dyeing establishments; to submit all findings together with a schedule of minimum retail and wholesale prices based upon such fair and reasonable average costs to the Industrial Commission for approval, and, when approved, said minimum retail and wholesale prices shall be binding on every member of the trade within this State, in that no member of the trade shall sell or offer to sell any of the services included in such minimum price schedule at a price which is lower than the fair and reasonable average cost as established and approved in the minimum price schedule.

(2) It is specifically provided that such minimum prices shall not constitute maximum or highest prices, but, to the contrary, shall constitute the lowest prices, as determined by the fair and reasonable average cost in this State, which can be charged for such services and yet be sufficient to enable the member of the trade (a) to maintain and meet the payment of wages; (b) to maintain minimum standards of quality; (c) to furnish stable employment necessary to maintain

³ An injunction was granted restraining the defendant from violation of L. 1937, pp. 425, 429, Stat. Ann. (Michie, Supp. 1939), c. 36A, *supra*, requiring cleaners and dryers to charge not less than minimum retail prices established by the industrial commission. The constitutionality of the act was not determined since that issue was not sufficiently raised by the pleadings. *People ex rel. Rogers v. Barksdale*, 87 Pac. (2d) 755 (1939).

the trade and further the relief and reduction of unemployment within the industry; and (d) to operate their businesses on a reasonable and average cost basis, including the amount necessary to yield a reasonable return.

(3) The fair and reasonable average cost shall be determined in the following manner: All expenses incurred in the operation and performance of the various services regularly performed by cleaning and dyeing establishments in this state must be considered, including, but not by way of limitation where other expenses exist, every item of expense or cost as set forth in the uniform cost system to be established by virtue of subsection (3) (i) of this section. Such uniform cost reports properly filled in and submitted by the members of the trade shall be used in determining the fair and reasonable average cost.

(4) Any state minimum prices thus established may from time to time be increased or decreased by the Industrial Commission according to changing conditions as evidenced from compilations of information derived from the uniform cost system; it is specifically provided that where the state minimum prices are too low to meet conditions existing in any particular trade area, the local administrative agency of such trade area may petition the State administrative board for such revisions of minimum prices as evidence will substantiate, and when approved by the industrial commission, such minimum prices shall be the effective minimum prices for such trade area.

(5) Immediately after such minimum prices, increases, or decreases have been approved by the Industrial Commission, the State Administrative Board shall take such steps as are reasonably calculated to notify all members of the trade thereof, and such minimum prices shall become effective upon such date as the Industrial Commission shall fix.

(6) It shall prescribe a simple, uniform system of cost accounting, for all cleaning and dyeing establishments in this State, designed to reveal costs incidental to the operation of each establishment; such system shall include, but not by way of limitation, such items as all production costs, all selling and distribution costs, and all office and administrative costs, together with the usual and necessary breakdown of such items into their component items and parts; all members of the trade shall make reports of costs according to such uniform system and within such time as may be required by the State administrative board.

Section 8 declares the following to be unfair trade practices:

(1) Advertising which announces or lays claim to a policy or con-

tinuing practice on the part of the advertiser of generally or regularly underselling competitors.

(2) Representation of any prices or credit term as "special" when they are, in fact, the regular prices or credit terms of the person so representing; also, the creation of the implication that quoted prices apply to completely finished work when in fact they apply to only partially finished work; also, representation or implication, in any manner whatsoever, that the "cash and carry" minimum price is the "call for and delivery" minimum price.

(3) The sale or offer to sell of any service performed by cleaning and dyeing establishments at less than the minimum price established and approved for such service under the provisions of this chapter; also, the sale, or offer to sell, of any such service in, or for delivery to, or for resale in, any trade area at less than the minimum wholesale or retail price, as the case may be, for such service, as established and approved for such trade area under the provisions of this chapter.

Unfair merchandising devices are declared to be:

- (a) Furnishing free work to anyone except a bona fide charity.
- (b) Furnishing free storage to customers.
- (c) Payment of a commission or any other consideration to anyone not a member of the trade or regularly employed by a member of the trade, for the solicitation or procuring of cleaning service: *Provided, however,* That a maximum of ten percent commission may be paid to bona fide clubs or hotels.
- (d) Use of premium, coupon books, and trading stamps in ways which involve commercial bribery in any form: *Provided, however,* That there shall be no discounts or rebates other than as specifically set forth herein.
- (e) The secret payment or allowance to any customer, or to any employee of a customer, of rebates, refunds, remissions of past indebtedness, commissions or discounts, whether in the form of money or otherwise, including extension to particular customers of special services or privileges, false invoicing, and rebates under the guise of allowance for lost, misplaced, or damaged articles.
- (f) Advertising, offering to sell, or selling more than one article for a bulk price of less than the aggregate of the prices of the several articles when sold separately.

Section 9 (3) provides that the attorney general or any district attorney may institute suits to prevent or restrain any violation of any provision of this chapter.

Section 9 (2) provides that any person who violates any provision of this chapter or any rule or regulation of the commission, shall be guilty of a misdemeanor and punished by a fine not to exceed \$500.

DELAWARE

Rev. Code (1935), c. 184
Cleaning and Dyeing Code

Section 6278 provides for creation of a board of five members to be appointed by the Governor for a 5-year term.

Section 6280 is devoted to the functions, duties, and powers of the board among which is to make (1) rules and (2) through such rules control the industry; (3) to grant and revoke licenses; (4) conduct hearings, subpoena witnesses, etc.; (5) act as mediator; and (6) promote interests of public at large.

Section 6281 provides for licensing those engaged in the business of cleaning and dyeing and payment of annual fees.

Section 6282 provides for disposition of money for administration of act.

Section 6283 make dealers and owners liable for damages as insurers.

Section 6285 provides for penalties for violations.⁴

FLORIDA

Comp. Gen. Laws Ann. (Skillman, Supp. 1940)
Dry Cleaning and Laundry Code

Section 4151 (444) creates the Florida dry cleaning and laundry board of seven members to be appointed by the Governor.

Section 4151 (445) empowers the board to supervise and regulate the entire cleaning, dyeing, pressing, and laundry industry of the State of Florida and to fix minimum and maximum prices or either for rendering of services in separate trade areas in connection with the industry.

Section 4151 (449) provides that the Florida dry cleaning and laundry board shall have the power to make all reasonable rules and regulations for the enforcement of this act.

Section 4151 (447) provides that before establishing any trade area or fixing any prices to be charged for various services to be performed or rendered by the industry herein regulated, or in altering or amending the same, the board shall hold a public hearing

⁴ In certiorari proceedings following a conviction for violating the act regulating the cleaning, pressing, and dyeing business, it was held that the statute authorizing the regulation and licensing of the cleaning business and creating a trade board with authority to promulgate regulations containing price control provisions was in violation of the due process provisions of the U. S. Constitution, since such industry was not so affected with public interest as to justify such regulations. *Becker v. State*, 37 Dela. 454, 185 Atl. 92 (1936).

for such purpose in the area to be affected after giving reasonable notice in some newspaper of the general circulation in said area: *Provided*, The board may on its own motion, and without hearing correct any errors inadvertently made in any of its orders previously issued.

In establishing prices the board shall take into consideration the rights of the general public, the reasonable and necessary expense and overhead of the industry herein regulated in rendering efficient and sanitary service with modern equipment and efficient operation, together with the allowing for such reasonable overhead expense including reasonable compensation for labor and the fixing of such reasonable charges as will permit the business herein regulated to be conducted so as to provide the public with safe and sanitary service at a reasonable price while enabling the efficient proprietor of such business to continue in business with a fair return on the actual reasonable investment made therein. Different prices may be reasonably fixed for different trade areas as the same may be established by the board.

After the board shall have fixed prices to be charged or paid for the various classes of service regulated under the provisions hereof, it shall be unlawful for any person, firm, or corporation to knowingly sell, charge, or offer to sell, collect, or charge any different price, or less than such price or prices as shall be applicable to the particular transaction under the rules and orders of this board in reference thereto, and no method or device shall be lawful whereby any such service may be done, charged for, offered, or sold at or for a price less or different from such prices as shall be applicable to the particular transaction hereunder as established by order of such board, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such service, together with another commodity or commodities or service or services which is less or more than the aggregate for the prices for such service, and the price or prices for such other commodity or commodities or other service or services, when sold or offered for sale separately or otherwise, or by the payment of any abnormally high rate of commission to any employee under such conditions as would encourage such employee to rebate the customer part of such commission as an inducement for the procuring of such trade and custom.

It shall further be unlawful for any person, firm, or corporation to knowingly aid, encourage, or abet any violation of this law or any order of this board whatever, or by the use of any advertising medium of any character or description whatever, on pain of being subject to be temporarily enjoined without notice.

Also, section 4151 (452) provides that all rules and regulations, including those fixing prices, shall be incorporated in a written order, approved and signed by a majority of the board. The same section provides that in addition to other remedies or criminal prosecution, the board shall also have authority to revoke or suspend the license of any person, firm, or corporation knowingly violating any rule or order of the board.

Section 4151 (454) provides that any person deeming themselves aggrieved by any action of the board, may, within 30 days, file a bill of complaint in the circuit court and seek to obtain relief in equity.

INDIANA

Stat. Ann. (Burns, Supp., 1939)
Barbering Code

Section 63-330 provides that whenever a scale of minimum prices for barber services shall be submitted to the State board of barber examiners by any organized and representative group of barbers, after such scale has been agreed upon and signed by at least eighty (80) percent of the barbers licensed by said board and operating in each city or town within any trade area, limited and defined in the scale, the State board of examiners shall have power to approve such agreements and to declare and establish within such trade area, by official order, the minimum prices for any and all work or service usually performed in barber shops.

Before approving such agreements the board, within thirty (30) days after such schedule is submitted, shall determine by investigation, whether such suggested prices are reasonable and sufficient to enable barber shops in such trade area to operate in keeping with the purposes of this act in minimizing danger to the public health and safety incident to such work.

In determining reasonable minimum prices, the board shall take into consideration the necessary costs incurred in the particular trade area in maintaining barber shops in a clean, healthful, and sanitary condition. If the board shall find after investigation that the minimum prices fixed in any such trade area are insufficient to provide adequate service for protecting the public health and safety, or that such prices are excessive or unreasonable such agreement shall not be approved.

Section 63-332 provides that all orders of the board approving schedules of prices to be charged shall remain in force and effect for a

period of one year after date of such order and shall be renewed annually unless rescinded, modified, or replaced.

Section 63-338 provides that the board may decline to grant or may suspend or revoke a barber's license when satisfied that such person has violated any of the provisions of this act.

IOWA

Code (1939)

Section 5786.1 authorizes the adoption of ordinances by municipalities providing for fair competition applicable to trades in which services are rendered upon a person or persons without necessarily involving the sale of merchandise and in which there has been ruinous price cutting.

Section 5786.3 provides that owners, operators, or managers of not less than 65 percent in towns under 2,500 and of 70 percent of business establishments in towns of over 2,500 population may apply to the governing body of such city or town for enactment of an ordinance providing for fair competition for such trade within the city or town.

Section 5786.4 provides that the violation of any provision of any ordinance adopted under the provisions of this chapter shall constitute a misdemeanor and every day's continuance of such violation shall constitute a separate offense punishable by a fine of not more than \$100 or imprisonment of not more than 30 days.

Section 5786.6 provides that the governing body of city or town may reject or approve application for ordinance in whole or in part.⁵

LOUISIANA

Gen. Stat. Ann. (Dart. 1939), tit. 62
Barbering Code

Section 9389.1 provides that the act is enacted in exercise of the police power of the State to protect the public welfare, public health, and public safety. Unfair and uneconomical trading practices have

⁵City of Des Moines adopted an ordinance setting minimum prices to be charged by barbers pursuant to authorization of statute. The court held that the statute and ordinance were invalid as being violative of the due process provisions of the Federal Constitution. On the authority of *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923), the court held the legislature lacked the power to fix prices of trades unaffected with public interest. *Duncan v. City of Des Moines*, 222 Iowa 218, 268 N. W. 547 (1936).

been and are being carried on in the operation of barber shops the act declares to the extent that prices have been reduced to the point where it is impossible for an average barber to maintain safe and healthful bargering service.

Section 9389.3 provides that the barber board is authorized and empowered to act as a control board to administer this law.

Section 9389.5 provides that the board may adopt all rules and orders necessary to carry out the provisions of the act.

Section 9389.9 provides that the board may decline to grant a license, or may suspend or revoke any such license if granted, when satisfied that any person has violated the provisions of the act.

Section 9389.12 provides that the board shall have the power to approve price agreements establishing minimum prices for barber work, signed and submitted by any organized groups of at least 75 percent of the barbers of each judicial district, after ascertaining by such investigations, and proofs as the conditions permits and requires, that such price agreement is just, and under varying conditions, will best protect the public health and safety, by establishing a sufficient minimum price for barber work to enable the barbers to furnish modern and healthful services and appliances so as to minimize the danger to the public health incident to such work. The board shall take into consideration all conditions effecting the barber profession in its relation to the health and safety.

In determining reasonable minimum prices, the board shall take into consideration the necessary costs incurred in the particular judicial district in maintaining a barber shop in a clean, healthful, and sanitary condition.

If the board after investigation, made either upon its own initiative or upon the complaint of a representative group of barbers, determines that the minimum price so fixed is insufficient to properly provide healthful services to the public and keep the shops sanitary, then the board from time to time shall have authority to vary or refix the minimum prices for a barber's work in each judicial district.

Section 9389.8 provides that violations of any provisions of the act or order of the board lawfully made pursuant thereto shall be a misdemeanor punishable by a fine of not less than \$25 and not exceeding \$300, or by imprisonment not exceeding 6 months, or both.*

*The operation of barber shops was held to be so related to the public welfare, health, and safety as to be subject to regulations under the State's police power. Such regulations properly include the fixing of prices since a substantial relation exists between minimum price regulation and sanitation and hygiene standards. *Board of Barber Examiners of Louisiana v. Parker*, 190 La. 214, 182 So. 486 (1938). See also *State of Louisiana v. Guchereau*, 190 La. 306, 182 So. 515 (1938).

MINNESOTA

Stat. (Mason, Supp., 1940)

Section 5705-31 provides that upon application to the Governor for relief from unfair competition and unfair trade practices in the service trades licensed and regulated by the State for the safeguard of the public health, the Governor is directed to prescribe reasonable rules, regulations, or standards, to prevent unfair competition and unfair trade practices, to establish maximum hours, minimum wages, and working conditions, and to create trade areas. "Personal services" does not include services of persons licensed or registered by the State to practice any of the healing arts.

Section 5705-32 provides that such application shall be made by not less than 65 percent of all such persons in such trade in any municipality or subdivision of the State or in any trade area created thereunder and such rules shall be prescribed and approved by the Governor after reasonable public notice and hearing.

Section 5705-33 provides that upon the approval of such rules all persons and corporations engaged in the trade shall be bound thereby.

Section 5705-35 provides that all orders of the Governor modifying and prescribing rules are subject to review by the district court.

Section 5705-37 provides that any person who violates any of the sections of the act shall be guilty of a misdemeanor.⁷

MONTANA

Rev. Code Ann. (Anderson and McFarland, 1935) and (Anderson and McFarland, Supp. 1939)

Barbering Code

Section 3228.24 provides for a board of barber examiners consisting of three members appointed by the Governor.

Section 3228.21 (H) provides that the examiners may either refuse to issue or renew or may suspend or revoke any barber shop or barber school, or college license for specified causes.

Section 3228.21 (I) provides any applicant whose license has been refused, suspended, or revoked by the board may, within 10 days, file a petition in the district court in the county in which he resides.

⁷A conviction for charging less for haircutting than the price fixed by the Governor, pursuant to statute, was sustained. The court held that the fixing of prices is a proper exercise of the police power which was not unlawfully or unduly delegated to the Governor. *State v. McMasters*, 204 Minn. 438, 283 N. W. 767 (1939).

Section 3228.27. * * * The board of barber examiners shall have power to approve price agreements, establishing minimum prices for barber work, signed and submitted to the board of barber examiners by any organized group or groups of at least 75 percent of the barbers in any city or town, within the State of Montana, should the board of barber examiners, after ascertaining by such investigations and proofs as the condition permits and requires, find that such price agreement is just and under varying conditions will best protect the public health and safety by affording a sufficient minimum price for barber work to enable the barbers to furnish modern and healthful services and appliances so as to minimize the danger to the public health incident to such work. For the purpose of this act, a city or town shall be deemed to include, in addition to the territory within its legal limits, the territory adjacent to it and lying within three miles of said legal limits. In determining whether any such price agreement is just and will best protect the public health and safety, the board shall take into consideration all the conditions affecting the barber business in its relation to the public health and safety.

In determining reasonable minimum prices the board of barber examiners shall take into consideration the necessary cost incurred in the city or town in maintaining a barber shop in a clean, healthful and sanitary condition.

