

REGULATION OF PRICE COMPETITION



SUPPLEMENT

TO PART ONE IN VOLUME II - STATE
PRICE CONTROL LEGISLATION (1940)
IN MARKETING LAWS SURVEY SERIES

PRESENTING
CODE REVISIONS • NEW LEGISLATION •
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REGULATION OF PRICE COMPETITION



Supplement
to
PART ONE - VOLUME II
STATE PRICE CONTROL LEGISLATION
A
MARKETING LAWS
SURVEY
PUBLICATION



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Bibliography On Barriers To Trade Between States
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The Marketing Laws Survey projects, operated during 1942 under the Work Projects Administration, Federal Works Agency, are officially sponsored by the Department of Commerce. The policies and techniques of research and compilation are directed by the Marketing Laws Unit of the Bureau of Foreign and Domestic Commerce, Department of Commerce. Paul T. Truitt is Chief of the Unit; E. E. McCleish, Assistant Chief and Editor-in-Chief of Survey publications.

FOREWORD

There has been much new legislation and many important court decisions in the field of price control since the Marketing Laws Survey issued its comprehensive study of *State Price Control Legislation* early in 1940. These revisions of statutes, new state legislation and judicial decisions have been compiled and checked against the publication outline of the master volume and are now made available to the public. The present handbook, under the title of *Regulation of Price Competition*, is a supplement to Part 1, Vol. II, *State Price Control Legislation*, Marketing Laws Survey series. *Regulation of Price Competition* includes resale price maintenance, prohibition of sales below cost and anti-discrimination legislation in the same order in which they were presented in the original volume. Research and analysis covered all pertinent statutes enacted by 1940 and 1941 legislative sessions and decisions in these three fields by the courts of state and federal jurisdiction through 1940, 1941 and 1942.

To aid the agencies of government, students of law and marketing; the supplement follows the state by state summaries of Volume II. Each chapter and each subsection under the states designates the pages in the original volume which are amplified or amended by later legislation and judicial interpretation.

Extensive as changes appear to be in these three types of price control laws, legislatures and courts have during the last three years been even busier in the fields of state price fixing, price practices and special price legislation which comprised Part II of Volume II. The supplement to Part II is now being assembled for early publication.

This supplement and its forthcoming companion are the work of the attorneys, publication and administrative

staffs of the Marketing Laws Survey project in the WPA Administration for Southern California. The early completion of this supplement in a field of legislation which holds during these war days the spotlight of national attention has been made possible by the invaluable co-operation of Henry Russell Amory, State Administrator for Work Projects Administration in Southern California. The research and production work has been under the immediate direction of Harold R. Bassin, regional supervisor for the Marketing Laws Survey and reflects the policies and general objectives of the Marketing Laws Unit, Bureau of Foreign & Domestic Commerce, Department of Commerce, the official sponsor of the Survey projects in New York, Chicago, Los Angeles. Lt. George W. Henderson, Lecturer in Law, University of Southern California, served as the legal consultant and advisor. Legal research was conducted by George Macdonald, regional counsel, Charles R. Morfoot and Edwin A. Foster, assistants regional counsel.

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November, 1942.

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PART ONE

REGULATION OF PRICE COMPETITION

A

Resale Price Maintenance

B

Prohibition of Sales Below Cost

C

Anti-Discrimination Legislation

ALABAMA

A. RESALE PRICE MAINTENANCE

See pp. 1 to 3, Vol. II

L. 1939, No. 35

Now appears in Ala. Code Ann. (Michie, 1940), tit. 57,
c. 2, secs. 77 to 83.

ARIZONA

B. PROHIBITION OF SALES BELOW COST

JUDICIAL DECISIONS

See p. 9, Vol. II

Constitutionality of Statute.

That portion of Section 2 of the Act defining "cost" which provides that purchases made by wholesalers and retailers at prices which cannot be justified by prevailing market conditions within the State shall not be used in determining cost is so indefinite and uncertain that it is arbitrary and unreasonable and therefore unconstitutional, since the seller cannot determine thereunder just what cost is meant by the law. However, this provision is separable and does not invalidate the entire Act, since, after the elimination of this unconstitutional part, the remainder of the Act is still workable and constitutional. *State v. Walgreen Drug Co.*, 113 Pac. (2d) 650 (1941).

Application of Statute.

"Cost of Doing Business," "Cost," Etc.

See, also, "*Constitutionality of Statute.*"

In determining "cost to wholesaler," the wholesaler is not required to include in the computation of cost the items of salaries, administrative expenses, and taxes, because under the Act the only items of cost which must be taken into consideration are the invoice and replacement cost, less certain discounts, plus freight charges and cartage. Letter, Atty. Gen., June 14, 1939; P-H, Trade & Ind. Ser., par. 96558.

Intent to Injure.

The Act is not invalid as imposing civil and penal liability upon persons violating the same without criminal intent, notwithstanding that the Act fails to

state that the particular things constituting a violation must be done with a criminal intent, where the only reasonable implication from the entire language is that such intent is an essential ingredient of a violation thereof. *State v. Walgreen Drug Co., supra.*

ARKANSAS

B. PROHIBITION OF SALES BELOW COST

JUDICIAL DECISIONS

See p. 17, Vol. II

Application of Statute.

Scope.

The Unfair Practices Act does not prohibit the giving of a trade discount where it is not secret and is given to all when the same service is rendered. Biennial Rep. of Atty. Gen., 1937-39, p. 47; P-H, Trade & Ind. Ser., par. 97066.

CALIFORNIA

A. RESALE PRICE MAINTENANCE

See pp. 23 to 25, Vol. II

Gen. Laws (Deering, 1937), Act 8782
Fair Trade Act

Repealed by Stats. 1941, c. 526, p. 1847, sec. 2 and reenacted as c. 3, secs. 16900 to 16905, Bus. & Prof. Code (Deering Supp. 1941).

JUDICIAL DECISIONS

See pp. 25 to 27, Vol. II

Application of Statute.

Parties Entitled to Establish Resale Prices.

A trade-mark owner is entitled to fix resale price restrictions. *Lentheric, Inc. v. F. W. Woolworth Co.*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97062.

A manufacturer of tooth brushes made of patented nylon is entitled to fix the resale price thereof, provided the tooth brushes are in fair and open competition with other articles of the same general class produced by others. *Weco Products Co. v. Mid-City Cut Rate Stores*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25523.

Relation of Price to Value or Quantity, Etc.

The producer is not required to proportion prices to quantities, but may fix the same price for a small quantity as for a larger quantity; manufacturer of trade-marked perfume is entitled to establish a minimum resale price for one ounce and require that the

same price be maintained in any sale of less than one ounce. *Lentheric, Inc. v. F. W. Woolworth Co., supra.*

Resale prices are not required by the Fair Trade Act to bear any particular relation to the value of the article, provided such article is in fair and open competition with other articles of the same general class produced by others. *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25477; P-H, Trade & Ind. Ser., par. 97088.

The prices fixed by a producer are not required by The Fair Trade Act to bear any relation to those of his competitors. *Lentheric, Inc. v. F. W. Woolworth Co., supra.*

Removal of Brand.

A dealer is not prohibited by the Fair Trade Act from rebottling and selling a product (perfume) without restriction as to price, provided such product is disassociated from the producer's trade-mark and name. *Lentheric, Inc. v. F. W. Woolworth Co., supra.*

Parties Bound by Resale Price Restrictions.

An agent who buys and resells goods is a "seller" within the meaning of the Fair Trade Act; and one who buys for resale from an unidentified price cutter is a vendor subject to Fair Trade contractual provisions relating to such goods. *Capital City Merchants Assn. v. Hotel Service Bureau*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97136.

Coupons, Trading Stamps, Etc.

When a dealer sells merchandise at the minimum resale prices fixed by the manufacturer under the Fair Trade Act, the dealer's giving of trading stamps redeemable by him, either in cash or in merchandise, constitutes a sale below the minimum Fair Trade price and will be enjoined; because of their fixed value, such stamps were held equivalent to allowing a cash rebate or refund, or a discount on the sales price, and not comparable to store courtesies such as parking privileges and delivery service which bear no relation to the

amount of the customer's purchase. *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, *supra*.

Defenses - General.

In an action to restrain sales below the prices fixed by the manufacturer under the Fair Trade Act, it is a good defense that the manufacturer's good will has been created by misleading advertisements of the commodity in question. *Dr. Miles California Co. v. Mid-City Cut Rate Drug Stores*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25478; P-H, Trade & Ind. Ser., par. 97089.

Abandonment of System of Fair Trade Contracts.

The fact that a distributor, who has established minimum resale price schedules under the Fair Trade Act, makes combination package sales composed of articles subject to such prices and other articles not so subject, does not constitute an abandonment by him of his Fair Trade system of doing business where such special sales are engaged in only for limited periods of time. *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, (Super. Ct. 1941); CCH, Trade Reg. Ser., par. 52583.

B. PROHIBITION OF SALES BELOW COST

See pp. 27 to 34, Vol. II

Gen. Laws (Deering, 1937), Act 8782, as amended
by Gen. Laws (Deering Supp. 1939), Act 8781
Unfair Practices Act

Repealed by Stats. 1941, c. 526, p. 1847, sec. 2 and reenacted as c. 4, secs. 17000 to 17101; Bus. & Prof. Code (Deering Supp. 1941).

JUDICIAL DECISIONS

See pp. 34 to 36, Vol. II

Constitutionality of Statute.

Sections 1 (locality discrimination) and 7 (secret rebates) of the Unfair Practices Act are constitutional, and the means of regulation set out are neither arbitrary, unreasonable, nor capricious, but have a reasonable relation to a proper legislative purpose. Neither is the Act unconstitutional as not establishing a clear standard of conduct, since it prohibits and penalizes certain clearly defined methods. *Dunnell v. Shelly*, 38 Cal. App. (2d) 118, 100 Pac. (2d) 830 (1940).

The Unfair Practices Act is constitutional; the legislature having authority under its police powers to regulate business for the general welfare of the public by prohibiting merchants from selling products below cost for the purpose of injuring competitors and destroying competition. *Green v. Grimes-Stassforth Stationery Co.*, 39 Cal. App. (2d) 52, 102 Pac. (2d) 452 (1940); *People v. Black's Food Store and People v. Green Frog Emporium*, 16 Cal. (2d) 59, 105 Pac. (2d) 361 (1940).

The title of the Act, as amended, sufficiently embraces the subject matter included therein to conform to the constitutional provision requiring the subject of a statute to be expressed in its title. *People v. Black's Food Store and People v. Green Frog Emporium*, *supra*.

The provisions of the Act making proof of one or more acts of selling or giving away any article below cost, together with proof of the injurious effect of such acts, presumptive evidence of the purpose or intent to injure competitors or destroy competition, are not unconstitutional. *People v. Pay Less Drug Stores*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97150.

The Unfair Practices Act contains no inhibitions on the content of newspapers and circulars and the enforcement of the Act as to the sales of such articles below cost does not abridge the freedom of speech and press

guaranteed by the Constitution. *Newspaper and Circular Printing Assn. v. Acme Colorprint Co., Ltd.*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97055.

The contention that violations of the Act are misdemeanors, that the civil complaints charged defendants with having committed crimes, and that therefore the defendants were denied their constitutional right to a jury trial, is not well taken; these are not criminal prosecutions, but civil actions. *Institute of Automobile Dealers, Inc. v. W. D. Dunham & Co., et al.*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97125.

Application of Statute.

Scope.

The Act prohibits sales below cost to the United States Government and its agencies, as well as to individuals, since the prohibitions of the Act are imposed on the vendor and not on the purchaser. *Metropolitan District Material Dealers Assn. v. Eastside Building Material Co., Inc.*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25521.

The Act prohibits sales below cost to a municipality. The contention that the purchase of supplies by the city was a municipal affair; that the manner of such purchases was governed by the city's charter; that the charter superseded the general laws, and that therefore the Unfair Practices Act has no application to sales made to the city, was rejected. It was held that the conduct prohibited by the Act was not a matter of local or internal interest to the city but was of concern to the entire State, and that where a charter provision and a general law are in conflict concerning matters not municipal, the general law will prevail though it became effective after the adoption of the charter. *Institute of Automobile Dealers, Inc. v. W. D. Dunham & Co., et al.*, *supra*.

The Act is not a price-fixing law, but merely regulates the conduct of those engaged in business so as to eliminate such unfair practices for the purpose of injuring competitors or destroying competition. *Dunnell v. Shelly*, *supra*.

The Agricultural Code (Div. VI, Chap. 8) is a special law regulating the marketing of dairy products only, in this case, ice cream, and supersedes and prevails over the provisions of the Unfair Practices Act which are applicable generally to the sale of all commodities. *Balian Ice Cream Co. v. Golden State Co., Ltd.*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25537.

The special provisions of the Milk Stabilization Act (Agricultural Code, Div. IV, Chap. 10) regulating the price of milk also prevails over the provisions of the Unfair Practices Act. *Southern California Allied Food Bureau v. Carnation Co.*, (Super. Ct. 1939); CCH, Trade Reg. Ser., par. 25344.

A printer who prints newspapers and circulars for others is a producer; newspapers and circulars are articles within the meaning of the Unfair Practices Act, and sales of the same in violation of the Act will be enjoined. *Newspaper and Circular Printing Assn. v. Acme Colorprint Co., Ltd.*, *supra*.

Coupons, Trading Stamps, Etc.

Defendant retail drug store operator issued "cash discount" trading stamps at the rate of one stamp with each ten cent purchase, except on "double stamp days" when two stamps were given with each such purchase. Each stamp had a cash surrender value of two mills and were redeemable by defendant in lots of 500 stamps for \$1.00 in cash or \$1.25 in merchandise. Defendant, who conducted a cash business only, denied he used the plan to injure competitors or destroy competition and contended he used it as an advertising medium and to induce cash purchases by patrons. Held, the plan does not constitute making a gift of \$1.00 in cash or \$1.25 in merchandise, but is a discount given the customer in consideration of his paying cash. The stamps are not gifts within the meaning of the Act. Only in the event the issuance of the stamps resulted in a below-cost sale of the article purchased upon receiving the stamps could the plan be held in violation of section 3 of the Act. *Food & Grocery Bureau of So. Cal. v. Garfield, d. b. a. Mid-City Drug Co.*, 20 Cal. (2d) 248, 125 Pac. (2d) 3 (Apr. 28, 1942).

The Redeemable Coupon Act (Stats. 1933, p. 2479, as amended by Stats. 1939, c. 1005), is not in conflict with the Unfair Practices Act, nor does the former expressly authorize the issuance of coupons with purchases. *Food and Grocery Bureau of So. Cal. v. Blue & Gold Stamps - U-Save Premium Co.*, (Super. Ct. 1941); CCH, Trade Reg. Ser., par. 52528.