The board of barber examiners, after making such investigation, shall fix by official order the minimum price for all work usually performed in a barber shop within the city or town in which such price agreement has been signed. The board of barber examiners may, upon the petition of 50 percent of the barbers of the said city or town readjust the minimum prices and such new prices must be approved by 75 percent of the barbers in the city or town, providing that any apprentice barber shall charge not less than 50 percent of the approved price in the said city or town: *Provided, further,* That this section shall not apply to students who have been enrolled less than six months in any barber college in the State of Montana or until they become apprentice barbers.

The board of barber examiners shall have authority to make necessary rules and regulations for the administration of the provisions of this act not inconsistent with this act nor the laws of the State.

Section 3228.28 provides that any person practicing the occupation of a barber without first having obtained a license, as provided in this act, or any person knowingly employing a barber who has not obtained such a license, or any person who falsely pretends to be qualified to practice such occupation under this act, and any person

who violates 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 less than twenty-five (\$25.00) dollars nor more than two hundred (\$200.00) dollars, or imprisonment in the county jail for not less than ten (10) days nor more than ninety (90) days, or both. In addition to the penalty hereinbefore prescribed, the board of barber examiners may, after hearing, suspend or revoke any barber's certificate of registration, or license to operate a barber shop, school or college, or both by reason of any person wilfully violating this act or persistently failing to conform to the lawful rules and regulations promulgated by the board of barber examiners.

NEW MEXICO

Stat. Ann. (Courtright, Supp., 1938)
Cosmetology

Section 123-115 provides for the creation of a State board of cosmetologists consisting of three members who are appointed by the Governor.

Section 123-204 empowers the board to supervise and regulate the cosmetology and beauty culture industry in the State of New Mexico.

Section 123-205 empowers the board to adopt and enforce all rules and orders necessary to carry out the provisions of this act.

Section 123-212 provides that the board shall have the power to approve price agreements establishing minimum prices for cosmetology and beauty culture work, signed and submitted by any organized groups of at least 75 percent of the cosmetologists and beauty culturists of each judicial district, after ascertaining by such investigations and proofs as the conditions permit and require that such price agreement is just and, under varying conditions, will best protect the public health and safety by affording a sufficient minimum price for cosmetology work to enable the cosmetologists and beauty culturists to furnish modern and healthful services and appliances, so as to minimize the danger to the public health incident to such work.

The board shall take into consideration all conditions affecting the cosmetology and beauty culture profession in its relation to the public health and safety.

In determining reasonable minimum prices, the board shall take into consideration the necessary costs incurred in the particular judicial district in maintaining a beauty shop in a clean, healthful, and sanitary condition.

The board, after making such investigation, shall either approve or disapprove such agreement, and if same is approved, shall by official order fix the minimum prices set forth in such agreement as the minimum price for all work in such beauty shops.

If the board after investigation made either upon its own initiative or upon the complaint of a representative group of cosmetologists and beauty culturists, determines that the minimum prices so fixed are insufficient to properly provide healthful services to the public and keep the shops sanitary, then the board shall have power to vacate any order theretofore entered approving any such agreement and require the submission of new agreements for its approval.

Section 123-209 provides that the board may decline to grant, suspend, or revoke a license when satisfied that any person has violated the provisions of this act.

Section 123-209 (a) provides that any person deeming himself aggrieved by any action of the board may file a petition in the district court to reverse, vacate, or modify the order complained of.

Section 123-208 provides that a violation of any provisions of this act or of any rule, subpoena, or order of the board lawfully made pursuant hereto, except as otherwise expressly provided by this act, be a misdemeanor punishable by a fine of not less than twenty-five (\$25.00) dollars and not exceeding one hundred (\$100.00) dollars, or by imprisonment not exceeding six (6) months, or both, and each day during [which] such violation shall continue, shall be deemed a separate violation.

The board may institute such actions in the courts of competent jurisdiction as may appear necessary to enforce compliance with any provision of this act, or to enforce compliance with any rule, subpoena, or order of the board made pursuant to the provisions of this act, and in addition to any other remedy may apply to any district court of competent jurisdiction for relief by injunction.

OKLAHOMA

Stat. Ann. (1936), tit. 59
Barbering Code

Section 61 provides for the creation of a State board of barber examiners which shall consist of four members appointed by the Governor.

Section 68 empowers the board to make such rules and regulations as may be necessary to enforce the provisions of this act.

Section 94 (a) empowers the board to supervise and regulate the barbering industry in the State.

Section 102 provides that (a) the board shall have the power to approve price agreements establishing minimum prices for barber work, signed, and submitted by any organized groups of at least seventy-five per centum (75%) of the duly licensed, registered and practicing barbers of any city or town of one thousand (1,000) population or more according to the last Federal Decennial Census, after ascertaining by such investigations, and proofs as the condition permits and requires, that such price agreement is just, and under varying conditions, will best protect the public health and safety by affording a sufficient minimum price for barber work to enable the barbers to furnish modern and healthful service and appliances, so as to minimize the danger to the public health incident to such work.

The board shall take into consideration all conditions affecting the barber profession in its relation to the public health and safety.

In determining reasonable minimum prices, the board shall take into consideration the necessary costs incurred in the particular city or town affected by this act in maintaining a barber shop in a clean, healthful and sanitary condition.

(b) The board, after making such investigation, shall fix, by official order, the minimum price for all work usually performed in a barber shop.

(c) That if the board, after investigation made either upon its own initiative or upon the complaint of a representative group of barbers, determines that the minimum prices so fixed are insufficient to properly provide healthful services to the public and keep the shops sanitary, then the board from time to time shall have authority to vary or refix the minimum prices for a barber's work in each city or town affected by this act.

Section 99 provides that the board may decline to grant, suspend, or revoke a license, when satisfied that the provisions of this act have been violated.

Section 98 provides that a violation of any provision of this act or of any rule, when a written certified copy of said rule has been served upon the person violating said rule, subpoena, or order of the board lawfully made pursuant hereto, except as otherwise expressly provided by this act, shall be a misdemeanor punishable by a fine not less than twenty-five (\$25) dollars and not exceeding three hundred (\$300) dollars, or by imprisonment not exceeding six (6) months, or both.

The board may institute such actions in the courts of competent

jurisdiction as may appear necessary to enforce compliance with any provision of this act or to enforce compliance with any rule, subpoena, or order of the board made pursuant to the provisions of this act, and in addition to any other remedy may apply to any district court of competent jurisdiction for relief by injunction.*

TENNESSEE

Barbering Code⁹

Section 7134 provides for the creation of a board of barber examiners, to consist of three members appointed by the Governor.

Section 7139 (4) to 7139 (7) grants to the board power to regulate and supervise the barbering industry of the State, which powers are additional to the powers already granted the board under the public health laws, State sanitary code and the State barber law. The board may adopt and enforce all rules and orders necessary to carry out the provisions of this law and may conduct investigations in accordance with rules and regulations that it may promulgate.

Section 7139 (12) provides that the board shall have the power to approve price agreements establishing minimum prices for barber work, signed, and submitted by any organized groups of at least 75 per centum of the barbers of each county, after ascertaining by such

*On application for a writ of prohibition to restrain a district judge from making any further orders on an injunction brought by board of barber examiners of State against plaintiff to restrain him from charging prices less than those fixed by the board, the court found that a reasonable relation existed between the price-control feature of the law and public health since shops cutting prices cannot meet sanitary standards, and denied the application. Power to fix prices was not unlawfully delegated to an unnamed board. Reference was made to the fact that *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 349, 67 L. Ed. 785 (1923), was overruled. *Herrin v. Arnold*, 183 Okla. 392, 82 Pac. (2d) 977 (1938). See also *Jarvis v. State Board of Barbers*, 183 Okla. 527, 83 Pac. (2d) 560 (1938).

The statute does not authorize enforcement of prices recommended by unofficial groups and in consequence order committing petitioner for violating injunction procured by board of barber examiners restraining petitioner from cutting prices below those recommended by an unofficial association was therefore held void for lack of jurisdiction. *Es parte Tennyson*, 184 Okla. 50, 84 Pac. (2d) 637 (1938).

*The validity of statute authorizing the State board of barber examiners to fix minimum price of barber work in the several counties of the State was challenged. The court held that the act is a denial of due process and equal protection of the laws. The only appropriate way in which the legislature can protect the public health or promote the public welfare in the barbering industry is to establish sanitary requirements. The case was held distinguishable from the *Nebbia* case. In the latter, price cutting by the competitors in the milk business was producing waste, harmful to the public, was threatening ultimately to cut off the supply of milk and to destroy the industry itself, and thus to affect most disastrously the public welfare. That situation is far from the situation in the case under consideration. *State v. Greeson*, 124 S. W. (2d) 253 (1939).

investigations, and proofs as the condition permits and requires, that such price agreement is just, and under varying conditions, will best protect the public health and safety by affording a sufficient minimum price for barber work to enable the barbers to furnish modern and healthful services and appliances so as to minimize the danger to the public health incident to such work.

The section further provides that the board shall take into consideration all conditions affecting the barber profession in its relation to the public health and safety.

The section finally provides that in determining reasonable minimum prices the board shall take into consideration the necessary costs incurred in the particular county in maintaining a barber shop in a clean, healthful, sanitary manner. The board, after making such investigation, shall fix by official order, the minimum price for all work usually performed in a barber shop. If the board after investigation, made either upon its own initiative, or upon the complaint of representative groups of barbers, determines that the minimum prices so fixed are insufficient to properly provide healthful services to the public and keep the shops sanitary, then the board, from time to time, shall have authority to vary or to refix the minimum prices for a barber's work in each county.

Section 7139 (9) provides that the board may decline the grant or may suspend or revoke a license, when satisfied that any such person has violated the provisions of this law. This section further provides that any person aggrieved by any action of the board taken under any provision of this law, may appeal to the circuit court.

Section 7139 (8) provides that the board may institute such actions as may appear necessary to enforce compliance with this law and in addition to any other remedy may apply to the circuit court for injunctive relief.

This section further provides that a violation of any provision of this law or any rule, subpoena or order of the board shall be a misdemeanor punishable by a fine not less than twenty-five (\$25.00) dollars and not exceeding three hundred (\$300.00) dollars or by imprisonment not exceeding 6 months, or both, and each (day) of such violation shall be deemed a separate violation.

WISCONSIN

Rev. Stat. (1939)

Service Trades

Section 100.205 provides that (1) (a) The department shall appoint a trade practice examiner not subject to chapter 16, who shall, after

investigation and public hearing, issue by order such standards, with written reasons therefor, as are necessary or convenient to eliminate unfair methods of competition or unfair trade practices in the cleaning and dyeing, barber, cosmetician, and shoe rebuilding trades and amend or revoke by order any standards previously issued by him.

(b) The department may modify or set aside any action taken by the examiner respecting the issuance, amendment or revocation of standards, or his refusal to issue, amend, or revoke standards. Such action may be taken by the department upon its own motion or upon appeal to it by any aggrieved party within twenty days after action by the examiner. Review of the examiner's action shall be on the record and the department may remit the same to the examiner for further evidence, proceedings or action by the examiner. The department, in reviewing the action of the examiner, may adopt, modify, or change the written reasons assigned by the examiner for such action, based upon the record of the proceedings, and confirm the action taken by the examiner based on the written reasons assigned by the examiner or on the written reasons as modified or changed by the department.

(c) Judicial review of orders and denials of orders of the department under this section may be had in the manner provided for review of orders of the industrial commission as provided in chapter 102 of the statutes of 1937 so far as applicable except that instead of the review being by the circuit court of Dane county it shall be by the circuit court of the county where the cause of action that gave the department jurisdiction arose.

(2) (a) The department shall appoint an advisory committee for each of the service trades covered by this section. Such committees shall consist of three members of the trade for which the advisory committee is appointed, one representative for the workers employed in the trade, and one consumer representative. Appointments to the advisory committee shall not be subject to chapter 16, and membership therein shall expire on January thirty-first, of each year. The committee shall meet at least once a month upon call of the examiner, and the members thereof shall be paid seven and a half dollars per day for the attendance of meetings and their expenses.

(b) Upon the issuance of standards, the department shall appoint and employ a deputy examiner for the trade covered by the standards. The individual so employed shall be one experienced in the trade covered by said standards, and his employment shall not be subject to chapter 16. The deputy examiner so appointed shall receive such compensation as may be fixed by the department and shall devote his full time to the enforcement and administration of the standards for the trade for which he is appointed, subject to the direction of the

examiner and the department, and perform such other duties respecting said trade as may be delegated to him by the examiner and the department.

(3) (a) Unreasonably low wages, unreasonably long or inappropriate work or shop hours, other unreasonably burdensome or hazardous labor conditions, and selling below reasonable cost, are severally expressly declared to be, among others, unfair methods and practices.

(b) For standards of hours, wages, and other labor conditions, the industrial commission shall name a member of its staff who shall act with the examiner, and the commission shall act with the department under paragraph (b) of subsection (1).

(c) For pertinent reasons, and within the limitation of this section, standards may classify persons, places, and other things, and delimit areas of natural competition in the trade, and the examiner, by like procedure and subject to like review, may make specific exemptions.

(d) No standards shall be issued or continued in any area where it is impracticable of enforcement.

(e) No standard tending to promote monopoly, oppress, or discriminate against small enterprises, or unreasonably burden consumers, shall be issued or continued.

(f) Standards may affect interstate commerce to the extent of State power.

(4) (a) Standards, and the amendment or revocation thereof, shall become effective upon publication, or at a later date specified in the standards, amendment, or revocation.

(b) Any court having any equity jurisdiction may enjoin violation of the provisions of this section or the violation of any standard issued thereunder.

(c) Any defendant may have a jury trial in any criminal or contempt proceeding.

(d) Violation of any provision of this section or any standard promulgated or issued thereunder, shall be punishable by a fine of not less than five nor more than one hundred dollars, or by imprisonment in the county jail for not less than five nor more than ninety days, or both.

(5) (a) It shall be the duty of the examiner, under the supervision of the department, to administer and enforce this section, including the prosecution and defense of legal proceedings, in which at his request the attorney-general and district attorney shall assist.

(b) After a standard issued under this section has been in force for sixty days, and as long as a standard issued under this section shall be in force, for any trade covered by this section, no service, sales or distribution business in such trade in any area subject to such standards

shall operate or solicit business directly or indirectly in such area without annual license. Said license shall be issued by the department upon application on a form which shall be provided therefor by the department. The license shall be issued if the applicant shall supply the department with all necessary information required by it on the application blank, and shall have agreed in writing to comply with all lawful standards issued under this section, and shall have paid the required fee therefor. If the trade is subject to a license requirement under any other statute, the state agencies may co-operate in using a joint application and license and collecting a combined fee.

(c) Assessments or license fees to be paid under this section shall be fixed by standards issued after hearing, upon an equitable basis. They shall be such as to enable the department to defray the expense of investigating, administering and enforcing standards for the affected trade. They shall be at a rate which shall in no event aggregate, for the trades as a whole, in any year, commencing August 1, 1939, more than the following: Cleaning and dyeing, seventeen thousand dollars; barber, twenty-one thousand dollars; cosmetician, twenty-five thousand dollars; shoe rebuilder, six thousand five hundred dollars. Refunds of advances, overpayments and of moneys in the treasury upon the revocation of standards for the trade may be made by direction of the examiner.

(d) The department may accept such voluntary services, contributions and advances against fees as will not prejudice the public interest.

(6) (a) The provisions of this section shall not apply to any county having a population of thirty thousand or less by the last federal census, or to any town, city or village having a population of five thousand two hundred or less by such census. Such territory shall be known as noncode area. Provided that if the provisions of this paragraph as to counties is invalid, the provision shall be that standards are prima facie not necessary or convenient in any county of not more than thirty thousand population by the last federal census unless by reason of proximity to a county of greater population unfair competition would result, and that if the provision of this paragraph as to towns, cities and villages is invalid the provision shall be that standards are prima facie not necessary in any town, city or village of not more than five thousand two hundred population by such census unless by reason of proximity to a municipality of greater population unfair competition would result; provided that in any event no standards shall be effective in any such county or in any such town, city or village other than those in a county having a population of five hundred thousand or more unless such standards are approved by a majority of the electors voting thereon in such county or town, city or village.

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Provided further that in judicial review of orders or denials of orders under this paragraph, the court shall have the same powers as the department under paragraph (b) of subsection (1). Each provision of this paragraph is expressly declared to be severable.

(b) Every person having its principal Wisconsin place of business in a code area shall maintain code prices on all business solicited or done in the state, and every person having his principal Wisconsin place of business in a noncode area shall maintain code prices on all business solicited directly or indirectly or done in a code area. Provided that if any provision of this paragraph shall be invalid, this section shall be in force without such provision.

(7) Provisions and limitations of this section, whether or not in the same subsection or sentence, or express or implied, all are severable from each other and as to different persons, things and circumstances.

Section 100.21 provides that any person who shall suffer pecuniary loss because of a violation by any other person of any order issued under above section may sue such person for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

CHAPTER TWO

LEGISLATIVE PRICE FIXING

SECTION 1

LEGAL NOTICES • OFFICIAL ADVERTISING

COLORADO

Stat. Ann. (Michie, 1935), c. 130

Section 7 provides that for the publication of all legal notices or advertisements required by law or the order of any court of record in this State to be published in newspapers, the publishers thereof shall be entitled to receive seven cents for each column line of nonpareil, or smaller type, measure not less than twelve ems (pica) wide, for the first insertion, and four cents per line for each subsequent insertion. All emblems, display headings, rule work, and necessary blank space shall be calculated as solid type, and twelve lines shall be counted to the inch.

The clerk of any court in the State or any public trustee, county treasurer, or other public officer required by law to publish legal notices or advertisements shall tax the cost of publishing such notices or advertisements, as prescribed in this section, as part of the costs of such cause or proceeding and shall collect for such publication before such cause or proceeding is closed and shall remit to the publisher the proper cost of such legal notices or advertisements.

Section 8 provides that publishers of newspapers in this State shall be entitled to receive the following fees: For the publication of all legal advertising in newspapers required to be done by law in this State, publishers shall be paid at the rate of seven cents for each line of nonpareil, measure thirteen ems (pica) wide, for the first insertion, and four cents for each subsequent insertion. In ascertaining charges under the provisions of this law, twelve lines shall be counted to the inch, and all emblems, display headings, rule work, and necessary blank space shall be paid for as if solid type.

And any public or municipal officer or board created by or existing under the laws of this State that has now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements, is hereby authorized, subject to other limitations on said authority, now imposed by law, to agree to pay therefor prices not exceeding said rates.

IDAHO

Code Ann. (1932)

Section 58-105 provides that the rate to be charged for all official notices published in any newspaper is to be one dollar per vertical inch, single column measure, consisting of not less than ten lines in nonpareil type or its equivalent, or sixty words to the inch, for the first insertion; and fifty cents per inch for each subsequent insertion. For table or figure matter, one dollar and fifty cents per vertical inch, consisting of not less than ten lines in nonpareil type or its equivalent, and seventy-five cents for each subsequent insertion; fractional inches to be charged for pro rata: *Provided*, That no charge is to be made for less than an inch in any case.

IOWA

Code (1939)

Section 11106 provides that the compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed one dollar for one insertion and fifty cents for each subsequent insertion, for each ten lines of brevier type. In case of controversy regarding measurements the question is to be referred to the State printing board for final decision.

MICHIGAN

Stat. Ann. (Henderson, 1936)

Section 27.2562 provides that for publishing any legal notice or any order, citation, summons, or any other proceedings or advertisement

required by law to be published in any newspaper, the cost of publishing such advertisement shall not exceed the rate of one (1) dollar and twenty (20) cents per folio for the first insertion and sixty (60) cents per folio for each subsequent insertion: *Provided*, That any newspaper publishing for the State of Michigan any such advertisement other than tax lists and those arising in the course of judicial proceedings shall be permitted to charge therefor its regular established commercial rate in effect at the time such notice or advertisement is published.

NEW JERSEY

Rev. Stat. (1937)

Sections 35:2-1 to 35:2-3 provide that the price to be paid for publishing all official advertising in newspapers be as follows:

(a) In newspapers published in cities of the first and second classes, or counties of the first, second, third, and fifth classes, twelve cents per agate (or 5½ point) line for the first insertion and ten cents per agate line for each subsequent insertion;

(b) In all other newspapers, ten cents per agate or nonpareil (or 6 point) line for the first insertion and eight cents for each subsequent insertion.

In computing the charge per line the lines are to average at least six words, but date lines, paragraph endings, titles, signatures, and similar short lines are to be computed as full lines where set to conform to the usual rules of composition. The price fixed for "subsequent insertions" apply only to subsequent consecutive insertions.

NEW MEXICO

Stat. Ann. (Courtright, 1929)

Sections 113-101 and 113-102 provide that the legal rate for the publication of all notices and other matters required by law to be made shall be thirty (30) cents per hundred ems of the type in which the notice of publication is set, for the first insertion thereof, and twenty (20) cents per hundred ems of the type in which the notice or publication is set for each subsequent insertion. Any publisher of any newspaper who charges or exacts rates higher than those specified in this chapter, shall be guilty of a misdemeanor and

upon conviction thereof shall be punished by fine of not less than one hundred dollars, nor exceeding five hundred dollars.

Section 113-104 provides that the legal rate for the publication of delinquent tax lists shall be not to exceed seven cents per line of eight-point type, 13 pica ems wide, for the first insertion and four cents for each subsequent insertion; and that the legal rate for all other legal publications, required by law to be published, or ordered published by any State, county, municipal, district, educational, or other public official, or by any commission, board, or other public body, at public expense; and all other notices required by law to be published at either public or private expense shall be not to exceed eight cents per line of eight-point type, 13 ems pica wide, for the first insertion and five cents per line for each subsequent insertion.

PENNSYLVANIA

Stat. Ann. (Purdon, 1931), tit. 45

Section 5 provides that all official and legal advertising shall be charged for at an established or declared rate or price per single column, line of reading matter measured in depth by the point system, or at a rate or price per inch single column. When such official and legal advertising is not classified, and is not published according to prescribed or recognized forms, and no rate has been established or declared, such rate for official and legal advertising shall not be in excess of the rates usually charged or received by the newspaper publishing such official and legal advertising for commercial, general, or other advertising: *Provided*, Where official and legal advertising is usually and ordinarily published according to recognized or prescribed forms, or particular matters are itemized and classified under general headings, this act should not be construed to prohibit the fixing of definite prices or sums for publishing official and legal advertising, regardless of the number of single column lines or space required for each item, notice, or advertisement published in any separate matter or proceeding, and regardless of rates established, fixed, charged or received for commercial, general or other advertising. The purpose of this provision is to enable newspapers to take into consideration, as elements, when fixing advertising rates or charges, location of the advertisement in the newspaper, the purpose to be served, the character of the advertising, and that a newspaper is entitled to compensation for its readiness at all times to render an advertising service.

SOUTH DAKOTA

Comp. Laws (1939)

Section 65.0512 provides that in all cases where any legal publication of anything is required or allowed by law, and no other fee is prescribed for such publication, the maximum fee which may be charged for said publication shall be as follows:

Eight cents per counted line of six point type for the first insertion and six cents per counted line of six point type for each subsequent insertion; six cents per counted line of eight point type for the first insertion and five cents per counted line of eight point type for each subsequent insertion; a line within the meaning of this section being the standard column width of 2 inches or the equivalent thereof. When matter is required to be set in tabulated form, with two or more justifications, the rate shall be one and one-half times the rates named in this section. In all cases of publication of notices in connection with sales upon execution the plaintiff may designate the newspaper, published within the county, in which such notice shall be published.

Section 65.0507 provides that the affidavit of publication of all notices required by law to be published shall contain a statement that the full amount of the fee charged for the publishing of the same inures to the benefit of the publisher or publishers thereof; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever, and every affidavit of publication shall state in plain terms the fees charged thereon.

WASHINGTON

Rev. Stat. Ann. (Remington, 1932)

Section 5841 provides that any corporation, partnership, or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance, or transportation of which the price, rate, or tariff is by law required to be published, shall, when any price, rate, or tariff is charged in excess of the existing and established price, rate, or tariff refund to the person, partnership, or corporation so overcharged, or to the assignee of such claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight percent per annum until paid.

SECTION 2
TICKETS AND ADMISSIONS

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CONNECTICUT

Gen. Stat. (1930)
Admissions

Section 6331 provides that no person or corporation shall sell, offer for sale, or attempt to sell any ticket, privilege, or license of admission to any place of public amusement, performance, sport, exhibition, or athletic contest given in this state under the auspices of an educational institution, at a price greater than the price, including tax, printed thereon, or at a price greater than the price fixed for admission, including tax, to such place of public amusement, performance, sport, exhibition, or athletic contest. Any person or the agent of any corporation violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both, for each offense; and the sale of each ticket in violation of any provision of this section shall constitute a separate offense.

IDAHO

Code Ann. (1932)
Admissions

Section 65-2501 provides that the department of agriculture has power to promulgate orders, rules, and regulations governing the holding of State fairs, including the fixing of the prices for admission.

MASSACHUSETTS

Ann. Laws (1933), c. 140

Section 185-D provides that no licensee under section 185-A shall resell any ticket or other evidence of right of entry to any theat-

rical exhibition, public show or public amusement or exhibition of any description at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of right of entry as the purchase price thereof.

MINNESOTA

Stat. (Mason, Supp., 1940)
Theater Tickets

Section 10535 provides that no person, firm, or corporation shall sell or offer or expose for sale any tickets of admission to any theater, opera, concert, athletic contest, or other public entertainment at a greater price than the same are being sold for or offered for sale by the management of the same. ('13, c. 521, sec. 1.) [9031.]

Violation of this act, as provided in section 10536, shall be punishable by a fine of not less than ten (10) dollars or more than one hundred (100) dollars, or imprisonment in the county jail for not less than ten (10) days or more than ninety (90) days.

MISSISSIPPI

Code Ann. (1930), ch. 80
Boxing, Sparring, Wrestling

Section 3643 provides that boxing, sparring, and wrestling matches and exhibitions for percentage of gate receipts where an admission fee is charged, are hereby allowed, except on Sundays, provided, however, that all such boxing, sparring, and wrestling matches and exhibitions authorized herein, shall be held under the supervision of and subject to the rules and regulations of the Mississippi Athletic Commission existing hereunder, and in strict compliance with the provisions of this chapter, and provided further that no boxing or sparring match or exhibition shall exceed ten rounds of three minutes each, and provided that a charge of not more than \$2.50 for each seat or ticket shall be made for any such match or exhibition.

NEW JERSEY

Rev. Stat. (1937)

Section 2: 108-1 provides that any person who shall sell or offer to sell or dispose of, or have in his possession with intent to sell or

dispose of, any ticket of admission, or any ticket entitling the holder to the use of a reserved seat in or on any theater, athletic field, stadium, or other public place of amusement or entertainment within this State, at or for a price in excess of the sale price established for such ticket as printed on the face thereof, shall be guilty of a misdemeanor.

Section 5:2-13 provides that the fee for admission to and seating at any boxing, wrestling, and sparring exhibition or performance shall be published by the licensee holding the same in at least one newspaper circulating in the municipality wherein the license operates for at least two days prior to the holding thereof.

No licensee shall exact or charge a greater fee than that advertised, and in no event, greater than the sum of fifteen dollars, unless the commissioner judge that the exhibition or performance warrants an admission fee of more than fifteen dollars, in which case the commissioner, in writing, fix the admission fees which may be charged at such exhibition or performance.

A violation of this section shall subject the licensee to a forfeiture of his license and a penalty of five hundred dollars.

SECTION 3

RACING



ARKANSAS

Dig. Stat. (Pope, 1937)
Horse Racing

Section 12448 provides that any licensee under the provisions of this act, conducting a horse racing meeting, may provide a place or places in the race meeting grounds or enclosure at which he may conduct and supervise the pari-mutuel or certificate system of wagering by patrons on horse races.

No other place or method of betting, pool making, wagering, or gambling shall be used or permitted by the licensee, nor shall the pari-mutuel or certificate system of wagering be conducted on any races except horse races at the race track where such pari-mutuel or certificate system of wagering is licensed to be conducted. The Commission in its discretion may authorize any licensee to retain not to exceed ten percent (10%) and the breaks as his, their or its

commission on the total of all monies thus wagered. Breaks shall be at all times computed on the basis of not to exceed five cents on the dollar.

Greyhound Racing

Section 12471 provides that within the enclosure of any greyhound race meeting licensed and conducted under this act, the sale of pari-mutuel pools, or certificate form of wagering, under such regulations as the Arkansas Racing Commission shall subscribe, is hereby authorized and permitted. Commissions on such pools to be retained by permit holders shall be ten percent (10%) of the total contributions to each pari-mutuel pool, and the odd cents of all redistributions to be made exceeding a sum equal to the next lowest multiple of ten (10)—said ten percent shall be in addition to the State tax.

CALIFORNIA

General Laws (Deering, 1937), Act 3421
Racing

Section 14 provides that the commission deducted by licensee shall not exceed 8 percent of the gross amount of money handled and the odd cents of all redistributions to be made on all mutual contributions exceeding a sum equal to the next nearest multiple of 10.

ILLINOIS

Rev. Stats. (Smith-Hurd, 1939), c. 8
Racing

Section 37 (j) provides that each licensee may retain not to exceed 7½ percent of the breaks or his commission on all the money wagered: *Provided, however*, If the racing track of licensee is located in a county of less than 250,000 people and more than 100 miles from a city of a population of 1,000,000 or more, he may retain no more than 9 percent of the breaks during 1937 and no more than 8 percent thereafter.

MICHIGAN

Stat. Ann. (Henderson, 1936)
Racing

Section 18.954 provides that no other place or method of betting, pool making, wagering, or gaming shall be used or permitted by the

licensee, nor shall the pari-mutuel or auction pool system of wagering be conducted on any races except races at the race track where such pari-mutuel or auction pool system of wagering is conducted. Each licensee may retain not less than six (6) percent and not to exceed seven and one-half ($7\frac{1}{2}$) percent, which amount shall be fixed by the commission, and the breaks as his, their, or its commission on the total of all moneys thus wagered. Breaks shall at all times be computed on such basis as the commission shall prescribe. No licensee shall knowingly permit any minor to be a patron of the pari-mutuel or auction pool system of wagering, conducted or supervised by it.

CHAPTER THREE
MISCELLANEOUS PRICE PRACTICES

SECTION 1
TRADING STAMP STATUTES

ALABAMA

TRADING STAMPS, PREMIUMS, AND COMBINATION SALES

No statutory provisions.¹

ARKANSAS

Dig. Stat. (Pope, 1937)

Section 9589 provides that under its general police power, a municipality may regulate, license, and tax gift enterprises.

Sections 9699 and 9700 provide that cities of the first and second classes may regulate, license, and tax gift enterprises.²

CALIFORNIA

Gen. Laws (Deering, 1937), Act 6759

Section 1 provides that it shall be unlawful for any person, firm, or corporation to issue, use, distribute, give away, sell, or furnish

¹ A municipal ordinance requiring merchants issuing trading stamps in connection with their business to pay a license tax therefor, in addition to a mercantile license tax, is unconstitutional under the Constitution, sections 1 and 35 providing for the protection of citizens in their enjoyment of life, liberty, and property. *City Council v. Kelly*, 142 Ala. 552, 38 So. 67 (1905).

A penal statute suppressing lotteries does not prohibit the issuance of trading stamps, there being no element of chance in the redemption of the trading stamps. *Yellow-Stone Kit Co. v. State*, 88 Ala. 196, 7 So. 338 (1890); *State v. Shugart*, 138 Ala. 86, 35 So. 28 (1903).

² Under this statute a city cannot prohibit the issuance of trading stamps by merchants. The term "gift enterprise" denotes a scheme involving the element of chance and thus would not be applicable to the issuance of trading stamps redeemable in merchandise. *Humes v. City of Little Rock*, 138 Fed. 929 (C. C. 1898).

coupons, certificates, cards, package labels, wrappers, can covers, bottle caps, or other similar devices which shall entitle the person holding or delivering or surrendering the same to have the same exchanged for or redeemed in goods, wares, or merchandise free of charge or for less than the retail market price of said goods, wares, or merchandise unless there shall be specified in or upon such coupon, certificate, card, package label, wrapper, can cover, bottle cap, or other or similar device, specifically or by class, the person or persons, firm or firms, corporation or corporations by whom or with whom such coupon, certificate, card, package label, wrapper, can cover, bottle cap, or other or similar device is exchangeable or redeemable, and unless such person, firm, or corporation or persons, firms, or corporations so specified shall be either,

(a) The person, firm, or corporation or persons, firms, or corporations issuing, using, distributing, giving away, selling, or furnishing such coupon, certificate, card, package label, wrapper, can cover, bottle cap, or other or similar device; or

(b) A member or members of an association issuing, distributing, using, giving away, selling, or furnishing such coupon, certificate, card, package label, wrapper, can cover, bottle cap, or other or similar device; or

(c) A person, firm, or corporation engaged in the business of issuing coupons, certificates, cards, package labels, wrappers, can covers, bottle caps, or other or similar devices for use or distribution by itself or by other persons, firms, or corporations.

Section 2 provides that any person, firm, or corporation violating any of the provisions of this act shall for each single offense be deemed guilty of a misdemeanor.