The practice of giving coupons to a grocer's customers which coupons are redeemable in pottery according to a profit paying list is not a violation of the Unfair Practices Act where such gifts are made without intent to injure competitors or destroy competition. Op. Atty. Gen. N. S. 1464, Feb. 21, 1939; P-H, Trade & Ind. Ser., par. 96564.

Coupons given away with cash sales which coupons are redeemable in pottery is not a violation of the Unfair Practices Act where there is no intent to injure competitors or destroy competition. Op. Atty. Gen., N. S. 1464, *supra*.

For the same reason, the announcement upon labels "Save this and other 'A' labels for valuable premiums," is not a violation of the Act. Op. Atty. Gen., N. S. 1754, June 8, 1938; P-H 96564.

The issuance of certificates entitling the holders to free photographs, which certificates are not issued for the purpose of injuring competitors or destroying competition, is permissible under the Act. Op. Atty. Gen., Feb. 4, 1940; P-H, Trade & Ind. Ser., par. 97052.

The issuance of trading stamps in connection with the purchase of goods, the stamps being redeemable for valuable articles, are premiums or gifts in violation of the Unfair Practices Act where accompanied by the requisite unlawful intent. *Food and Grocery Bureau of So. Cal. v. Blue and Gold Stamps - U-Save Premium Co.*, *supra*.

Section 3 of the Act embraces gifts, as well as sales below cost, made with the requisite predatory intent, and where merchandise credit checks are issued by a dealer (which he accepts as part payment on the purchase price of merchandise) secretly, or not to all purchasers purchasing on like terms and conditions, they also constitute rebates or refunds in violation

of Section 7 of the Act. *Better Business Bureau of Los Angeles, Ltd. v. Consolidated Appliance Dealers of Cal.*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97083.

"Cost of Doing Business," "Cost," Etc.

The term "cost," as used in the Act, is broader than the term price, and includes advertising expenditures. *People v. Pay Less Drug Stores, supra*.

The contention that the definition of "cost," as used in the Act, is arbitrary and unreasonable, must be overruled; it must be presumed that the legislature did not intend to prescribe that the cost of an article must be absolutely exact, but meant that "cost" means what business men generally mean - the approximate cost arrived at by a reasonable rule. *Institute of Automobile Dealers, Inc. v. W. D. Dunham & Co., et al., supra*.

In *Johnson v. Farmer*, 41 A. C. A. 874, 107 Pac. (2d) 959 (1940), a case involving cost of production, the court said: "The first essential is that the actual cost of production shall be fairly, and at least approximately, determined upon satisfactory evidence. This would seem necessarily to care for the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion. . . To otherwise construe the act would make it practically unworkable."

Intent to Injure.

See, also, *Constitutionality of Statute, supra*.

See, also, *Coupons, Trading Stamps, Etc., supra*.

Intent to injure may be inferred from the facts alleged. *Better Business Bureau of Los Angeles, Ltd. v. Consolidated Appliance Dealers of Cal., supra*.

Supreme Court declined to interfere with a temporary injunction when the only issue was as to the presumption of intent to injure competitors arising from proof of sales below cost. *People v. Black's Food Store and People v. Green Frog Emporium, supra*.

Combination Sales, Loss Leaders, Etc.

The sale of an article for one cent, that price being

less than cost, in combination with other similar articles sold at a profit, is a violation of the Act; and when two or more articles are sold in a combination sale, one of which is sold at less than cost, the latter is a "loss leader" prohibited under the Act. *Food and Grocery Bureau of So. Cal. v. Ziskin*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25578.

But where an article has been given to the dealer by the manufacturer, without charge, to be sold for one cent in connection with the sale of other similar articles at the regular price, the dealer does not violate the Act in making such sale. *Food and Grocery Bureau of So. Cal. v. Ziskin*, *supra*.

Meeting Competition.

The exception (contained in section 6(d) of the Act) permitting below cost sales in good faith to meet a competitor's legal price on the same articles, applies only to legal and not illegal prices of the competitor. *People v. Pay Less Drug Stores*, *supra*.

The term "competition," as here used, is narrower than the dictionary meaning of the term and permits price-cutting only on the identical article price-cut by the competitor. Furthermore, price-cutting not only on the identical articles price-cut by the competitor but also on other comparable articles is an indication of lack of good faith in meeting competition. *People v. Pay Less Drug Stores*, *supra*.

A preliminary injunction to restrain sales below cost will be denied where the defendant cut his prices to meet those of the plaintiff-competitor. *C. S. Smith Metropolitan Market Co., Inc. v. Roth's Market and Food Terminal*, (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97050.

Cost Surveys.

In an action against photo-engravers for allegedly selling cuts below the cost of production thereof, a scale prepared by a photo-engraving association in 1932 from records obtained from that industry throughout the entire United States, was not a "cost survey" within the meaning of the Act, and should not have been admitted in evidence. The scale was not sufficient

to prove defendant's cost of production of the cuts, because the scale was obviously designed merely to furnish a guide in fixing prices with the suggestion that actual sales prices should be arrived at in individual uses by allowing discounts from the scale figures or by adding percentages thereto. *Johnson v. Farmer, supra.*

Parties, Pleading, Proof, and Practice.

A non-profit cooperative corporation may maintain an action on its own account or on behalf of its members for an injunction to restrain a violation of the Unfair Practices Act. *Better Business Bureau of Los Angeles, Ltd. v. Consolidated Appliance Dealers of Cal., supra.*

The special provisions of the Unfair Practices Act applicable to injunctions prevail over and modify the general code requirements relating thereto. *Better Business Bureau of Los Angeles, Ltd. v. Consolidated Appliance Dealers of Cal., supra.*

An allegation of damage to the plaintiff is unnecessary. *Better Business Bureau of Los Angeles, Ltd. v. Consolidated Appliance Dealers of Cal., supra.*

In an action under the Act to enjoin the sale of photo-engraving cuts below their cost of production, the first requisite is that proof be made of the cost of production of such cuts; and the burden of proof of this cost is on the plaintiff. *Johnson v. Farmer, supra.*

A non-profit corporation and trade association is a "person expressly authorized by statute" to bring an action, under the Unfair Practices Act, to restrain the sale of automobiles below cost; and the contentions that such a plaintiff was not itself an automobile dealer and therefore not the real party in interest, had no legal capacity to sue, and not being able to allege damage to itself could not state a cause of action, were not well taken. *Institute of Automobile Dealers, Inc. v. W. D. Dunham & Co., supra.*

A judgment which enjoins the defendant from violating the Unfair Practices Act generally is too broad. *Johnson v. Farmer, supra.*

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See pp. 36 to 38, Vol. II

See, Subdivision B., supra.

Agric. Code (Deering, 1937), sec. 1272.5 amended by Stats. 1939, c. 797, sec. 6 to read:

Sec. 1272.5. Sales below price to person connected in interest as *prima facie* fraudulent. 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 co-partner, 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 named in licensee's application or in a specific contract with the consignor, shall be *prima facie* evidence of fraud within the meaning of this chapter.