Section 3 provides that all acts and parts of acts in conflict or inconsistent with this act are hereby repealed.³

COLORADO

Stat. Ann. (Michie, 1935), c. 104

Section 1 provides that it shall not be lawful hereafter for any person, persons, association of persons, or corporation to engage in

³ A prior statute (Stat. 1905, p. 67) prohibiting the use of trading stamps was held unconstitutional, the scheme not being a lottery and the transaction between retailer and customer being lawful and beyond the control of the Legislature. *Ex parte Drezel*, *Ex parte Holland*, 147 Cal. 763, 82 Pac. 429 (1905). A municipal ordinance imposing a tax on all merchants issuing trading stamps was held to be prohibitive and void, the court stating that such a scheme was lawful and not a lottery. *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916 (1899).

or otherwise promote any lottery or gift enterprise of any nature, or for any purpose whatsoever.

Section 2 provides that no person or persons, corporations, or association, shall, within this State, open, set on foot, carry on, promote, or draw, publicly or privately, any lottery, game, or device of chance of any nature or kind whatsoever or by whatever name it may be called, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, mines, or real estate, or any money, goods, or things.

Section 3 provides that no person or persons, association, or corporation, shall, by printing, writing, setting up of a sign, symbol, emblem, or in any other way or manner whatsoever, advertise or publish an account of any such lottery, game, or device.

Section 4 provides that it shall be unlawful for a newspaper to advertise any lottery, game, or device of chance, whether the drawing be to take place in this State or not.

Section 5 prohibits the sale of any paper purporting to be a ticket of or in any such lottery, device, or game of chance.

Section 6 provides that proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part of any ticket, or of the possession or keeping thereof, shall be conclusive evidence that such ticket, or share or interest, was signed and issued according to the purport thereof.

Section 7 provides that any indictment or information under this article shall be deemed and adjudged good and sufficient which describes the offense in the words of this article, although it does not set out the name or location of such lottery, device, or game of chance, nor set out in words and figures the ticket, policy, or device, or part or interest sold, bartered, or exchanged, or offered, or kept, or advertised to be sold, bartered, or exchanged, or furnished, or supplied.

Section 8 provides that the purchaser of any such ticket, part or share of such ticket, or interest, share, or chance in such lottery, game, or device, shall in all respects be a competent witness to prove any offense under this article.

Section 9 provides that from and after the passage of this article it shall be unlawful, in the State of Colorado, for any person or persons to engage in any manner in any gift enterprise business.

Section 10 provides that any person or persons who shall in any manner engage in any gift enterprise business in the state shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine in the sum of not to exceed one thousand dollars, or imprisonment not exceeding sixty days or both, in the discretion of the court.

Section 11 provides that it shall be unlawful in the State of Colorado to use or offer for the purpose of attracting or enticing trade or in any way to issue, give, deliver, or distribute, in consideration of or as a part of or on account of or accompanying any purchase of goods, wares, or merchandise, any trading stamp, profit-sharing coupon, profit-sharing certificate, or other token, certificate, or evidence of liability which shall be redeemable or exchangeable, alone or in connection with other such stamps or evidence of liability, in any way for premiums, whether such premiums be in the form of goods, wares, or merchandise or in the form of any valuable right or property right whatsoever.

Section 12 prohibits any bonus, prize, or premium in consideration of the purchase of or agreement to purchase any goods, wares, or merchandise or the sale of any article of value in the nature of a bonus, prize, or premium in connection with the sale or purchase of any other article of goods, wares, or merchandise and as an inducement to purchase such goods, wares, and merchandise.

Section 13 prohibits any receipt, coupon, or other evidence of liability which shall entitle the recipient, holder, owner, or beneficiary thereof to any cash, cash refund, credit, bank credit, discount, or reduction, except such beneficiary at the time of such issuance or delivery shall then and there actually receive a cash refund or receive an unconditional cash credit of like amount upon the books of the person, firm, or corporation made liable to pay or allow the same under the terms of such transaction.

Section 14 prohibits the use of premium devices.

Section 15 prohibits any transactions involving any bonuses, premiums, discounts, rebates, credits, or prizes or any trading-stamps, profit-sharing coupons, tokens, or other evidences of liability of any sort, which are redeemable or exchangeable in any way for bonuses, premiums, discounts, rebates, credits, or prizes, where the success or maintenance of any such trade-system, practice, or business scheme, or plan, or any advantage or profit to be derived in the course of it, arises from or depends upon any or either of the following factors or causes:

(a) The credulity, ignorance, misinformation, or negligence of the person or persons to whom such are offered or delivered.

(b) The failure or negligence of any person to accept or take the advantage of any such bonuses, premiums, discounts, rebates, or prizes, or other devices, or to redeem or exchange any token, tokens, or evidence, or evidences of liability therefor.

(c) The encouragement of any profligate, excessive, or inconsiderate purchasing of goods, wares, and merchandise or from or upon any-

thing which materially encourages, or tends to encourage, any of the same.

(d) The opportunity for deceit, fraud, or misrepresentation in the course thereof, or the opportunity to play upon the ignorance, credulity, or inexperience of the public.

(e) The inducement or encouragement given to purchase such articles either wholly or partially because of the value of or any profit or advantage to be derived from the acquisition of any such bonus, premium, discount, rebate, credit, or prize as distinguished from purchasing the same solely because of the intrinsic value of or need for any advantage in the acquisition of the articles themselves.

(f) *Provided*, That nothing in this section shall be construed to prohibit the giving or receiving of cash discounts.

Section 16 provides a penalty for violation of any of the sections by a fine of not more than three hundred dollars or imprisonment in the county jail for not more than sixty days, or both.

Section 17 provides that nothing herein contained shall limit or affect the power of any town, city, or municipality (whether organized under general or special law or any constitutional provisions) to enact any ordinances or other local measures whatsoever on the subjects herein contained: *Provided*, That such ordinance or local measure shall not have the effect of making lawful anything forbidden in this article.⁴

CONNECTICUT

Gen. Stat. (1930)

Section 4707 provides that each person who shall issue or deliver to his customers, in connection with the sale of merchandise, any trading stamps, coupons, or similar devices, with the promise or representation, expressed or implied, that they have a redeemable value in money or merchandise, shall, upon demand, redeem the same at their stipulated value. No person shall issue to his customers in connection with the sale of merchandise any trading stamp, coupon, or similar

⁴ Art. XVIII, sec. 2 of the Constitution and L. 1881, p. 178, sec. 1 (Stat. Ann. (Michie, 1935), c. 104), prohibiting lotteries or gift enterprises does not authorize the passage of a municipal ordinance suppressing gift enterprises when "gift enterprise" is defined so as to include the issuance of trading stamps. The constitutional and statutory provisions are applicable only to transactions where the element of chance is present and this does not include the distribution of trading stamps. *City of Denver v. Frucauff*, 39 Colo. 20, 88 Pac. 389 (1907); *City of Denver v. United Cigar Stores Co.*, 68 Colo. 363, 189 Pac. 848 (1920); *United Cigar Stores v. People*, 68 Colo. 546, 190 Pac. 117 (1920).

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device which has previously been issued in such connection by any other person responsible for the redemption thereof, unless the consent of the latter has been first obtained.

Section 6338 provides that any person who shall sell or offer for sale to any minor any box or package, the consideration of such sale being in whole or in part any distribution of or any chance at drawing or obtaining any article of value in such box or package, shall be fined not more than one hundred dollars or imprisoned not more than six months or both.

FLORIDA

No statutory provisions.⁵

GEORGIA

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

Section 26-6506 provides that it shall be a misdemeanor for any person, firm, or corporation to issue or give away, in connection with the sale of any article of goods, wares, or merchandise, any stamp, commonly called a trading stamp, or other like device, which said stamp or other like device would entitle the holder thereof to receive, from some other person or party than the vendor, any indefinite or undescribed thing, the nature or value of which was unknown to the purchaser at the time of the purchase of said article of goods, wares, or merchandise.

IDAHO

Code Ann. (1932)

Sec. 17-3916. Sales with trading stamps prohibited—Penalty.—Any person, firm, or corporation who shall sell or exchange any goods, wares, or merchandise whatsoever, or offer, or attempt so to do, upon a representation, advertisement, notice, or inducement that any

⁵ A former statute (Acts 1913, p. 3, sec. 35) which imposed a license tax on merchants using trading stamps in connection with their business was held valid under the police power of the State in *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679 (1916), the court stating that while the trading-stamp plan was not a lottery, it had the same evils behind it and therefore was subject to regulation by the State.

stamps, trading stamps, coupons, tickets, certificates, or other similar devices which entitles the purchaser to demand or receive, either from the vendor or from any other person, firm or corporation, any other article of property as a premium or premium gift, are to be delivered or received, or are in any way connected with, or are a part of the transaction as a premium or premium gift, shall for each and every offense be guilty of a misdemeanor and be punishable by a fine of not less than \$50.00 nor more than \$300.00.

Hist. 1917, ch. 122, sec. 1, p. 409, reen. C. L., sec. 7104g; C. S., sec. 8488

Sec. 17-3917. Giving of premiums prohibited—Penalty.—Any person, firm, or corporation who shall sell or exchange any of the devices mentioned in the preceding section upon a contract to enable the purchaser or receiver thereof to sell or exchange property, or attempt so to do, upon any representation, advertisement, notice, or inducement hereinbefore mentioned, or who shall deliver any goods, wares, or merchandise upon the presentation of any such stamps or other similar devices, shall be guilty of a misdemeanor, and be punishable by a fine not less than \$50.00 nor more than \$300.00.

Hist. 1917, ch. 122, sec. 2, p. 410, reen. C. L., sec. 7104h; C. S., sec. 8489.

Sec. 17-3918. Exemptions from two preceding sections.—The provisions of the two preceding sections shall not apply to agricultural or church fairs conducted for scientific or charitable purposes.

Hist. 1917, ch. 122, sec. 3, p. 410; compiled and reen. C. L. sec. 7104i; C. S., sec. 8490.

INDIANA

Stat. Ann. (Burns, Supp. 1939)*

Sec. 58-701 (12228) Contents—Money value.—No person shall sell or issue to any person in this State any stamps, trading stamps, cash discount stamps, checks, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares, or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices

* A former statute (Acts 1915, c. 184) providing for the licensing of trading-stamp companies only is unconstitutional, being discriminatory and repugnant to the equal protection clause of the Federal Constitution. *Sperry and Hutchinson Co. v. State*, 188 Ind. 173, 122 N. E. 584 (1919).

shall have legibly printed or written on the face [face] thereof the redeemable value thereof in lawful money of the United States.¹ (Acts 1913, ch. 299, sec. 1, p. 777; 1921, ch. 109, sec. 1, p. 265.)

Sec. 58-702. (12229) Redemption in money.—Any person who shall sell or issue to any person engaged in any trade, business, or profession, any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money, goods, wares or merchandise, shall upon presentation redeem the same either in goods, wares or merchandise, or in lawful money of the United States, at the option of the holder thereof, at the value in lawful money printed on the face thereof: *Provided*, That the same be presented for redemption in number or quantity aggregating in money value not less than five cents (5c) in each lot. (Acts 1913, ch. 299, sec. 2, p. 777.)

Sec. 58-703. (12230) Redemption refused, liability.—Any person engaged in any trade, business, or profession who shall distribute, deliver, or present to any person dealing with him, in consideration of any article or thing purchased, any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive (money, goods, wares, or merchandise), either directly from the person issuing or selling the same, as set forth in section 2 (sec. 58-702) hereof, or indirectly from any other person, shall, upon the refusal or failure of the said person issuing or selling same to redeem the same as set forth in said section 2 (sec. 58-702) hereof, be liable to the holder thereof for the face value thereof, and shall, upon presentation of the same in lots of (or) number aggregating, in money value, not less than five cents (5c) in each lot, redeem the same either in ware or merchandise or in lawful money of the United States, at the option of the holder thereof, at the value in lawful money printed on the face thereof. (Acts 1913, ch. 299, sec. 3, p. 777.)

Sec. 58-704. (12231) Redeemable value of stamps.—The redeemable value of such stamps, trading stamps, cash discount stamp, check, ticket, coupon, or other similar device, printed or legibly written on the face of said stamp as herein provided shall be the same, whether redeemed in merchandise or in lawful money of the

¹ A contract by a vendor of merchandise to repurchase the merchandise unsold after two years if the vendee issued trading stamps good for one-half the price of "art pictures" is valid under section 58-701. The act, being penal and in derogation of the common law, must be strictly construed. *Ashbaucher v. Price*, 83 Ind. App. 604, 145 N. E. 775 (1924).

United States, and the redemption of such stamps as hereinabove mentioned shall be in lawful money of the United States or in merchandise of equal value thereto, at the option of the holder of said stamps. (Acts 1913, ch. 299, sec. 4, p. 777.)

Sec. 58-705. (12232) Consent of original issuer to use.—No person, firm or corporation shall give or deliver, as an inducement for or in connection with the sale of merchandise, any coupon, check, ticket, stamp, token, or similar device redeemable in money or in merchandise, as in this act provided, by any other person, firm or corporation without the consent of the person, firm or corporation originally issuing the same and responsible for the redemption thereof. (Acts 1913, ch. 299, sec. 5, p. 777.)

Sec. 58-706. (12233) Penalty for violation.—Any person, firm, or corporation who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100) for each offense. (Acts 1913, ch. 299, sec. 6, p. 777.)

IOWA

Code (1939)

Section 9920 provides that all gift enterprises, as hereinafter defined, and all trade practices carried on in connection therewith are hereby prohibited and declared to be unlawful.

Section 9921 provides that whenever two or more persons enter into any contract arrangement or scheme, whereby for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, any other party thereto, for a valuable consideration and as part of such scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such party to said scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a "gift enterprise," unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases, shall be definitely described on such stamp or ticket and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the

sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised becomes absolute upon the completion upon the delivery thereof without the holder being required to collect any specified number of other similar stamps or tickets and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance, uncertainty, or contingency whatever.

Section 9922 provides that violation of the above sections constitutes a misdemeanor.

KANSAS

Gen. Stat. Ann. (Corrick, 1935)
Trading Stamps

Sec. 19-2210. Trading stamps, coupons, or similar devices.— Every person, firm, or corporation who shall use, and every person, firm, or corporation who shall furnish to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices, which shall entitle the purchaser receiving the same with such sale of goods, wares, or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge, or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall, before so furnishing, selling, or using the same, obtain a license from the county clerk of each county, wherein such furnishing, selling or using shall take place, for each and every store or place of business in that county, owned or conducted by such person, firm, or corporation from which such furnishing or selling, or in which such using shall take place: *Provided, however,* That the provisions of this section shall not apply to the furnishing or issuance of any stamps, coupons, tickets, certificates, cards, or other similar devices, redeemable at their face value, in cash or merchandise from the general stock of said merchant at regular retail prices at the option of the holder thereof.⁸ (L. 1917, ch. 331, sec. 1; May 26; R. S. 1923, sec. 19-2210.)

⁸Laws 1917, c. 331 (secs. 19-2210 et seq.) requiring trading stamp companies to pay a license tax is constitutional. It is within the police power of the State to suppress a business injurious to the public by imposing a prohibitive license tax. *State v. Wilson*, 101 Kans. 789, 163 Pac. 679 (1917); *State v. Crosby Bros.*, 103 Kans. 733, 176 Pac. 321 (1918).

Sec. 19-2211. Trading-stamp license fees.—In order to obtain such license, the person, firm, or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought an annual license fee, based upon population as follows:

In counties of 30,000 or less.....	\$1,000
In counties of 30,000 to 50,000.....	5,000
In counties of 50,000 to 70,000.....	6,000
In counties of over 70,000.....	7,000

Upon such payment being made to the county treasurer, he shall issue his receipt therefor, which shall be presented to the county clerk, who shall issue to the person, firm, or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 (19-2210) of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no other place than that mentioned therein. (L. 1917, ch. 331, sec. 2; May 26; R. S. 1923, sec. 19-2211.)

Sec. 19-2212. Place of dealing in trading stamps.—No person, or firm, or corporation shall furnish or sell to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city, or county in this State other than that in which such furnishing or selling shall take place. (L. 1917, ch. 331, sec. 3; May 26; R. S. 1923, sec. 19-2212.)

Sec. 19-2214. Penalties for violating sections 19-2210 to 19-2214.—Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$500 or be imprisoned in the county jail for not less than 60 days, or by both such fine and imprisonment, at the discretion of the court. (L. 1917, ch. 331, sec. 5; May 26; R. S. 1923, sec. 19-2214.)

KENTUCKY

Stat. Ann. (Baldwin's Carroll, 1936, and Supp., 1939)

Sec. 2573. Felony to set up, operate, promote or aid.—Whoever shall set up, carry on, conduct, manage, operate, draw, or otherwise promote, and whoever shall aid, assist, or abet in setting up, carrying on, conducting, managing, operating, drawing, or in otherwise promoting any lottery or gift enterprise, whereby money or other thing

of value is, or is pretended to be, disposed of, and whoever shall write, print, vend, sell, barter, exchange, dispose of, furnish, supply, or procure, or cause to be supplied or procured, to or for any person or persons, and whoever shall have in possession or under control, with intent for himself or another, to vend, sell, barter, exchange, dispose of, furnish, or supply any ticket, share, or part of a ticket, or any writing, print, paper, certificate, token, device, or thing whatever, purporting, designed, or intended to give or entitle the holder, or any other person, to any prize, share, or interest in any prize, or to any right, share, or interest whatever, in any lottery or gift enterprise in or out of this Commonwealth, or in or to any drawing of, or in or to the result of any lottery or gift enterprise in or out of this Commonwealth, shall be guilty of a felony, and shall be fined not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00), and shall be confined in the penitentiary not less than two years nor more than five years: *Provided, however,* That the words "lottery or gift-enterprise," as used in this section, shall not apply to any gift or money, property or other thing of value which is awarded by lot or drawing by mercantile establishments, theaters, or newspapers who make such awards to their customers and patrons, and who charge no price and collect no fee for the privilege of participating in such lot or drawing other than the regular prices of merchandise sold, or admission tickets, or subscription price to all customers and patrons whether they participate or do not participate in such awarding. (1938, 1st. ex. s. c. 23, p. 1076, sec. 1; 1892, c. 7, p. 8, sec. 1.)

Sec. 2574. Felony to permit use of or to rent house, for lottery or sale of tickets.—Whoever shall, in any house shop or other building, owned, possessed, occupied, or controlled by him, knowingly permit the commission of any of the offenses mentioned in the preceding section, and whoever shall demise, rent, let, or give control of any house, shop, or other building, or any part of either, with knowledge or for the purpose that any of the offenses mentioned in the preceding section are to be committed therein, shall be guilty of a felony, and shall be subject to the penalties denounced in the preceding section. (1892, c. 7, p. 8, sec. 2.)

Sec. 2575. Misdemeanor to buy or procure ticket.—Whoever shall buy for himself, and whoever shall in anywise procure for himself, any lottery or gift enterprise ticket, or other token, device or thing mentioned in section 2573, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00), which may be recovered by warrant before a justice of the peace, or by indictment. (1892, c. 7, p. 8, sec. 3.)

Sec. 2576. Pretended or fictitious lotteries; punishment.—The penalties mentioned in the three preceding sections shall apply as well where the lottery or gift enterprise is merely pretended or fictitious, as where the same is real. (1892, c. 7, p. 8, sec. 4.)

Sec. 2577. Indictment; several offenses.—An indictment may charge in one count the commission of any number of the offenses mentioned in sections 2573 and 2574. (1892, c. 7, p. 8, sec. 5.)

Sec. 2578. Charging grand juries; duty of judges.—Judges of all courts in which grand juries are impaneled shall, whenever a grand jury is therein impaneled, charge such jury as to the offenses mentioned and penalties denounced in this act. (1892, c. 7, p. 8, sec. 6.)

Sec. 2579. Witnesses; competency; exemption.—That the buyer of any lottery ticket, or any device in the nature of a lottery ticket, shall be a competent witness in any prosecution against the seller of it; and it shall be no exemption to said buyer that his testimony may criminate himself; but no such testimony given by the witness shall be used against him in any prosecution, except for perjury, and he shall be discharged from all liability for any offense so necessarily disclosed in his testimony. (1892, c. 7, p. 8, sec. 7.)

Sec. 2580. Indictment; sufficiency of.—That any indictment found under any of the preceding provisions of this act shall be held good, which charges the offense in the language of the law, without setting forth therein the number, date, or other description of the ticket or device, or the name of the lottery or gift enterprise. (1892, c. 7, p. 8, sec. 8.)

Section 4224a-1 provides for the levying of a license tax of \$350 on all trading stamp companies redeeming stamps for premiums of valuable personal property.⁹

Section 2290-12 provides that a municipality may impose license fees on trades and occupations.¹⁰

LOUISIANA

No statutory provisions.¹¹

⁹A trading stamp company redeeming stamps in money is subject to the license tax under section 4224a-1, cash redemptions being "premiums of valuable personal property." *Lawton v. Stewart Dry Goods Co.*, 197 Ky. 394, 247 S. W. 14 (1923).

¹⁰Where a municipality imposed a license tax of \$300 annually under section 2290-12, and the net profit of the trading stamp company was \$500 per year, it was held that while a license fee imposed on trading stamp companies is valid, generally the ordinance was void as imposing an oppressive and prohibitory tax. *Sperry & Hutchinson Co. v. City of Owensboro*, 151 Ky. 389, 151 S. W. 932 (1912).

¹¹A former statute (L. 1904, Act 47) which provided for a license tax to be levied on trading stamp companies based on the gross receipts of the business

MARYLAND

Ann. Code (Flack, Supp., 1935) art. 56
Trading Stamps¹²

Sec. 235. Every person, firm, association, and corporation of this State or carrying on business therein, who shall sell or deliver any stamps, coupons, tickets, certificates, or other similar devices which are or may be redeemable for merchandise, other than a manufacturer or packer issuing such stamps, coupons, tickets, certificates, labels, or other similar devices around or in connection with his, their, or its own products, to any other person, firm, association, or corporation, in connection with any sale by such other person, firm, association, or corporation, of any goods, wares, or merchandise, shall before so doing take out an annual license therefor and shall pay an annual license fee of five hundred dollars; and every manufacturer or packer who shall furnish, sell, or deliver any such stamps, coupons, tickets, certificates, labels, or other similar devices with or in connection with the sale of his, her, or its own manufactured or processed products to any other person, firm, association, or corporation shall, before so doing, take out an annual license therefor and pay an annual license fee of fifty dollars.¹³ (An. Code, 1924, sec. 235; 1912, sec. 173; 1916, ch. 704, sec. 173; 1935, ch. 360.)

Ann. Code (Flack, Supp., 1935), art. 27
Trading Stamp and Other Devices

Sec. 504. Prohibition.—No person or association of persons shall, either directly or indirectly, by agent or otherwise, use or hold for use in any way, or sell any stamp commonly called a trading stamp, or any ticket, or check, or any written or printed promise or assurance, express or implied, or any other scheme or device for the sale, barter, or trade of any goods, wares, or merchandise, holding out as an inducement for any such sale, barter, or trade the giving or issuing of any such stamp, ticket, check, promise, assurance, scheme, or device is to

of the merchant using such stamps is not in contravention of article 225 of the State constitution providing for uniform taxation on property or of the Federal Constitution as a burden on interstate commerce. *State v. Underwood*, 139 La. 288, 71 So. 513 (1915).

¹² A former statute (Acts 1886, c. 480) which prohibited the blanket issuance of trading stamps was held unconstitutional the scheme not involving the element of chance and being an unlawful regulation of trade not necessary for the protection of the public health, safety, or morals. *Long v. State*, 74 Md. 565, 22 Atl. 4 (1891).

¹³ Article 56, section 235, is constitutional as being a valid exercise of the police power of the State. The legislature having decided that the trading-stamp scheme prohibited by the statute was detrimental to the public welfare, it is within their power to regulate or suppress it. *State v. J. M. Seney Co.*, 134 Md. 437, 107 Atl. 189 (1919).

be or may be presented to or redeemed by some person or association of persons other than those making the sale, barter, or trade aforesaid, the holder of said stamp, ticket, check, promise, assurance, scheme, or device for presentment or redemption getting or receiving in exchange therefor any gift, prize, or gratuity, or anything uncertain, undetermined or unknown to the purchaser of said goods, wares, or merchandise at the time of the purchase thereof.¹⁴ (An. Code, sec. 456; 1904, sec. 404; 1898, ch. 207, sec. 263A.)

Sec. 505. Limitations on sale or exchange.—No person or association of persons shall, either directly or indirectly, by agent or otherwise, use or hold for use, or sell any stamp commonly called a trading stamp, or any ticket, check, promise, or assurance, express or implied, or any other scheme or device of the kind or character described in the preceding section, and thereby prohibited to be used or held for use, or to be sold when the same, instead of or in addition to the manner of redemption therein described, is to be or may be presented to or redeemed by the person or association of persons selling, bartering, or trading the goods, wares, or merchandise as in said section set forth, at any other place than that where said sale, barter, or trade was made, or in any manner than by something certain and known to the purchaser at the time of said sale, barter, or purchase: *Provided, however,* That nothing contained in this or the preceding section is intended to prevent any manufacturer from offering any gift or present to any purchaser of his products. (An. Code, sec. 457; 1904, sec. 405; 1898, ch. 207, sec. 263B.)

Sec. 506. Violations.—Any person or association of persons violating any of the provisions of the two preceding sections, or aiding, abetting, or assisting in said violation, shall be deemed guilty of a misdemeanor, and upon conviction thereof before any justice of the peace of this State or court of competent jurisdiction therein, shall be fined not less than fifty dollars nor more than one hundred dollars for each offense, and for a second or repeated violation of said sections may, in addition to said fines, be imprisoned in the house of correction or in the city or county jail, as the case may be, for not less than one month nor more than six months. (An. Code, sec. 458; 1904, sec. 406; 1898, ch. 207, sec. 263C.)

¹⁴ Sections 504 and 505 were held as a valid prohibition of a lottery or gaming scheme, except insofar as section 505 be interpreted to declare unlawful the redemption of a trading stamp solely because redeemed at a place other than where the sale was made. *State v. Hawkins*, 95 Md. 133, 51 Atl. 850 (1902).

Where a trading stamp company maintained a premium store fully stocked, issued premium catalogue denoting the premiums to be issued and advertised many samples of the premiums that could be redeemed it was held that the company did not violate the statute. *State v. Caspare*, 115 Md. 7, 80 Atl. 606 (1911).

Sec. 507. Redeemable value.—No person, firm, or corporation shall sell or issue any stamps, trading stamps, cash discount stamps, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall have legally printed or written upon the face thereof the redeemable value thereof in cents. (An. Code, sec. 459; 1904, sec. 407; 1904, ch. 233, sec. 263D.)

Sec. 508. How redeemable.—Any person who shall sell or issue to any person engaged in any trade, business, or profession, any stamps, trading stamps, cash discount stamps, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, shall, upon presentation, redeem the same either in goods, wares, or merchandise, or in cash, good and lawful money of the United States, at the option of the holder thereof, and any number of such stamps, trading stamps, cash discount stamps, checks, coupons, or other similar devices shall be redeemed as hereinbefore set forth at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number, when presented, at the face value in cents printed upon the face thereof as hereinbefore provided. (An. Code, sec. 460; 1904, sec. 408; 1904, ch. 233, sec. 263E.)

Section 509 provides that upon the refusal or failure of the said person issuing or selling the same to redeem the same, as set forth in the preceding section, he shall be liable to the holder thereof for the face value thereof.

Sec. 510. Manufacturer may issue.—It shall not be unlawful for any manufacturer to place his own tickets, coupons, or other vouchers in or upon packages of goods manufactured by him, such tickets, coupons, or other vouchers to be redeemed by such manufacturer, either in money or merchandise, whether said packages are sold directly to the consumer or through retail merchants; nor shall it be unlawful for any person to issue with such packages, tickets, coupons, or other vouchers so issued by said manufacturer. (An. Code, sec. 462; 1910, ch. 381 (p. 95).)

Section 511 prohibits a different redeemable value in merchandise from the redeemable value in money.

Section 512 requires of each person or corporation a bond to the State of Maryland, in the penalty of twenty-five thousand dollars, with security to be approved by and said bond to be filed with the clerk of the superior court of Baltimore City or with the clerk of the circuit court for the county in which such stamp, trading stamp, cash discount stamp, ticket, check, coupon, or other similar device shall be issued, sold, or given, and to be recorded by said clerk at the cost of the person, firm or corporation giving such bond, conditioned for the faithful performance by the person, firm or corporation executing such bond, of each and all the obligations incurred in connection with the issue of such stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device; and in the event of failure at any time to comply with any of the obligations of said stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device, by the person, firm or corporation executing said bond, the holder of such stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device shall be entitled to maintain a suit on such bond to recover the amount of the loss sustained by him by reason of such default.

Sec. 513. Penalties.—Any person, firm, or corporation violating any of the provisions of Sections 507, 508, 509, 511, or 512 of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than one hundred dollars for each and every offense, and in default of payment of the fine shall be committed to jail for a period of not less than thirty days, and one-half of the fine so paid shall go to the informer. (An. Code, sec. 465; 1910, ch. 381 (p. 95).)

MASSACHUSETTS

Ann. Laws (Supp., 1938), c. 100
Premiums

Section 19 prohibits the sale, exchange, or giving away of any prize packages, gifts, premiums, or bonus, or otherwise as an inducement to purchase any other goods, wares, or merchandise at public auction.

Ann. Laws (1933), c. 271
Trading Stamps¹¹

Sec. 29. Gift enterprises prohibited.—Whoever sells, exchanges, or disposes of any property, or offers or attempts so to do, upon a

¹¹ A former statute (L. 1904, p. 376, c. 403) which levied an excise tax on the business of selling or issuing trading stamps was held unconstitutional as an

representation, advertisement, notice, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received, or is in any way connected with or is a part of the transaction, or whoever gives a stamp, coupon, or other device which entitles a purchaser to demand or receive from a person or company other than the merchant dealing in the goods purchased or the manufacturer thereof, any other property than that actually sold or exchanged, or whoever delivers by any person or company other than the merchant dealing in the goods purchased, or the manufacturer thereof, goods, wares or merchandise upon the presentation of such stamp, coupon, or other device, shall be punished by a fine of not less than ten nor more than five hundred dollars.¹⁶ (1884, 277; 1898, 576; R. L. 214, sec. 29.)

Sec. 30. Sale, etc., of trading stamps, etc., prohibited.—Whoever, in connection with the sale of any article or any merchandise whatsoever, sells, gives, or delivers any trading stamps, checks, coupons, or similar devices to be exchanged for, or to be redeemed by the giving of, any indefinite or undescribed article, the nature and value of which are not stated, or to be exchanged for, or to be redeemed by the giving of, any article not distinctly bargained for at the time when such trading stamps or other devices as aforesaid were sold, given or delivered, shall be punished by a fine of not less than ten nor more than fifty dollars. (1903, 386.)

MICHIGAN

No statutory provisions¹⁷

unreasonable restriction on the business. *O'Keefe v. City of Somerville*, 190 Mass. 110, 76 N. E. 457 (1906).

A bill designed to prohibit "gift enterprises," including the issuance of trading stamps, was held unconstitutional under the Fourteenth Amendment of the Federal Constitution. *In re Opinion of The Justices*, 208 Mass. 607, 94 N. E. 848 (1911).

An act forbidding the issuance of trading stamps redeemable by anyone other than the distributor thereof would be unconstitutional. *In re Opinion of The Justices*, 226 Mass. 613, 115 N. E. 978 (1917).

The business of issuing trading stamps to merchants to be given to customers of merchants, redeemable in merchandise, is not contrary to public policy. *Sperry & Hutchinson Co. v. Temple*, 137 Fed. 992 (C. C. A. 1905).

¹⁶ Section 29 does not prohibit the issuance of a photograph in connection with the sale of another commodity, even though the purchaser is allowed to select a photograph of his own choice. *Commonwealth v. Emerson*, 165 Mass. 146, 42 N. E. 559 (1896). Where a purchaser receives a coupon entitling him to redeem it for merchandise in another store, such transaction is not within the prohibition of section 29. *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385 (1901).

¹⁷ A former statute (Acts 1911, Act 244) which permitted the use of trading stamps only if redeemed by the merchant furnishing them to his customers

MINNESOTA

Stat. (Mason, 1927)

Sec. 10492. Gift enterprises prohibited.—All gift enterprises, as hereinafter defined, and all trade practices carried on in connection therewith are hereby prohibited and declared to be unlawful.¹⁸ ('09, c. 142, sec. 1.) - [8995.]

Sec. 10493. Gift enterprises defined.—Whenever two or more persons enter into any contract, arrangement, or scheme, whereby for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, any other party thereto, for a valuable consideration and as a part of such scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such other party to said scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a "gift enterprise," unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases, shall be definitely described on such stamp or ticket and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised, becomes absolute upon the completion upon the delivery thereof without the holder being required to collect any specified number of other similar stamps or tickets and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance uncertainty or contingency whatever.¹⁹ ('09, c. 142, sec. 2.) [8996.]

was held unconstitutional in *People v. Sperry & Hutchinson Co.*, 197 Mich. 532, 164 N. W. 503 (1917). The court stated that as long as the legislature permitted the use of trading stamps it could not prohibit the redemption of such stamps by trading-stamp companies. The statute was held discriminatory and void.

¹⁸ A former statute (L. 1911, c. 287) compelling persons offering special inducements to its customers in trade to pay a certain amount of such inducement in cash in lieu of merchandise, if the customer so elects, was held invalid in *Kanne v. Segerstrom Piano Mfg. Co.*, 118 Minn. 483, 137 N. W. 170 (1912).