JUDICIAL DECISIONS

See p. 38, Vol. II

Section 1 (anti-discrimination) of the Unfair Practices Act is constitutional, and the means of regulation set out are neither arbitrary, unreasonable, nor capricious. *Dunnell v. Shelly*, 38 Cal. App. (2d) 118, 100 Pac. (2d) 830 (1940); *Green v. Grimes-Stassforth Stationery Co.*, 39 Cal. App. (2d) 52, 102 Pac. (2d) 452 (1940).

A complaint under the Unfair Practices Act seeking a mandatory injunction ordering the defendants to sell filing supplies to the plaintiff at the same price at which defendants sold such supplies to other dealers in plaintiff's neighborhood is demurrable where it failed to negative the exceptions of Section 1 of the Act - i.e., failed to allege that defendants sold to other dealers in the same quantities, as were involved,

at a discount and that the said price differentials were not based on differences in grade, quality or quantity. *Green v. Grimes-Stassforth Stationery Co.*, *supra*.

A preliminary injunction will issue prior to trial and without determination of the constitutionality of the Unfair Practices Act, where locality discrimination is found to have existed on the basis of the pleadings and affidavits filed and where the issuance of injunctive restraint against unfair competition effects no injury to the defendant retailer. *Food and Grocery Bureau of So. Cal. v. Great A. & P. Tea Co.*, (Super. Ct. 1938); CCH, Trade Reg. Ser., par. 25188.

2. Special Prohibitory Laws

See pp. 38 to 41, Vol. II

Agric. Code (Deering 1937), secs. 1299.1, 1299.2 amended by Stats. 1941, c. 1031, p. 2663, sec. 2 and p. 2665, sec. 2 respectively (Agric. Code, Deering Supp. 1941), secs. 1299.1 and 1299.2 to read as follows:

Sec. 1299.1. Unlawful methods and practices: Meeting competitive prices; Solicitation, collusion, etc. In the marketing of market milk, cream and dairy products the following methods of doing business or trade practices are hereby declared unfair and unlawful:

(a) The payment, allowance, or acceptance of secret rebates, secret refunds, or unearned discounts, whether in the form of money or otherwise.

(b) The giving of any milk, cream, dairy products, services, or articles of any kind except to bona fide charities for the purpose of securing or retaining the milk, cream, or dairy products business of any wholesale customer or consumer; provided, however, that nothing herein shall be construed to prohibit a distributor of frozen dairy products for reasonable compensation, from furnishing a wholesale customer with, and maintaining such refrigeration facilities as shall be reasonably necessary for the storage and preservation of the frozen dairy products distributed by such distributor to such wholesale customer; provided further that the use of said refrigeration facilities by any person for the storage or preservation of any product other than the frozen dairy products distributed to said wholesale customer by the distributor furnishing

such facilities shall be an unfair and unlawful business practice.

(c) The extension to any wholesale customer or consumer of special prices or services not made available to all customers who purchase milk, cream, or dairy products of like quantity under 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) Discriminations in price between wholesale customers, or between consumers, who purchase milk, cream, or dairy products of like grade and quality under like conditions of service where the effect of such discrimination may be substantially to lessen competition or to injure or destroy or prevent competition with the person who either grants or knowingly receives the benefit of such discrimination; provided, that nothing herein shall prevent differentials which make only due allowance for differences in the cost of the raw product used in such milk, cream, or dairy products, or the cost of manufacture, processing, sale, or delivery resulting from the different methods or quantities in which said commodities are manufactured, processed, sold or delivered.

(f) The sale or offer to sell or giving of any article in any transaction involving the sale or disposal of milk, cream or dairy products, for less than the invoice or replacement cost thereof, whichever is lower, to secure or retain the milk, cream, or dairy products business of any wholesale customer or any person who buys as a consumer.

(g) The sale of milk, cream, and dairy products at less than cost which, as used herein, shall mean the cost of raw product, plus all costs of manufacturing, processing, handling, sale and delivery, including overhead costs. Evidence of cost, based on impartial audits or surveys, made within a reasonable time prior to an alleged violation of this subparagraph shall constitute prima facie proof of such cost at the time of the commission of such violation.

(h) False statements or representations, knowingly made, by any wholesale customer or consumer, or anyone acting on the behalf of either, to any distributor or manufacturer, or any representative thereof, that a competitor of such distributor or manufacturer has offered or is offering to sell, or is selling milk, cream, or dairy products to said wholesale customer or consumer at a lower price or prices than said manufacturer or distributor has offered or is offering to sell, or is selling the same, or that said competitor has offered or is offering to do, or is doing any of the business practices heretofore declared to be unfair and unlawful.

(i) 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.

Meeting competitive prices. Nothing in the aforesaid unfair trade practice provisions shall be construed to prohibit the meeting, in good faith, of a lawful, competitive price or a lawful, competitive condition.

Solicitation, collusion, etc. Solicitation by, or collusion or joint participation between or among, any manufacturer, distributor, wholesale customer, consumer, or any representative thereof, to commit any of the aforesaid unfair trade practices, or the use of any misrepresentation, threat, intimidation, or boycott to effectuate the commission of said unfair trade practices, shall make all persons participating therein subject to the penalties of this act.

Sec. 1299.2. Construction: Persons subject to "Unfair Practices Act." The provisions of this chapter shall be liberally construed as being complementary of and supplemental to the provisions of Chapter 10 of Division 4 of this code. Whenever a provision of this chapter and a similar provision of said Chapter 10 is applicable to the same person and subject matter the provisions of said Chapter 10 shall control; and whenever a provision of this chapter is applicable to any person and subject matter as to which said Chapter 10 makes no express provision the provision of this chapter shall control.

Any person and subject matter to which this chapter is applicable shall not be subject to the provisions of the "Unfair Practices Act" of the State of California.

JUDICIAL DECISIONS

See p. 41, Vol. II

The Agricultural Code (Div. VI, c. 8, secs. 1299 to 1299.12) is a special law regulating the marketing of dairy products only, in this case, ice cream, and supersedes and prevails over the provisions of the Unfair Practices Act which are applicable generally to the sale of all commodities. *Balian Ice Cream Co. v. Golden State Co., Ltd.*, (Super. Ct. 1940); CCH, Trade Reg. Ser., par. 25537.

COLORADO

A. RESALE PRICE MAINTENANCE

See pp. 43 to 44, Vol. II

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

Now appears in Colo. Stat. Ann. (Michie, Supp. 1941),
c. 165, secs. 20(1) to 20(5).

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

Intoxicating Liquors

Section 17 of the above law (which section enumerates what acts shall be unlawful) was amended by L. 1941, sec. 1 (H.B. No. 734) by adding thereto a new sub-section (t) reading as follows:

Wilfully selling or offering for sale at a price less than Fair Trade Act. (t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937.

JUDICIAL DECISIONS

See p. 44, Vol. II

Application of Statute.**Parties Bound by Resale Price Restrictions**

Temporary injunction restraining sale of cement at price less than that fixed by agreement under the Fair Trade Act was made permanent even though agreement had not been inaugurated in the orderly manner contemplated by the Act. *Francis J. Fisher, Inc. v. Perry* (Dist. Ct. 1941); P-H, Trade & Ind. Ser., par. 97167.

Close-out Sales.

Sales of goods below the minimum resale prices provided in contracts under the Fair Trade Act are not "close-out sales" exempted by the Act where the goods are purchased by the dealer simultaneously with his advertisement of the "close-out sale." *National Dist. Products Corp. v. Greenwald Liquors, Inc.* (U. S. Dist. Ct., Dist. Colo.) (1939); CCH, Trade Reg. Ser., par. 25352.