¹⁹ Section 10493 is constitutional as a valid exercise of the police power of the State, the prohibition not being against the use of all trading stamps but only those involving an element of chance. *State v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N. W. 120 (1910).

Sec. 10494. Engaging in gift enterprise, etc.—Penalty.—Any person who engages in a gift enterprise such as is defined in this act or who advertises the same in any manner, or who in furtherance of such scheme, as an inducement to purchasers issues in connection with the sale of any merchandise or other property any such ticket or stamp purporting to be redeemable in some indefinite article not described thereon, only when presented with a collection of other stamps or tickets of like kind, by some other party to such scheme, and which, unless presented in the manner aforesaid is not redeemable at all, shall each and all be guilty of a misdemeanor. ('09, c. 142, sec. 3.) [8997.]

Sec. 10495. "Person" defined.—The word "person" as used in this act, may in proper cases in order to make the intent and meaning of the law effective, be construed to mean firm or corporation. ('09, c. 142, sec. 4.) [8998.]

Sec. 10496. Gift enterprises prohibited.—All gift enterprises as hereinafter defined and all trade practices carried on in connection therewith are hereby prohibited and declared to be unlawful. ('13, c. 374, sec. 1.) [8999.]

Sec. 10497. Gift enterprise defined.—Whenever any person for the purpose of inducing the public to subscribe for or buy any newspaper, magazine, or periodical, for a valuable consideration, offers and advertises to give a premium, gift, or prize, or offers and advertises any contest whatever, whereby a premium, gift, or prize is to be given to any person or persons procuring such sale or subscription, the person so undertaking and carrying on such scheme or contest and offering such gift, premium, or prize shall be deemed to be engaged in a "gift enterprise," unless such premium, gift, or prize is absolute and does not depend upon any chance or contingency whatever.²⁰ ('13, c. 374, sec. 2.) [9000.]

MONTANA

Rev. Codes Ann. (Anderson and McFarland, 1935)
Premiums and Bonuses²¹

Section 2430 requires a license of all persons engaged in furnishing premiums or bonuses for the sale of merchandise.

²⁰ A scheme whereby a publication sponsors a mystery puzzle and a prize for the solution thereof is not within the definition of "gift enterprise" under section 10497, the contest requiring no payment for entry. *Holt v. Rural Weekly Co.*, 217 N. W. 345 (Sup. Ct. 1928).

²¹ A former statute (L. 1917, c. 17) which prohibited the issuance of premiums to purchasers by unlicensed persons is inapplicable to the giving of trading

Section 2431 requires the payment of an annual \$6,000 license fee of each person licensed.

Section 2433 provides that any person, firm, or corporation violating any of the provisions of this act shall, for each single offense, be deemed guilty of a misdemeanor, and punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail not to exceed sixty days, or by both such fine and imprisonment.

NEBRASKA

Comp. Stat. (1929)

Sec. 28-965. "Lotteries," gift enterprises unlawful, penalty.—Whoever sells or offers for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise or gift or bestowal of any article or thing, for and in consideration of the purchase of any other article or thing, whether the object shall be for individual gain, or for the benefit of any institution of whatever character, or for any purpose whatever, shall be held to be engaged in a gift enterprise which is hereby declared to be unlawful and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both. (1911, p. 560; Ann. 2337x4 and 2337x5; Comp. 7894g and 7894h; R. S. 1913, 8825; C. S. 1922, 9821.)

Comp. Stat. (1929)

Trading Stamps

Sec. 28-968. Trading stamps, sale or issuance, when illegal.—No person shall sell or issue any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall have legibly printed or written upon the face thereof the redeemable value thereof

stamps redeemable in cash. The statute applies only to schemes involving the element of uncertainty in the redemption of the premiums. *State v. Lucey Bros.*, 55 Mont. 545, 179 Pac. 457 (1919).

in cents. (1905, p. 696; Ann. 12050; Comp. 7894b; R. S. 1913, 8828; C. S. 1922, 9824.)

Sec. 28-969. Same; manner of redemption.—Any person who shall sell or issue to any person engaged in any trade, business or profession, any stamp, trading stamp, cash discount stamp, check, ticket, coupon or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, shall, upon presentation, redeem the same either in goods, wares, or merchandise, or in cash, good and lawful money of the United States, at the option of the holder thereof, and any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number, when presented, at the value in cents printed upon the face thereof, as hereinbefore provided. (1905, p. 697; Ann. 12051; Comp. 7894c; R. S. 1913, 8829; C. S. 1922, 9825.)

Sec. 28-970. Same; refusal to redeem.—Any person engaged in any trade, business or profession who shall distribute, deliver or present to any person dealing with him, in consideration of any article or thing purchased, any stamp, trading stamp, cash discount stamp, check, ticket, coupon or other similar device, which will entitle the holder thereof on presentation thereof, either singly or in definite number, to receive, either directly from the person issuing or selling same, as set forth in the next preceding section (28-969), or indirectly through any other person, shall upon the refusal or failure of the said person issuing or selling same to redeem the same, as set forth in the next preceding section, be liable to the holder thereof for the face value thereof, and shall upon presentation redeem the same, either in goods, wares, or merchandise, or in cash, good and lawful money of the United States of America, at the option of the holder thereof, and in such case any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made; but they shall be redeemed in any number, when presented, at the value in cents printed upon the face thereof, as hereinbefore provided. (1905, p. 697; Ann. 12052; Comp. 7894d; R. S. 1913, 8830; C. S. 1922, 9826.)

Sec. 28-971. Same; violation, penalty.—Any person, firm, or corporation who shall violate any of the provisions of the next three preceding sections (29-968, 28-969, 28-970) shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense. (1905, p. 698; Ann. 12053; Comp. 7894e; R. S. 1913, 8831; C. S. 1922, 9827.)

Sec. 28-972. Same; exceptions.—The next four preceding sections (28-968, 28-969, 28-970, 28-971) shall not apply to tickets, coupons or other vouchers placed by any merchant or manufacturer in or upon packages or goods sold or manufactured by him, if such tickets, coupons or other vouchers are issued by such merchant or manufacturer in his own name, to be redeemed by him. (1905, p. 698; Ann. 12054; Comp. 7894f; R. S. 1913, 8832; C. S. 1922, 9828.)

NEW HAMPSHIRE

Pub. Laws (1926), c. 173
Trading Stamps²²

Sections 1 to 14 provide that no corporation engaged in the business of selling, issuing, exchanging, or redeeming stamps, known as trading stamps or other similar devices, not organized under the laws of this State, shall do business within this State, unless it has obtained a license authorizing it so to do, as herein provided and set forth the manner and method of making application, hearing, procedure, service of process, deposit requirements, procedure for renewal, and revocation fees and penalties.

Taxation of Licenses

Sections 15 to 20 provide that every licensee shall pay an excise tax of ten percent of all its sales of trading stamps or other similar devices to tradesmen within the State.

²² Pub. Laws (1926), c. 173, prohibiting companies from engaging in the business of selling, issuing, exchanging, or redeeming trading stamps without a license is unconstitutional. A mere statement in a legislative enactment that a particular business may be fraudulently conducted does not give the legislature the power to prohibit that business. *State v. Lothrop-Farnham Co., Inc.*, 84 N. H. 322, 150 Atl. 551 (1930).

Where a trading stamp company agreed to deliver coupons to defendant for use in connection with the purchase of merchandise, the coupons giving the holder thereof an opportunity to win a piano, the trading stamp company can recover against the defendant for breach of contract even though the trading stamp transaction is unlawful under c. 173, sec. 1. *Main v. Berlin Dry Goods Co.*, 75 N. H. 511, 77 Atl. 483 (1910).

Sections 20-28 provide that every tradesman giving or delivering trading stamps or other similar devices, in connection with the sale of articles, entitling the holders to receive articles other than the articles so sold, shall pay an excise tax for carrying on such business, equivalent to three percent of the gross receipts by such tradesman from the sale of the articles so sold. These sections also provide for the manner and method of assessment and collection, for the manner of making returns, and for penalties in case of violation.

NEW JERSEY

Rev. Stat. (1937)

Trading Stamps and Similar Devices

Sec. 45: 23-1. "Trading stamp" defined.—The words "trading stamp" as used in this chapter mean any stamp, cash discount stamp, check, ticket, coupon, or similar device which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the person selling or issuing the same or indirectly through any other person, money, goods, wares, or merchandise.

Source. L. 1905, c. 265, sec. 1, p. 554 (C. S. p. 5648, sec. 1).

Sec. 45: 23-2. Statement of money value on face of stamp; penalty.—No person shall sell or issue any trading stamp unless it has legibly printed or written upon its face the redeemable value thereof in lawful money of the United States. Whoever violates this section shall be deemed guilty of a misdemeanor.

Source. L. 1905, c. 265, secs. 1, 4, pp. 554, 555 (C. S. pp. 5648, 5649, secs. 1, 4.)

Sec. 45: 23-3. Redemption of stamps.—A person who sells or issues to any person engaged in any trade, business, or profession, any trading stamp shall, upon presentation thereof for redemption in number or quantity aggregating in money value not less than five cents in each lot, redeem the same, either in goods, wares, or merchandise or in lawful money of the United States at the option of the holder thereof, at the value in lawful money printed on the face thereof, and, upon the refusal or failure of said person to to so redeem the same, any person engaged in any trade, business, or profession, who distributes, delivers, or presents any trading stamp to any person dealing with him in consideration of any article or thing purchased, shall be liable to the holder thereof for the face value thereof and shall redeem the same as herein above set forth.

Source. L. 1905, c. 265, secs. 2, 3, pp. 554, 555 (C. S. pp. 5648, 5649, secs. 2, 3.)

Sec. 45: 23-4. Application of chapter limited.—This chapter shall not apply to tickets, coupons, or other vouchers placed by a manufacturer in or upon packages or goods manufactured by him, nor to those so placed by a merchant, if such tickets, coupons, or other vouchers are to be redeemed by such merchant.

Source. L. 1905, c. 265, sec. 5, p. 555 (C. S. p. 5649, sec. 5.)



NEW YORK

Penal Law (McKinney)

Section 2360 provides that any person selling, dealing in or using any trading stamp or other device, in consideration of any article or thing purchased of, or any services performed, shall be guilty of a misdemeanor; but it shall not be unlawful for any merchant or manufacturer to place his own tickets, coupons, or other vouchers in or upon packages of goods sold or manufactured by him. Such tickets, coupons, or other vouchers to be redeemed by such merchant or manufacturer, either in money or merchandise, whether such packages are sold directly to the consumer or through retail merchants. Nor shall it be unlawful for any person to issue with such packages, tickets, coupons, or other voucher so issued by such merchant or manufacturer.

Section 2361 prohibits the selling or issuance of trading stamps unless the stamps, trading stamps, cash-discount stamps, checks, tickets, coupons, or other similar devices shall have legibly printed or written upon the face thereof the redeemable value thereof in lawful money of the United States, and upon presentation, redemption must be made either in goods, wares, or merchandise or in lawful money of the United States, at the option of the holder thereof, at the value in lawful money printed on the face thereof, provided the same be presented for redemption in number or quantity aggregating in money value not less than five cents in each lot.

The section further provides that no person, firm, or corporation shall give, sell, or deliver as an inducement for or in connection with the sale of merchandise, any coupon, check, ticket, stamp, token, or similar device redeemable in money or merchandise by any other person, firm, or corporation, without the consent of the person, firm or corporation originally issuing the same and responsible for the redemption thereof.

Any person, firm, or corporation who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor.

This section shall not apply to tickets, coupons, or other vouchers placed by any merchant or manufacturer in or upon packages or goods sold or manufactured by him if such tickets, coupons, or other vouchers are issued by such merchant or manufacturer in his own name, to be redeemed by him.

NORTH CAROLINA

Code Ann. (Michie, 1939)

Sec. 7880 (87). Trading stamps.—Every person, firm, or corporation engaged in the business of issuing, selling, and/or delivering trading stamps, checks, receipts, certificates, tokens, or other similar devices to persons, firms, or corporations engaged in trade or business, with the understanding or agreement, expressed or implied, that the same shall be presented or given by the latter to their patrons as a discount, bonus, premium, or as an inducement to secure trade or patronage, and that the person, firm, or corporation selling and/or delivering the same will give to the persons presenting or promising the same, money or other thing of value, or any commission or preference in any way on account of the possession or presentation thereof, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license a tax of two hundred dollars (\$200.00).

(a) This section shall not be construed to apply to a manufacturer or to a merchant who sells the goods, wares, or merchandise of such manufacturer, offering to present to the purchaser or customer a gift of certain value as an inducement to purchase such goods, wares, or merchandise.

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1935, c. 371, sec. 156; 1939, c. 158, sec. 156.)

NORTH DAKOTA

Comp. Laws Ann. (Supp., 1925)
Trading Stamps

Section 3020a1 provides that every person engaged in selling, distributing, or furnishing trading stamps or other such devices must

obtain a separate license from the county auditor for each store or firm so engaged: *Provided*, That this act shall not apply to using or furnishing coupons, tickets, certificates, cards, or similar devices contained in or attached to the original package of said goods, wares, or merchandise, by the manufacturer, jobber, distributor, or packer thereof, and directly redeemable by the manufacturer, jobber, distributor, packer, or retailer of such goods, wares, or merchandise.²⁸

Section 3020a2 provides for an annual license fee of \$6,000 of each person, firm, or business licensed.

Section 3020a3 provides that no person, firm, or corporation shall furnish or sell to any other person, firm, or corporation, to use in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city, or county in this state other than that in which such furnishing or selling shall take place.

Section 3020a4 provides that any person, firm, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor.

OHIO

Code Ann. (Baldwin's Throckmorton, 1936)

Sec. 6386. What trading stamps may be sold or issued.—No person shall sell or issue a stamp, trading stamp, cash discount stamp, check, ticket, coupon or other device which entitles the holder thereof, on presentation thereof either singly or in definite number, to receive from the vendor or other person, money, goods, wares or merchandise, unless each of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other devices has legibly printed or written upon the face thereof the redeemable value thereof in lawful money of the United States. (97 v. 277, sec. 1.)

History: R. S. sec. 4427-13; 97 v. 277, sec. 1.

Section 6387 provides that all such stamps must be redeemed either in goods, wares, merchandise or lawful money of the United States, at the option of such holder, at the value in lawful money printed on the face thereof, provided they are presented for redemption in number aggregating in money value not less than five cents in each lot.

Section 6388 provides that the issuer shall be liable to the holder for the face value thereof, and upon presentation thereof in lots

²⁸ Section 3020a1 does not include trading stamps redeemable in cash and the issuance of such trading stamps by one not licensed under the statute is not a violation thereof. *Olson v. Ross*, 39 N. D. 372, 167 N. W. 385 (1918).

aggregating in money value not less than five cents in each lot, shall redeem them either in goods, wares, merchandise, or lawful money of the United States at the option of the holder thereof and at the value in lawful money printed on the face thereof.

Sec. 6389. When not to apply.—This chapter and the penal statutes relating thereto shall not apply to tickets, coupons, or other vouchers placed by a merchant or manufacturer in or upon packages of goods sold or manufactured by him if such tickets, coupons, or other vouchers are to be redeemed by such merchant or manufacturer. (97 v. 278, sec. 5.)

OKLAHOMA

Stat. Ann. (1936), tit. 21

Sec. 1051. Lottery defined—Issuance of tickets by merchants.—A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid, or promised, or agreed to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by a lot or chance, whether called a lottery, a raffle, or a gift enterprise, or by whatever name the same may be known: *Provided*, It shall not be a violation of the lottery or gambling laws of this State for a bona fide resident merchant or merchants of a city or town, acting together or in conjunction with the chamber of commerce or commercial club thereof, to issue free of charge numbered tickets on sales of his merchandise, the corresponding stub of one or more of which tickets to be drawn or chosen by lot by a representative or representatives of said chamber of commerce or of said commercial club in the manner set forth on said tickets, the numbered stub or stubs so drawn to entitle the holder of the corresponding numbered issued ticket to a valuable prize donated by said merchant. (R. L. 1910, sec. 2470; L. 1929, ch. 19, p. 16, sec. 1.)

Sec. 1052. Lottery unlawful—Nuisance.—Every lottery is unlawful, and a common public nuisance. (R. L. 1910, sec. 2471.)

PENNSYLVANIA

Stat. Ann. (Purdon, 1931), tit. 18
Trading Stamps and Other Devices

Sec 1564. Giving customers tickets or checks representing value.—Any merchant, manufacturer, importer, retailer, or dealer

doing business within this Commonwealth who shall offer, give, or sell, or authorize, or permit any agent, salesman, or employee to offer, give, or sell any purchaser or customer any ticket or tickets, check or checks, or other tokens or memoranda entitling such purchaser or customer to demand or receive money or any article of value, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not less than ten, nor exceeding one hundred dollars, or suffer imprisonment not exceeding one year, or either, or both, at the discretion of the court.²⁴ (1885, June 3, P. L. 55, sec. 1.)

RHODE ISLAND

Rev. Gen. Laws (1938), c. 612
Trading Stamps²⁵

Sec. 5. All schemes and devices whereby any person or corporation shall sell, give, or distribute any stamp, trading-stamp, cash discount stamp, amusement stamp, check, coupon, or other similar device to any purchaser of goods, wares, or merchandise, which will entitle the holder of such stamp, trading-stamp, cash discount stamp, amusement stamp, check, coupon, or other similar device, on presentation thereof, either singly or in definite numbers, to receive either directly from the vendor or indirectly through any other person or corporation, some indefinite and undescribed article, the nature and value of which are unknown to the purchaser of said goods, wares, and merchandise at the time of the purchase thereof, are hereby declared to partake so much of the nature of a lottery as to be detrimental to the public morals, and are hereby declared to be illegal. (L. 1909, c. 349; L. 1923, c. 401, sec. 5.)

Sec. 6. No person or corporation shall sell, give, or distribute any stamp, trading-stamp, cash discount stamp, amusement stamp, check, coupon, or other similar device, on presentation thereof either singly or in definite numbers, to receive either directly from the vendor or indirectly through any other person or corporation, some indefinite and undescribed article, the nature and value of which are unknown

²⁴This act was held unconstitutional on the ground that the title thereof did not clearly express its contents. While the language of the title applied only to the suppression of "lottery gifts" the remainder of the statute prohibited trading stamp schemes in which no element of chance was involved. *Commonwealth v. Moorhead*, 7 C. C. 513 (1890).

²⁵A former statute (Pub. Laws (1898-1899), c. 652) which permitted the use of trading stamps only if redeemed by the merchant issuing them was held unconstitutional in *State v. Dalton*, 22 R. I. 77, 46 Atl. 234 (1900). The court held that as the issuance of trading stamps did not constitute a lottery, it was beyond the regulation of the legislature.

to the purchaser of said goods, wares, and merchandise at the time of the purchase thereof. (Id., sec. 6.)

Sec. 7. No person or corporation shall, either directly or indirectly, give, sell, or distribute any stamp, trading-stamp, cash discount stamp, amusement stamp, check, coupon, or other similar device with the promise, express or implied, as an inducement to the purchase of some article of goods, wares, or merchandise, that the holder of said stamp, trading-stamp, cash discount stamp, amusement stamp, check, coupon, or other similar device is to receive on presentation thereof and in return therefor some gift, prize, or gratuity, the nature and value of which are unknown to the purchaser of said goods, wares, or merchandise at the time of the purchase thereof, said promise to be fulfilled only upon the presentation of said stamp, trading-stamp, cash discount stamp, amusement stamp, check, coupon, or other similar device, together with such a number of like stamps, trading-stamps, cash discount stamps, amusement stamps, checks, coupons, or other similar devices, as the issuer or redeemer thereof may elect shall be redeemed at any one time. (Id., sec. 7.)

Sec. 8. Whoever shall violate any provision of the preceding 3 sections shall be guilty of a misdemeanor, and for each such offense shall be punished by a fine of not less than \$100.00 nor more than \$500.00 or by imprisonment for a term not exceeding 3 months: *Provided, however,* That nothing in the preceding sections of this chapter shall be deemed to prohibit or make illegal the annual or semiannual distribution by chance, of prizes, souvenirs, or favors by any club, society, lodge, or association at its dance, dinner, entertainment, or outing where such distribution is purely incidental to such dance, dinner, entertainment, or outing or when the entire net proceeds of such dance, dinner, entertainment, or outing is devoted to charity, if such club, society, lodge, or association has first obtained the written permission for such distribution, in towns, from the town sergeant, in cities, from the police commission or police commissioner, if such there be, otherwise from the chief of police of the town or city where such dance, dinner, entertainment, or outing is held and said permitting authority is hereby authorized to grant such permit when he is satisfied that such distribution comes within this proviso. (P. L., 1931, c. 1691.)

SOUTH CAROLINA

Code (1932)

Sec. 1237. No gift or premium to be offered to the purchaser.— No person shall sell, exchange, or dispose of any article of food, or

attempt to do so, upon any representation, advertisement, notice, or indictment that anything other than what is specially stated to be the subject of the sale or exchange is or is to be delivered or received, or in any way connected with or a part of the transaction as a gift, prize, premium, or reward to the purchaser. Any person 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 not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. (Cr. C. '22, sec. 133; Cr. C. '12, sec. 278; Cr. C. '02, sec. 206; R. S. 192; 1887, XIX, 812.)

UTAH

Rev. Stat. Ann. (1933)

Sec. 96-0-1. Conditions of unlawful issue—Process agent—Bond.—It shall be unlawful for any person to sell, issue, transfer, or deliver to any other person within this state any trading stamp or stamps to be sold, issued, transferred, or delivered by such other person upon, in connection with, or as the result of, a sale of any goods, wares, merchandise, or other commodity or thing of value, unless and until the person in the first instance so selling, issuing, transferring, or delivering the same shall have established an office within this state where all books of account relating to the sale, issue, transfer, or delivery of trading stamps in this state shall be kept, and shall have filed with the secretary of state an appointment of a process attorney upon whom process in all civil actions may be served, and a good and sufficient bond as hereinafter specified. Any person violating any provision of this section is guilty of a misdemeanor. (C. L. 17, sec. 6160.)

Sec. 96-0-2. Bond—Actions—Parties—Limitation of action.—Said bond shall be in the sum of \$20,000, payable to the State of Utah, and shall be executed by the person furnishing the same as principal, together with at least one corporate surety, and shall provide that the principal shall, upon presentation by the lawful holder of the required quantity of trading stamps in the proper form, redeem the same according to the terms of the contract under which they were issued, and that the said principal shall pay all taxes imposed by law and all fines and penalties imposed for a violation of any law of this state. Said bond shall be in such form as the Secretary of State shall prescribe. Whenever any such bond shall become forfeited for breach of any condition therein contained, any person injured thereby may sue thereon, or all persons so injured

may join in prosecuting one action, but any such action must be commenced within one year after the cause of action accrued. (C. L. 17, sec. 6161.)

Rev. Stat. Ann. (Supp., 1939)

Sec. 96-0-3. Trading stamps, etc., to show redeemable value in cents.—No person shall sell or issue any stamps, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares, or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices shall have legibly printed or written upon the face thereof the redeemable value thereof in cents. (L. '35, ch. 102, sec. 1.)

Section 96-0-4 provides that the issuer shall, upon presentation, redeem the same either in goods, wares, or merchandise, or in cash, good and lawful money of the United States, at the option of the holder thereof, and any number of such stamps shall be redeemed at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made.

Section 96-0-5 provides that the distributor or issuer shall be liable to the holder thereof for the face value thereof, and shall upon presentation redeem the same, either in goods, wares or merchandise, or in cash, good and lawful money of the United States of America, at the option of the holder thereof, and in such case any number of stamps shall be redeemed at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made.

Sec. 96-0-6. Violation—Penalty.—Any person, firm, or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor. (L. '35, ch. 102, sec. 4.)

VERMONT

No statutory provisions.²⁸

²⁸ A former statute (Acts 1898, No. 123) prohibiting the use of trading stamps in connection with the purchase of merchandise is unconstitutional as being repugnant to the privileges and immunities clause and the due process clause of the Federal Constitution. There is no element of chance in the scheme, and the use of trading stamps being lawful, even if demoralizing to legitimate business, the statute is an invalid exercise of the police power of the State. *State v. Dodge*, 76 Vt. 197, 56 Atl. 983 (1904).

VIRGINIA

No statutory provisions.²⁷

WASHINGTON

Rev. Stat. Ann. (Remington, 1932)
Trading Stamps

Sec. 5837. Redeemable cash value to be printed on face.—No person shall sell or issue any stamps, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive, either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar device shall have legibly printed or written upon the face thereof the redeemable value thereof in cents. (L. '07, p. 742, sec. 1.)

Sec. 5838. Must redeem at cash value.—Any person who shall sell or issue to any person engaged in any trade, business, or profession, any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, shall upon presentation, redeem the same either in goods, wares or merchandise, or in cash, good and lawful money of the United States, at the option of the holder thereof, and any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices shall be redeemed as hereinbefore set forth, at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any number, when presented, at the value in cents printed upon the face thereof, as hereinbefore provided. (L. '07, p. 742, sec. 2.)

²⁷ A former statute (Acts 1897-98, p. 442, c. 406) which permitted the use of trading stamps only if they were redeemed by the merchant distributing them was held unconstitutional as an invalid exercise of the police power of the State in *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327 (1903). The court stated that the scheme was not a lottery and therefore the business of issuing trading stamps, whether redeemable by the merchant or a trading stamp company, was beyond regulation by the legislature, not being related to the protection of the public welfare.

Section 5389 provides that any person engaged in any trade, business, or profession who shall distribute or present in consideration of any article or thing purchased, any trading stamp, cash discount stamp, or other similar device, which will entitle the holder thereof, on presentation thereof, to receive, either directly as set forth in section 5838, or indirectly through any other person, shall, upon the refusal or failure of the said person issuing or selling same to redeem the same, as set forth in section 5838, be liable to the holder for the face value thereof, and shall redeem the same, either in goods, wares or merchandise, or in cash.

Sec. 5840. Penalty.—Any person, firm, or corporation who shall violate any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense.²⁸ (L. '07, p. 743, sec. 4.)

Sec. 8359. Licenses for stamps.—Every person, firm, or corporation who shall use, and every person, firm, or corporation who shall furnish to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares, or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or settling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm, or corporation from which such furnishing or selling, or in which such using shall take place. (L. '13, p. 413, sec. 1.)

Sec. 8360. County license.—In order to obtain such license the person, firm, or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the

²⁸ Sections 5837-5840 are constitutional as a valid exercise of the police power of the State, and do not deny equal protection or due process in violation of these clauses of the Federal Constitution. The court stated that the system of trading stamps differs from the ordinary transactions of trade and has its impulses in immediate and definite desires, leaving definite and measurable results, even though the system is, strictly speaking, not a lottery. *Tanner v. Little*, 210 U. S. 360, 36 Sup. Ct. 379; 60 L. Ed. 691 (1916).

presentation thereof issue to the person, firm or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 8359. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein. (L. '13, p. 414, sec. 2.)

Sec. 8361. Restrictions.—No person, firm, or corporation shall furnish or sell to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city, or county in this State other than that in which such furnishing or selling shall take place: *Provided, however,* That nothing in this section or act, or in any other statute or ordinance of this State, shall apply to the issuance and direct redemption by a manufacturer of a premium, coupon, certificate, or similar device, or prevent him or it from issuing and directly redeeming such premium coupon, certificate, or similar device, which, however, shall not be issued, circulated or distributed by retail vendors except when contained in or attached to an original package. The term "manufacturer," as used in this proviso, means any vendor of an article of merchandise which is put-up by or for him or it in an original package and which is sold under his or its trade name, brand or mark: *Provided, however,* That no premium coupon, certificate, or similar device shall be issued in connection with the sale of eggs and the products thereof, or milk and the products thereof.

(a) If any section, subsection, clause, or phrase of this act, or the act of which this is an amendment, is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act, or any act of which this act is an amendment. 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 of the other sections, subsections, sentences, clauses, or phrases by (be) declared unconstitutional. (L. '13, p. 414, sec. 3; amended L. 1939, c. 31.)

Sec. 8362. Penalty.—Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor.²⁹ (L. '13, p. 414, sec. 4.)

²⁹ Sections 8359-8362 are constitutional under the police power of the State regulating matters pertaining to the protection of public morals. It is not violative of the due process or equal protection clauses of the Federal Constitution. *Pitney v. State*, 240 U. S. 387, 36 Sup. Ct. 355, 60 L. Ed. 703 (1916).

WEST VIRGINIA

Code Ann. (Michie and Sublett, 1937)

Section 869 (1) provides that no person without a State license shall sell, offer, or expose for sale, to merchants, trading stamps, premium stamps, or certificates of like nature or character, or undertake with merchants to redeem such stamps or certificates in money or goods.

Section 914 (46) provides for a tax of \$500 on every license to sell merchants trading stamps, premium stamps, or stamps or certificates of like nature or character, or to undertake with merchants to redeem such stamps or certificates in money or goods.³⁰

WISCONSIN

Rev. Stat. (1939)
Trading Stamps

Section 100.15 provides that no person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares, or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares, or merchandise, which slip, ticket, or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm, or corporation issuing the same; provided, that the publication by or distribution through newspapers, or other publications, of coupons in advertisements other than their own, shall not be considered a violation of this section; and provided further, that this section shall not apply to any coupon, certificate, or similar device, which is within, attached to, or a part

³⁰ Code (1906), c. 32, sec. 101 (sec. 914 (46)), is not invalid under the State constitution or the Fourteenth amendment to the Federal Constitution. *Sperry & Hutchinson Co. v. Melton*, 69 W. Va. 124, 71 S. E. 19 (1911).

of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer.

The giving, offering, issuance, or delivery of any trading stamp, token, ticket, bond, slip, check, or other similar device having a redemption value, by any person, firm, corporation, or association, in connection with the resale of any goods, wares, or merchandise which were bought by such person, firm, corporation, or association with knowledge or notice that the resale price thereof had been fixed or established by the producer or distributor thereof, when the price obtained on the resale less the total redemption value of the device herein mentioned given in connection therewith is below the fixed or established minimum price, is declared to be an unfair method of competition in business, and notwithstanding the provisions of subsection (1) of this section, or any other provision in the statutes, is prohibited. In addition to the penalty provided in section 100.26 for violation of this section, an injunction may be issued by any court of competent jurisdiction restraining further violation hereof at the suit of any person, firm, or corporation damaged or affected thereby.

If any provision, sentence, clause, or word of this section or the application thereof to any person, firm, corporation, or association, thing, or circumstance shall be held invalid, the remainder of this section and the application of such provision, sentence, clause, or word to other persons, firms, corporations, or associations, things, or circumstances shall not be affected thereby.⁵¹

⁵¹ It has been held that section 100.15 (Rev. Stat., 1937) is constitutional as a valid exercise of the police power of the State, the court holding that, while the scheme was not a lottery, it could be considered as having "the seduction of evil of such." *Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N. W. 54 (1917). Contra, *State ex rel. Downey-Farrell Co. v. Weigle*, 168 Wis. 19, 168 N. W. 356 (1918).

A plan whereby a trading stamp company sold stamps to merchants who distributed them to their purchasers, such stamps being redeemable by the trading stamp company, is not in violation of section 100.15 (Rev. Stat., 1937). *Sperry & Hutchinson Co. v. Weigle*, 169 Wis. 562, 173 N. W. 315 (1919).

A contract for the sale of jewelry to a retailer providing for an advertising plan under which the retailer was to send 50 coupons to prospective purchasers, each coupon being good for a cash credit of 50 cents, was held not to violate section 100.15 (Rev. Stat., 1937). *Rice v. Green*, 199 Wis. 518, 227 N. W. 22 (1929).

SECTION 2
SALES TAX PROVISIONS

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ARKANSAS

Dig. Stat. (Pope, 1937)
Absorption of Sales Tax

Section 14084 provides that it shall be unlawful for any retailer to assume or absorb the tax, or to advertise or hold out to the public, or to any customer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer.

CALIFORNIA

Gen. Laws (Deering, 1937), Act 8493

Section 8 provides that it is unlawful to advertise absorption of the sales tax. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

COLORADO

Stat. Ann. (Michie, Supp. 1939), c. 144

Section 8 provides that it shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the sales tax or any part thereof imposed by this chapter will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor.

IOWA

Code (1939)

Section 6943.080 provides that it shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer directly or indirectly, that the tax or any part thereof imposed by this division will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

Section 6943.079 provides that retailers shall, as far as practicable, add the tax to the sale price; agreements between competing retailers to provide uniform methods for adding such tax, and which do not involve price-fixing agreements are expressly authorized and are not in violation of the antitrust laws of this State.

KANSAS

Stat. Ann. (Corrick, Supp. 1939)

Section 79-3605 provides that it shall be unlawful for any retailer to advertise or hold out, or state to the public, or to any consumer, directly or indirectly, that the tax, or any part thereof, imposed by this act will be assumed or absorbed by the retailer, or that it will not be considered as an element in the price to the consumer, or if added, that it, or any part thereof, will be refunded.

LOUISIANA

Gen. Stat. Ann. (Dart, 1939)

Section 8648.6 (c) provides that a person engaged in any business taxable under this act shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax or that he will relieve the purchaser from the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor.

MICHIGAN

Stat. Ann. (Henderson, 1936)

Section 7.554 provides that no person engaged in the business of selling tangible personal property at retail shall advertise or hold out

to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder.