B. PROHIBITION OF SALES BELOW COST

See pp. 44 to 47, Vol. II

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

Amended by L. 1941, pp. 821 to 824, secs. 2 to 13 (Michie, Supp. 1941, c. 48, secs. 302(2) to 302(13)) to eliminate former sec. 302(8) relating to the duty of the attorney general to institute suits under the Act.

JUDICIAL DECISIONS

See p. 47, Vol. II

Constitutionality of Statute.

Granting of injunctive relief under the Act does not violate constitutional guarantee of "trial by jury" in criminal cases; both remedies being authorized by the Act. *Dikeou v. Food Distributors Assn.*, 108 Pac. (2d) 529 (1940).

Application of Statute.

Scope.

The Unfair Practices Act is not a price-fixing law. *Dikeou v. Food Distributors Assn.*, *supra*.

"Cost of Doing Business;" "Cost," Etc.

Where the court found defendants' cost of doing business was not less than eleven per cent, sales of commodities below such figure were restrained. *Heffelfinger v. Save - A - Nickel Stores* (Dist. Ct. 1941); P-H, Trade & Ind. Ser., par. 97174.

The "cost of doing business" required by the Act to be included in determining "cost" need not be absolutely exact or based upon precise methods of accounting which any one merchant might adopt, but means merely what businessmen generally mean, namely, the approximate cost arrived at by a reasonable rule, but good faith in arriving at the approximate cost is necessary. *Dikeou v. Food Distributors Assn.*, *supra*.

Evidence of the "cost of doing business" of similar dealers in the vicinity is admissible. *Dikeou v. Food Distributors Assn.*, *supra*.

Intent to Injure.

Under the express provisions of the Unfair Practices Act, only such acts as are performed for the purpose of injuring competitors or destroying competition are in violation of the Act. *Miller's Groceteria Co. v. Food Distributors Assn.*, 107 Colo. 113, 109 Pac. (2d) 637.

Intent to injure may be inferred from the defendant's conduct. *Dikeou v. Food Distributors Assn.*, *supra*.

Parties, Pleading, Proof, and Practices.

Under the terms of the Unfair Practices Act, any person may sue to take advantage of its provisions in the form of injunctive relief; it is only when damages are sought that a personal interest other than that of a citizen must be shown. *Heffelfinger v. Safeway Stores, Inc.* (Dist. Ct. 1940); P-H, Trade & Ind. Ser., par. 97087.

In a complaint under the Act the plaintiff is required to show in what respect the defendant sold goods at less than cost in violation of the statute; which competitors were injured by the defendant's alleged illegal acts; which potential competitors were thereby prevented from going into business; how the plaintiff arrived at the conclusion that the defendant was selling below cost, and whether plaintiff's figures were based on defendant's actual cost of doing business or upon those of someone else, and in the latter case why defendant's costs were not used. *Heffelfinger v. Safeway Stores, Inc.*, *supra*.

A non-profit corporation organized under a statute expressly making it capable of suing and being sued, has legal capacity to maintain an injunction action under the Act, regardless of whether it is a private corporation or an association. *Dikeou v. Food Distributors Assn.*, *supra*.

An unequivocal denial of the allegation of intent tenders an issue of fact which cannot be disposed of by judgment on the pleadings without a trial of the issue. *Miller's Groceteria Co. v. Food Distributors Assn.*, *supra*.

Where two bakery companies had the same officers and directors, their products were identical, and the general sales manager acted as such for both companies, an injunction restraining violation of the Unfair Practices Act as to "gifts, etc.," was properly entered as against both companies. *Old Homestead Bread Co. v. Marx Baking Co.*, 108 Colo. 375, 117 Pac. (2d) 1007 (1941).

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See pp. 47 to 48, Vol. II

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

Section 302(1) of the above law was reenacted without change by L. 1941, p. 820, sec. 1 (Michie, Supp. 1941), c. 48, sec. 320(1).

CONNECTICUT

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 51, Vol. II

Constitutionality of Statute.

There is no merit to the contention that the Fair Trade Act is void because the legislature did not expressly declare it to be in derogation of the common law. *Burroughs Welcome & Co. v. Johnson Wholesale Perfume Co., Inc.*, — Conn. —, 24 Atl. (2d) 841 (1942).

Application of Statute.

Defenses - General.

Temporary injunction to restrain price-cutting will be denied where some substantial question exists on a constitutional ground and under the "clean hands" doctrine. *Boesch v. Johnson Wholesale Perfume Co., Inc.*, (Super. Ct. 1941); P-H, Trade & Ind. Ser., par. 97156.

The contention is without merit that the plaintiff did not come into court with "clean hands" because it refused to sell to defendant's wholesale and retail stores; the sale of plaintiff's products not being charged with a public interest there is no duty upon it to sell to one because it sells to another. The further contention that plaintiff is guilty of discrimination under the Robinson-Patman Act, because it refused to sell to defendant as a wholesaler requiring defendant's retail stores to purchase from distributors selected by plaintiff, cannot be sustained; the Robinson-Patman Act expressly provides that nothing therein contained shall prevent vendors from selecting their own customers, in a bona-fide transaction, and not in restraint of trade. *Burroughs Welcome & Co. v. Johnson Wholesale Perfume Co., Inc.*, *supra*.

Retail sales knowingly made below the minimum resale prices established by the manufacturer under the Fair Trade Act violate that Act; and the manufacturer's refusal - pursuant to its business policy - to sell directly to the retailer does not bar injunctive relief when the product is obtainable from wholesale sources and no intent to discriminate against the defendant is established. *Eastman Kodak Co. v. Johnson Wholesale Perfume Co., Inc.* (U. S. Dist. Ct., Dist. Conn.) (1941); CCH, Trade Reg. Ser., par. 52539.

B. PROHIBITION OF SALES BELOW COST

JUDICIAL DECISIONS

See p. 55, Vol. II

Constitutionality of Statute.

The Unfair Sales Practice Act, creating a right of action for injunctive relief in favor of a party aggrieved by a sale or offer of sale of merchandise at less than cost with intent to injure competitors or destroy competition, is constitutional; the statute is not penal - its only method of enforcement is by injunction; neither is it a price fixing law. *Carroll v. Schwartz*, 127 Conn. 126, 14 Atl. (2d) 754 (1940).

DELAWARE

A. RESALE PRICE MAINTENANCE

See p. 57, Vol. II

Del. L. 1941, c. 201, secs. 1 to 10
Fair Trade Act

Sec. 1. 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 persons 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. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, 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 Delaware 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 consumer 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. 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. 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 trademark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trademark, brand or name.

Sec. 5. 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 trademark, 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. 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. This Act shall not apply to any contract or agreement between or among producers or, except as provided in sub-division (c) of Section 2 of this Act, between or among wholesalers or between or among retailers as to sale or resale prices.

Sec. 8. 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. All Acts or parts of Acts inconsistent herewith are hereby repealed to the extent of such inconsistency.

Sec. 10. This Act may be known and cited as the "Fair Trade Act".

FLORIDA

A. RESALE PRICE MAINTENANCE

See pp. 59 to 61, Vol. II

L. 1941, c. 21001 (No. 793, Senate Bill 395)
Fair Trade Contracts on Liquor

Sec. 1. REFERENCE TO "THE BEVERAGE ACT." Except as otherwise herein specifically provided, this Act shall be administered in the manner provided for the regulation and supervision of licensees authorized under the Beverage Act and for the purpose of the administration, construction and interpretation of the provisions of this Act, the Beverage Act consisting of Chapter 16774, Laws of Florida, 1935; Chapter 18015, Laws of Florida, 1937; and Chapter 19031, Laws of Florida, 1939, and any and all amendments thereto, be and the same is hereby referred to and adopted.