MISSISSIPPI

Code Ann. (Supp. 1938)

Section 2352 provides that it shall be unlawful for any person, firm, or corporation, who is engaging or continuing within this State in the business of selling any tangible property and who is liable for a privilege tax assessed and levied by section 2c of chapter 119, Laws of Mississippi, 1934, to fail or refuse to add to the sale price and collect the amount due by him on account of said tax as provided in section 1 hereof or to add or collect more than the amount fixed by section 1 of this act on account of said tax.

MISSOURI

Stat. Ann. (Supp. 1939)

Section 10164 b-5 provide that it shall be unlawful for any person to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act, and required to be collected by him, will be assumed or absorbed by the person or that it will not be added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

NEW MEXICO

Stat. Ann. (Courtright, Supp. 1938)

Section 141-1707 (b) provides that it shall be unlawful for any person engaged in any business or profession subject to the sales tax not to collect it or by advertising to offer to absorb the tax directly or indirectly.

NORTH CAROLINA

Code Ann. (Michie, 1939)

Section 7880 (156) (b) provides that any retail merchant who shall by advertisement offer to absorb the tax levied in this article upon the retail sale of merchandise, or in any manner, directly or indirectly, advertise that the tax imposed is not considered as an element in the price to the consumer, shall be guilty of a misdemeanor.

NORTH DAKOTA

L. 1937, c. 249

Section 7 provides that it shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer.

SOUTH DAKOTA

Comp. Laws (1939)

Section 57.3305 provides that it is unlawful for any retailer to advertise or hold out to the public that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer.

UTAH

L. 1939, C. 10
Agricultural Products

Section 6 provides that it is unlawful for persons engaged in the production, processing, marketing, sale, or distribution of agricultural products to engage in practices which are unfair, discriminatory, or injurious to the producers or consumers of such products by any act, conduct, representation, method of competition, or agreement which results in discrimination in price between producers of agricultural commodities of like grade or quality.

Revised Statutes Annotated (Supp. 1939), Sec. 80-15-6, provides that vendor shall collect the sales tax from the vendee.

WASHINGTON

Rev. Stat. Ann. (Remington, Supp. 1939)
Sales Tax

Sec. 8370-27. Rebates, refunds, and absorptions unlawful.—Whoever, excepting as expressly authorized pursuant to this act, refunds, remits, or rebates to a buyer, either directly or indirectly and by whatsoever means, all or any part of the tax [Sales tax] levied by this title, or, makes in any form of advertising, verbal or otherwise, any statements which might infer that he is absorbing the tax or paying the tax for the buyer by an adjustment of prices, or at a price including the tax, or in any other manner whatsoever, shall be guilty of a misdemeanor. (L. '37, ch. 227, sec. 9, p. 1150; L. '35, ch. 180, sec. 27, p. 725.)

WYOMING

L. 1937, c. 102
Sales Tax

Sec. 16. Tax cannot be absorbed by retailer.—It shall be unlawful and a misdemeanor for any retailer to advertise or hold out, or state to the public, or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer, or that it will not be considered as an element in the price to the consumer, or if added, that it, or any part thereof, will be refunded.

SECTION 3
PRICE DIFFERENTIALS
A. MILK AND CREAM

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MINNESOTA

Stat. (Mason, Supp., 1940)
Cream, Butterfat

Sec. 3928-8. Purchases to be on basis of grades.—All purchases of cream shall be on the basis of the grades hereinbefore defined. All purchasers of cream and/or butterfat shall maintain a reasonable price differential for such grades and at no time shall this differential be less than one cent per pound butterfat between grades. The daily current price being paid for each grade shall be posted in a prominent place in each cream-buying station or creamery: *Provided, however,* That this requirement as to the posting of the daily current price shall not be applied to those creameries or cream-buying stations that do not make daily cash purchases. (Act Mar. 20, 1935, c. 61, sec. 5.)

MISSISSIPPI

Code Ann. (Supp., 1938)
Dairies and Creameries

Sec. 849. Price.—Every person owning or operating a creamery, or cream buying station, or cream vehicle route and engaged in the business of buying cream shall maintain a price differential between first-grade and second-grade cream of not to exceed 0.03c (three cents) per pound butterfat. (1936, ch. 292) sec. 3.

Sec. 850. Price posted.—The current price being paid f. o. b. buying point for various grades of cream shall be continuously posted in a manner prescribed by the commissioner of agriculture in each creamery, cream station, and vehicle used in transporting cream, controlled or managed by the party so purchasing. Except in case of

cooperatives where such price cannot be fixed until close of each pool, in which case price of last pool shall be posted. (1936, ch. 292) sec. 4.

Sec. 856. Acts prohibited.—The following acts or omissions are prohibited:

1. * * *

2. The failure to maintain a price differential between grades as provided in section 1, or the failure to post in a dairy products plant or cream buying station the current prices paid for butterfat, according to grade or the failure to show posted prices on a check stub, or statement delivered to patron, except in case of farmer's cooperatives where prices are determined only at the close of each pool period. (Id., sec. 10.)

Sec. 857. Penalty.—Any person who, by himself or by his agent or employee, wilfully violates any requirement of this Act shall be fined not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, and each separate violation constitutes a separate offense. (Id., sec. 11.)

MONTANA

Rev. Codes Ann. (Anderson and McFarland, 1935)
Butterfat

Sec. 2620.68. Posting price of butterfat required.—All creameries, cheese factories, or other buyers of milk products for direct sale or for manufacturing purposes, shall post each day in some conspicuous place in their factory or place of business, a schedule of the prices, which they pay for butterfat.

History: En. sec. 66 by sec. 10, ch. 39, L. 1931.

Sec. 2620.69. Penalties.—The violating of any of the provisions of this act for which no other penalty is provided, shall constitute a misdemeanor and be punishable as provided in section 2620.54.

History: En. sec. 11, ch. 39, L. 1931.

NORTH DAKOTA

L. 1929, c. 118
Posting Prices of Butterfat at Creameries, Cream Stations, Etc.

Section 1. Prices to be posted.—Every person who owns, operates, or manages a creamery or cream station in the State of North Dakota, where butterfat is purchased from the public shall post the price being offered for butterfat; such posting to be made in a place where

it can be clearly seen from the street; and it shall be unlawful for any such person to pay for such product, a price different from that so posted: *Provided*, That the above requirement shall only be held to apply to cream stations or creameries purchasing such butterfat outright and for a cash price agreed upon at the time of purchase thereof.

Sec. 2. Penalties.—Every person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed thirty (30) days or by a fine not to exceed the sum of one hundred dollars (\$100.00) or by both such fine and imprisonment.

OHIO

Code Ann. (Baldwin's Throckmorton, 1936)
Milk

Sec. 12720-1. Price paid producers based upon percentage of butterfat.—The price paid to the producers of milk by the dealers or manufacturers shall be based upon milk containing 3.5 percent butterfat; and a differential may be paid which should be greater for milk containing more than 3.5 percent butterfat and less for milk containing less than 3.5 percent butterfat. And whoever is guilty of a violation of this provision shall be fined not less than fifty dollars nor more than two hundred dollars.

History: 109 v. 550 (551).

B. BREAD AND BAKERY PRODUCTS

OREGON

L. 1st Ex. 1935, c. 65
Bread and Other Bakery Products

Section 1. Purpose and construction of act.—This act is in exercise of the police powers of the State for the protection of the safety, health, and welfare of the people of the State. It hereby is found and declared that the public welfare requires control and regulation of the manufacture and distribution of bread and other bakery products and of persons engaged therein, in order that there may be prevented or eliminated unsanitary, unhealthful, fraudulent, unfair or uneconomic practices and conditions in connection with such manufacture or distribution which endanger public health, defraud con-

sumers, jeopardize the public source and supply of a nourishing, healthful food, and seriously affect adversely a large and essential industry. It is further found and declared that the regulation of the commercial manufacture and distribution of bakery products as in this act provided is in the interest of the economic and social well-being and the health and safety of the state and all of its people, and is a necessary subject for immediate general legislation operating uniformly throughout the State. All provisions of this act shall be liberally construed for the accomplishment of the purposes of the act.

Sec. 15. Posting of terms and prices required.—(a) Each person hereafter operating a bakery, or offering for sale any bakery product other than exclusively at retail at a fixed place or places of business, shall file with the board in writing and under oath a statement of all prices, discounts, rebates, allowances, and other terms or conditions of sale or payment, thereafter by him to be quoted, offered, charged, made, or allowed upon each kind of bakery product offered by him for sale in this State, and shall keep a true and complete copy of said statement posted conspicuously at each of his places of such business within this State, or upon each vehicle used in distribution of bakery products if no fixed place of business is maintained. Such statement may be revised or added to by filing with the board a supplementary written statement under oath, the revision or addition to become effective no sooner than ten (10) days after its receipt by the board.

(b) On and after fifteen (15) days after the effective date of this act no such person shall sell or display or offer for sale within this State any bakery product the price and terms and conditions of sale of which shall not have been filed and posted as aforesaid, nor for any price or upon any term or condition or with any rebate, discount or allowance, other than the applicable price, term, condition, rebate, discount, or allowance specified for that type of bakery product in the statement of that person then on file with the board and posted as aforesaid.

Sec. 16. Prohibited trade practices.—In addition to other acts by this act made unlawful, it shall be unlawful in connection with the operation of any bakery or the sale or distribution of any bakery product:

(1) To use any advertising or selling method or make any statement, whether by print, radio, display, or otherwise, which is inaccurate in any material particular or which misrepresents any bakery product or ingredient thereof.

(2) To give or make any advertising allowance to any customer or to give or loan to any customer any showcase, display table, rack, or other display equipment or contrivance.

(3) To give redeemable coupons, tokens, or premiums; to give or make any discount, allowance, refund, or rebate, whether in the form of money, dividends, donation of free goods, or otherwise, or to extend to any purchaser any special service or privilege, not made, given, or extended to all purchasers under like terms and conditions.

(4) To sell or offer for sale any stale bakery product at any place or location other than one previously approved in writing for that purpose by the board.

L. 1939, c. 409

Bread and Other Bakery Products

Section 1. Definition.—When used in this act, unless the context otherwise requires:

1. The term “bakery” means any place, premises, or establishment where any bakery product is regularly prepared, processed, or manufactured for sale other than for consumption on the premises where originally prepared, processed, or manufactured.

2. The term “bakery products” includes bread, buns, rolls, cakes, pies, cookies, doughnuts, and all similar goods now manufactured by bakeries, to be used for human food.

Sec. 2. Unlawful acts.—It shall be unlawful in connection with the operation of any bakery or the sale or distribution by bakeries of any bakery product:

1. To use any method or make any statement, whether by print, radio, display, or otherwise, which is inaccurate in any material particular, or which misrepresents any bakery product or ingredient thereof.

2. To give or loan to any customer any showcase, display table, rack, or other display equipment or contrivance.

3. To offer or give any article of value in connection with the sale of a bakery product.

4. To offer or make any concession of any kind whatsoever, whether by the giving of coupons or otherwise, in connection with any such sale.

5. To offer for sale or sell a bakery product in combination with any other commodity.

Sec. 3. Remedies.—Any person injured by any violation of this act may maintain an action in any court of general equitable jurisdiction of this State to prevent, restrain, or enjoin such violation. If in such suit a violation of this act shall be established, the court shall enjoin and restrain or otherwise prohibit such violation, and the plaintiff in said action shall be entitled to recover the damages by him sustained and the costs of suit, including a reasonable attorney’s fee.

WASHINGTON

Rev. Stat. Ann. (Remington, Supp. 1939)
Bakery Goods

Sec. 6284-9. Statements of prices—Filing and posting copies—Unlawful sales and rebates.—(a) Each person hereafter operating a bakery or operating as a bakery distributor, shall file with the director of agriculture in duplicate and in writing and under oath a statement of all prices, discounts, rebates, allowances, and other terms or conditions of sale or payment, thereafter by him to be quoted, offered, charged, made, or allowed upon each kind of bakery product offered by him for sale in this State, and shall keep a true and complete copy of said statement posted conspicuously at each of his places of such business within this State, or upon each vehicle used in distribution of bakery products if no fixed place of business is maintained. Such statement may be revised or added to by filing with the director of agriculture a supplementary written statement in duplicate and under oath, the revision or addition to become effective no sooner than ten (10) days after its receipt by the director of agriculture;

(b) On and after fifteen (15) days after the effective date of this act no such person shall sell or display or offer for sale within this State any bakery product the price and terms and conditions of sale of which shall not have been filed and posted as aforesaid, nor any price or upon any term or condition or with any rebate, discount, or allowance, other than the applicable price, term, condition, rebate, discount, or allowance specified for that type of bakery product in the statement of that person then on file with the director of agriculture and posted as aforesaid. (L. '37, ch. 137, sec. 9, p. 507.)

C. FUEL PRICE POSTING**IOWA**

L. 1937, c. 136
Motor Vehicle Fuel Tax

Section 5093.04 provides that every distributor and other person selling motor-vehicle fuel or fuel oil in this State, at wholesale or at retail, shall keep posted in a conspicuous space most accessible to the public at their place or places of businesses, including bulk plants, service stations, garages and motor vehicle transports, a placard showing in words and/or figures of the same height and size but not less than one inch in height or size, the price per gallon of each grade

of motor vehicle fuel and fuel oil offered for sale, the amount of State license fee per gallon thereon, the Federal excise tax per gallon thereon, and the total thereof. If any rebate, discount, commission or other concession is granted by distributors or persons engaged in the sale of motor vehicle fuel or fuel oil of such nature as will reduce the cost or price to any purchaser or consumer of such products, the conditions, quantity and amount of such rebate, discount, commission, or other concession shall be posted as a part of the posted price. *Provided, however,* At all places making wholesale sales only and upon motor vehicle transports, the words or figures shall be of such size as to be plainly legible to the public and as approved by the treasurer. All price placards shall be subject to the approval of the treasurer. Any distributor or person failing to post or keep posted the placard required by this section, or who posts placards not approved by the treasurer as provided in this section, or who sells any motor-vehicle fuel or fuel oil at a price which directly or indirectly, by any means or device deviates from the posted price set forth on the price placard approved by the treasurer, shall be guilty of a misdemeanor and shall be punished by a fine of one hundred dollars or imprisonment in the county jail for thirty days. Nothing contained herein shall prohibit or restrict the distribution of earnings to the members of any distributor or person, nor to the distribution to consumers of road maps, publicity and other advertising media carrying the name of the distributor, person, or produce. Each day the required placard remains unposted or an unauthorized placard remains posted, or each deviation from the posted price, shall be considered a separate offense. In the event of a third conviction for the violation of any of the provisions of this section, the state treasurer may revoke the license of such distributor or person so convicted.

NEW JERSEY

Rev. Stat. (Supp., 1938)

Motor Fuels

Section 56: 6-1 defines the words person, retail dealer, motor fuel, sale, selling expense, and commissioner as used in the act.

Sec. 56: 6-2. Posting prices.—(a) Every retail dealer shall publicly display and maintain on each pump from which motor fuel is sold, in the manner regulated by the State Tax Commissioner, a sign stating the price per gallon of the motor fuel sold by said dealer from such pump. All taxes, State and Federal, imposed with respect to the manufacture or sale of motor fuel shall be included

in the price shown on said sign, but said sign shall contain a statement of the amount of taxes included in said price, or, without specifying the amount thereof, said sign shall state that taxes are included in said price. A retail dealer shall not sell at any other price than the price, including tax, so posted. Any such price when posted shall remain posted and in effect for a period of not less than twenty-four (24) hours.

(b) No retail dealer shall sell motor fuel at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses.

(c) Any price signs, other than those required by section 201 (a), displayed by any retail dealer shall be displayed in a manner to be regulated by the State Tax Commissioner and shall state the per gallon price including the tax. Such signs may include references to the brand name or trade-mark of such motor fuel and claims for its quality, and shall include a statement of the amount of taxes included in the sale price, or, without specifying the amount thereof said signs shall state that taxes are included in said price. (Amended L. 1939, c. 62.)

(d) Any advertising of motor fuels by a retail dealer which contains a reference to the per gallon price thereof shall include all taxes in the price stated; and there shall be included in such advertising a statement that such price includes taxes or a statement of the amount of taxes which are included in such price.

(e) No rebates, allowances, concessions, or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor fuels from a retail dealer below the posted price or at a net price lower than the posted price applicable at the time of the sale.

(f) It shall be unlawful for any retail dealer to use lotteries, prizes, wheels of fortune, punchboards, or other games of chance, in connection with the sale of motor fuels. (L. 1938, c. 163, sec. 201.)

Section 56:6-3 provides that every retail dealer who shall fail to post and publicly display, in the manner herein required, a sign stating the price per gallon of all motor fuel sold by him, or who shall sell motor fuel at a price other than the per gallon price, as provided in article II hereof, or who shall violate any other provisions of article II of this act, shall, upon conviction, be subject to a penalty of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200.00) for each such offense, and in default of the payment of such penalty shall be imprisoned for a period not to exceed thirty days. If there shall be a conviction upon a second or subsequent offense, the license of the convicted retail dealer shall be revoked by the State Tax Commissioner.