Sec. 2. FAIR TRADE CONTRACTS, MINIMUM RESALE PRICES, PROVISIONS, CONCERNING. No distiller, rectifier, blender, distributor or vendor, or anyone for them, who holds a license in this State to sell intoxicating liquors, as defined in Section 5 of Chapter 16774, Laws of Florida, 1935, and any and all amendments thereto, which bears a trade mark, brand, label or name of the producer or owner and which is in fair and open competition with commodities of the same general class produced by others, shall offer any intoxicating liquors for sale in this State in any manner or at all without complying with the provisions of this Act.

All intoxicating liquors sold in this State by any licensee, licensed to distribute intoxicating liquors, must be sold according to a fair trade contract, and each such licensed distributor shall file with the Beverage Department a complete list of all intoxicating liquors offered for sale which list shall indicate minimum resale prices on all intoxicating liquors according to the size of containers in which sold and in addition thereto such distributor shall file with the Beverage Department all minimum resale price changes as they shall occur from time to time which such price list and changes thereto shall constitute a fair trade contract under this Act and as provided in Chapter 18395, Laws of Florida, 1937; Chapter 19201, Laws of Florida, 1939, and any and all amendments thereto, which fair trade contracts must provide the following minimum resale prices:

(a) On all sales from licensees, licensed to distribute intoxicating liquors to licensed vendors, a minimum mark-up resale price for said licensed vendor of

not less than forty (40%) per cent provided that thirty-nine (39%) per cent minimum mark-up resale price is allowable herein in order that the retail selling price be established at a twentieth part of a dollar instead of an odd cents price.

(b) All minimum mark-up resale prices shall be calculated and based on the actual prices to the licensed vendor, plus transportation charges and Federal and State taxes.

(c) Any licensee under the Beverage Act who shall offer to purchase or purchase, offer to sell or sell, any intoxicating liquors for a price less than the minimum mark-up resale price herein provided, shall be subject to the penalties hereinafter prescribed for any violation of this Act.

(d) The entire State shall constitute one trading area, and no licensee shall submit to the Beverage Board any fair trade contract which provides for any different minimum resale mark-up price for any portion of the State area different from that which is provided for the whole area other than the differences that might appear in actual transportation charges.

Sec. 3. The Beverage Department shall at all times investigate and regulate any unusual differences between minimum mark-up resale prices provided for in the fair trade contracts on file with the Department and if, upon investigation, it appears that the orderliness of the market has been disrupted by sales made below the minimum mark-up resale prices provided in said fair trade contracts, then in that event the licensees responsible for such practices shall be subject to the penalties hereinafter prescribed for the violation of any provisions of this Act.

Sec. 4. All licensees, licensed to distribute intoxicating liquors in this State, shall file with the Beverage Department a copy of the fair trade contracts under which such licensees, licensed to distribute intoxicating liquors, shall offer to sell and sell such intoxicating liquors to vendors in this State, not less than ten days prior to the date that said intoxicating liquors are offered for sale.

The said fair trade contracts, among other things, must contain:

- (a) Name or brand of the intoxicating liquors sold.
- (b) The age of the intoxicating liquors sold.
- (c) Proof of the intoxicating liquors sold.
- (d) The sale price of intoxicating liquors sold computed according to the size of the container in which it is sold.

(e) The stipulated minimum resale price at which it is required that the vendor resell to his purchasers or consumers, arrived at in the manner prescribed in Section 2, sub-Sections (a) and (b). Except that there shall not be included any mark-up for transportation charges.

Receipt of the intoxicating liquors by the vendor shall constitute notice to the vendor of the stipulated minimum resale price below which the vendor cannot resell the intoxicating liquors to the consumer.

Sec. 5. All licensees, licensed to distribute in-

intoxicating liquors, who have filed fair trade contracts with the Beverage Department, may file amendments thereto effecting any changes in the stipulated minimum resale prices contained in the original fair trade contracts filed with the Beverage Department; Provided, said amendments which change the vendors' resale prices shall be filed ten days before such amendments become effective.

Sec. 6. Vendors' close-out sales can only be made at a price below the stipulated minimum resale price fixed in the fair trade contract only when one of the following causes exists:

1. That said stock of goods has become obsolete by reason of either age, change or label, or
2. That said stock of goods are damaged goods, or
3. That said stock of goods are deteriorated in quality, or either of them.

And in addition to one of said causes, it must further appear:

(a) That the stock of goods sought to be closed out must have been in this State for a period of not less than three (3) months and that said stock of goods was not brought in this state, or any part thereof, for the purpose of offering it at a close-out sale.

(b) That the stock of goods sought to be sold had been first offered to the distributor from whom purchased at the original invoice price or less, and that the said distributor had refused to re-purchase said goods.

4. Causes (1), (2) and (3) are non-cumulative, where as conditions (a) and (b) are cumulative, and must be set up in a petition properly verified by said vendor and filed with the Beverage Department at least ten (10) days before such stock of goods shall be offered by sale to the public.

5. The Beverage Department, in its discretion, may then either:

(a) Allow or refuse to allow such close-out sale to be held.

(b) If the Beverage Department refuses to allow such close-out sale to be held, it shall notify the licensee, and the licensee shall have the right to apply to the Beverage Director for a hearing as provided in Paragraph (a) of Section 1 (a) of Chapter 19301, Laws of Florida, 1939, and any and all amendments thereto, for hearings before the Director.

Sec. 7. Any distributor or vendor, licensed to distribute or sell intoxicating liquor, who shall offer to sell or sell any intoxicating liquor which has not been fair traded as herein provided, shall be subject to the penalties hereinafter prescribed for any violation of this Act.

Sec. 8. The purpose of this Act is to require that fair trade contracts be filed with the Beverage Department and enforced in every respect.

The Beverage Board is hereby vested with plenary powers to make rules and regulations, and the Department is required to provide forms from time to time that

may be necessary to regulate the liquor industry and to make this Act effective in its entirety.

When there has been, in the opinion of the Director of the Beverage Department, by any licensee, any willfully and knowingly offering for sale or selling, any intoxicating liquor at less than the price stipulated in any fair trade contract entered into pursuant to the provisions of this Act, or any violation of any rule or regulation promulgated by the Beverage Department in enforcing this Act, the licensee so charged shall be deemed guilty of unfair competition and subject to any of the penalties prescribed in the Beverage Act (consisting of Chapter 16774, Laws of Florida, 1935; Chapter 18015, Laws of Florida, 1937; and Chapter 19301, Laws of Florida, 1939, and any and all amendments thereto), as the Beverage Board may determine.

Sec. 9. Whenever any words or phrases are used in this Act, which same words or phrases are used in the Beverage Act (consisting of Chapter 16774, Laws of Florida, 1935; Chapter 18015, Laws of Florida, 1937; and Chapter 19301, Laws of Florida, 1939, and any and all amendments thereto), and which words and phrases are therein defined, the same definition shall be given to the words and phrases used in this Act as are given by the Beverage Act.

Sec. 10. The Director and supervisors of the Beverage Department created under Chapter 16774, Laws of Florida, Acts of 1935, and any amendment thereto, shall enforce the provisions of this Act and are hereby vested with the same rights and authority to enforce this said Act as are provided for in said Chapter 16774, Laws of Florida, Acts of 1935, and any amendment thereto.

Sec. 11. The violation of any of the provisions of this Act shall constitute a violation of Chapter 16774, Laws of Florida, Acts of 1935, and any amendment thereto, and shall be punishable in the same manner as provided in said Act, and any amendment thereto.

Sec. 12. None of the provisions of Chapter 16774, Laws of Florida, Acts of 1935, or any amendment thereto, is hereby repealed, but this law shall be supplemental to and cumulative to the provisions of said Act.

Sec. 13. In the event any section of this Act, or any part thereof, shall hereafter be adjudged unconstitutional, the remainder of this Act shall not be affected thereby.

Sec. 14. This Act shall take effect October first A. D. Nineteen Hundred and Forty One.

JUDICIAL DECISIONS

Because the above statute (L. 1941, c. 21001), providing for fair trade contracts and minimum resale prices for intoxicating liquors, left prices to be fixed by distributors and provided for no hearing and invaded the property rights of owners of trade-marked liquors, and there was no legislative finding of necessity therefor or provision made for any finding of necessity and statute gave no indication that it was passed to promote public health, safety, morals or welfare, the statute was unconstitutional, *Scarborough v. Webb's Cut Rate Drug Co.*, — Fla. —. 8 So. (2d) 913 (1942).

GEORGIA

See pp. 65 to 67, Vol. II

No new material.

IDAHO

B. PROHIBITIONS OF SALES BELOW COST

See pp. 71 to 75, Vol. II

L. 1939, c. 209
Unfair Sales Act

Amended by L. 1941, c. 117, secs. 1 to 14. This 1941 law amended Sections 3 to 8 of the 1939 law and amended Chapter 209 of the 1939 law by adding six new sections to be known as Sections 9 to 14. With the exception of the omission of added Sections 10 and 11, which are deemed non-relevant, the amended and added sections now read as follows:

Sec. 3. (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 per cent 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 six per cent (6%) of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(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 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 ($\frac{3}{4}$) of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage 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 two per cent (2%) of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b) (aa) When used in this act, the term "cost to direct seller" shall mean the invoice cost of the merchandise to the retailer or the replacement cost of the merchandise to the retailer whichever is the 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 one and one half per cent ($1\frac{1}{2}\%$) 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 eight per cent (8%) of the cost to the retailer as herein set forth after adding thereto freight charges, but before adding thereto cartage and markup.

(c) When used in this act the term "replacement cost" 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 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 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 shall be governed by the provisions of subsections (a), (b) and (b-aa) of section 3 respectively.

(e) The terms "cost to the retailer", and "cost to the wholesaler" as defined in subsections (a), (b) and (b-aa) 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.

Any manufacturer's published list price, less published discounts, in effect in this state at the time any such manufacturer's merchandise is purchased by a wholesaler or retailer is deemed to be competent evidence of the cost of such manufacturer's merchandise, in the absence of proof of a lesser cost.

(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, or 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.

(g) The terms "sell at wholesale" "sales at wholesale" and "wholesale sales" shall mean and include and 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 purpose 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.

(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 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.

(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 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 apply only to the wholesale portion of such business.

(j) The term "freight charges" when 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 or the Interstate Commerce Commission which tariff is on file with the said Public Utilities Commission or the Interstate Commerce Commission.

(k) The term "direct seller" when used in this act shall mean and include every retailer as herein defined who buys processed merchandise direct from the processor for the purpose of selling such processed merchandise at retail, but a retailer shall be a direct seller only as to the processed merchandise so purchased.

Sec. 4. "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, impairs and prevents fair competition, injures public welfare, and is 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. 5. 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 knowingly buys any item of merchandise from any wholesaler at less than cost to the wholesaler as herein defined, 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 \$300.00. 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. 6. "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 prosecuting attorneys, in their respective counties, to prosecute, prevent and restrain violations hereunder, and it is hereby specially provided that it is the duty of attorney general to cause and require all necessary proceedings to be taken to enforce this act and provide legal and financial assistance to and supervision of the several prosecuting attorneys in instituting proceedings and invoking all remedies provided in law, equity and criminal actions to prevent, restrain and prosecute to final conclusion all violations under this act within the State of Idaho. Any person damaged, or who is threatened with a loss or injury by reason of a violation of this act shall be entitled to sue for and recover his damages as afforded by law, and have injunctive relief in any court of competent jurisdiction to prevent, restrain and to enjoin such violation or threatened violation."

Sec. 7. 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 an endeavor is made in good faith to meet the prices of a competitor as herein defined selling substantially the same article or product in the same locality or trade area in the ordinary channels of trade.

(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;

(g) where 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 if advertised, marked and sold as such. Provided, however, that any retailer or wholesaler claiming the benefits of any of the exceptions hereinabove provided, shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of such exceptions.

Sec. 8. The attorney general shall appoint and employ for the enforcement of this act.

(a) an investigator whose duty it shall be to inspect and investigate sales practices of wholesalers and retailers to ascertain violations of this act, who shall serve at the pleasure of the attorney general;

(b) an assistant to aid in prosecuting and enjoining violations of this act who shall be an attorney at law duly licensed to practice before the courts of the State of Idaho and specially trained in the field of unfair competition matters, who shall serve at the pleasure of the attorney general;

(c) such other ministerial and legal assistants as he may deem necessary for the effective enforcement of this act.

Sec. 9. Any party of record to any civil action or proceeding instituted or brought pursuant to the provisions of this act may be required to testify in such proceeding and to produce books, papers, invoices, contracts, agreements and all material documents before the court in such proceedings, providing, however, that no person compelled under the provisions of this section to testify or produce evidence tending to incriminate him or expose him to public ignominy shall be prosecuted for any crime which such testimony or evidence tends to prove or to which the same relates. This section shall not exempt any person from prosecution for perjury.

Sec. 12. If any section, sentence, clause or provision of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions.

Sec. 13. All laws or parts of laws in conflict with the provisions of this act, are hereby repealed to the extent of such inconsistency.

Sec. 14. In emergency existing therefor, which emergency is hereby declared to exist, this act shall take effect and be in force from and after its passage and approval.

ILLINOIS

A. RESALE PRICE MAINTENANCE

See pp. 85 to 88, Vol. II

Rev. Stat. (Smith-Hurd, 1939), c. 121½
Fair Trade Act

Sec. 190 of the 1939 law was amended by Rev. Stats. (1941), c. 121½, sec. 190 to read as follows:

Sec. 190. Act inapplicable to certain contracts.
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.

The provision of this Act shall not apply to any contract or agreement relating to any commodity for library purposes which may be sold or offered for sale to the State of Illinois or to any of its administrative agencies or political subdivisions, or to any municipality, or to any free public library, endowed library, college, university or school library in this State.

INDIANA

See pp. 89 to 93, Vol. II

No new material.

IOWA

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 96, Vol. II

Application of Statute.

Defenses - General.

A wholesaler of trade-marked products who refused to sell them to a retailer except at an excessive price was not thereby precluded from restraining the retailer's price-cutting on such products. The retailer's theory that said products were not, for that reason, being sold in "fair and open competition" within the terms of the Fair Trade Act was untenable where the record showed that in offering to purchase, the retailer did not also offer to comply with the manufacturer's price restrictions, but was merely attempting to establish a defense in the threatened injunction suit. *Barron Motor, Inc. v. May's Drug Stores, Inc.*, 227 Iowa 1344, 291 N. W. 152 (1940).

A wholesaler was entitled to restrain a retailer's price-cutting on trade marked products in violation of manufacturer's price restrictions, notwithstanding the retailer had bought its stock of such products before notice of price restrictions was received, especially where the retailer refused to sell its stock of such products to the wholesaler on the ground of the retailer's right to sell to whom it pleased rather than of desire to continue as a bona fide retailer. *Barron Motor, Inc. v. May's Drug Stores, Inc.*, *supra*.

Parties, Pleading, Proof, and Practices.

A petition of twenty-three separate owners and operators of drug stores, seeking an injunction under the Fair Trade Act, did not misjoin twenty-three separate

causes of action since all plaintiffs had a common interest in the subject of the action and the relief sought. *Iowa Pharmaceutical Assn., et al. v. May's Drug Stores, Inc.*, 229 Iowa 554, 294 N. W. 756 (1940).

In such a petition, allegations regarding permanent injunctions obtained restraining same defendant from violating other Fair Trade contracts were proper. However, plaintiffs were not entitled to a blanket injunction restraining defendant from any violation of a Fair Trade contract regardless of whether or not such violation constituted unfair competition as to plaintiffs; plaintiffs' rights must have their source in contracts the violation of which results in unfair competition and damage to plaintiffs. *Iowa Pharmaceutical Assn. et al. v. May's Drug Stores, Inc.*, *supra*.

KANSAS

B. PROHIBITION OF SALES BELOW COST

See p. 104, Vol. II

Kan. L. 1941, c. 277, secs. 1 to 9

Sec. 1. (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 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 six percent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup. (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 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 (3) a markup to cover the proportionate part of the cost of doing business, which markup, 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 markup: *Provided*, That where the cost of any item is a fractional part above one cent, such fraction shall be disregarded in determining cost. (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 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) 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 of paragraphs (a) or (b) of section 1, respectively. (e) The term "cost to the retailer" and "cost to the wholesaler" as defined in paragraphs (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. (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 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. (g) The terms "sell at wholesale," "sales at wholesale," and "wholesale sales" shall 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. (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 both sales at retail and sales at wholesale, 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 both sales at wholesale and sales at retail, such terms shall be applied only to the wholesale portion of such business.

Sec. 2. 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, of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, 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. 3. 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. 4. 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 county's attorneys, in the respective counties, to institute proceedings in equity to prevent and restrain violations.

Sec. 5. 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 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 the price of merchandise is made in good faith to meet the price of a competitor in the same locality; (f) where merchandise is sold by any officer acting under the order or direction of any court; (g) where merchandise is sold for charitable purposes or to relief agencies; (h) where merchandise is sold on contract to the departments of government or governmental institutions; (i) by manufacturers or processors: *Provided: However,* That any retailer or wholesaler claiming the benefits of any of the exemptions hereinabove provided shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of said exemptions: *Provided further,* The provisions of this act shall not apply to grain and feed dealers.

Sec. 6. In all matters pertaining to the competency and privilege of witnesses, the means of producing witnesses, the taking and use of depositions, the filing and use of affidavits, the mode of taking testimony, documentary evidence, the perpetuation of testimony, lost files and records, the appointment and trial by referee, the authority and duty of officers as related to any of the above matters, and any and all further acts of civil procedure necessary to the filing and maintenance of any action as provided herein, the provisions contained in the code of civil procedure of Kansas, as now constituted or hereinafter amended shall govern and be applicable.

Sec. 7. If any section, sentence, clause or provisions of this act shall for any reasons be held invalid or unconstitutional, the validity of the remaining parts hereof shall not be affected thereby.

Sec. 8. This act shall be known and designated as the "unfair practices act."

Sec. 9. This act shall take effect and be in force from and after its publication in the official state paper.

KENTUCKY

A. RESALE PRICE MAINTENANCE

See pp. 109 to 110, Vol. II

Stat. Ann. (Baldwin's Carroll, Supp. 1939)

Now appears as Rev. Stat. (Baldwin, 1942), secs. 365.080 and 365.090.

FAIR TRADE CONTRACTS ON LIQUOR

Rev. Stat. (Baldwin, 1942), secs. 244.380 to 244.430 inclusive.

Sec. 244.380 (2554e-2; 2554e-12; 47481-1; 42481-3) Provisions contracts of sale to contain (fair trade contracts). (1) No distiller, rectifier, blender, wholesaler, vintner or retailer shall sell any distilled spirits or wine which bears the trademark, brand or name of the distiller, rectifier, blender, vintner or owner and which is in fair and open competition with commodities of the same general class produced by others, except pursuant to a fair trade contract containing the following provisions:

(a) That the wholesaler or retailer will not resell any such commodity except at the price stipulated by the vendors;

(b) That the distiller, rectifier, blender, vintner or wholesaler require upon the sale of the distilled spirits or wine to another, that the purchaser or retailer agree that he will not, in turn, resell except at the price stipulated by the distiller, rectifier, blender, vintner or wholesaler.

(2) The contract provided for in subsection (1) shall not apply to resales in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivery of any such distilled spirits or wine, if such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten days before the stock is offered by sale to the public;

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

(c) By an officer acting under the orders of a court.

(3) This section shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. As used in this subsection producer means distiller, rectifier, blender or vintner.

Sec. 244.390 (2554e-2) Minimum resale prices- (1) The contract referred to in KRS 244.380 shall provide for the following minimum resale prices without discount:

(a) Sale from distillers, rectifiers, blenders, producers, owners or anyone for them, to wholesalers, a minimum mark-up resale price without discount for wholesalers of not less than fifteen percent.

(b) Sale from vintners to wholesalers, a minimum mark-up resale price without discount for wholesalers of not less than twenty percent.

(c) Sale from wholesalers to retailers, a minimum mark-up resale price without discount for retailers of not less than thirty-three and one-third percent in less than case lots and not less than ten percent in units of one case or more.

(2) Any donations, free goods, bribery or rebates of any character whatsoever which constitute any part of an inducement to purchase, before or subsequent to purchase, or which constitute any part of the consideration flowing from any licensee to any other licensee in this state, shall be construed as a violation of the minimum mark-up resale price.

(3) All mark-up resale prices to all licensees must be calculated on the actual price, inclusive of repackaging charges and all other charges paid for the distilled spirits or wine sold, plus all taxes, plus all transportation charges, to be calculated on a minimum basis of not less than twenty-five cents per case.

(4) No licensee shall offer to purchase or purchase, offer to sell or sell, any distilled spirits or wine for a price less than the minimum mark-up resale price.

(5) The entire state shall constitute one trading area, and no licensee shall submit to the board any fair trade contract which provides for any different minimum resale mark-up price for any portion of the state area different from that which is provided for the whole area.

(6) The department shall at all times investigate and regulate any unusual differences between market prices and minimum resale prices provided for in fair trade contracts on file. If upon investigation it appears that the orderliness of the market has been disrupted by fluctuations in market prices, licensees responsible for such practices shall be deemed guilty of unfair competition as in KRS 244.470.

Sec. 244.400 (2554e-3) Contracts of producers and processors; filing; contents.

(1) All distillers, rectifiers, blenders or vintners of distilled spirits or wine, whether the distilled spirits or wine bear private labels or not, shall file with the department the number of copies the department may require, of the fair trade contracts under which the distillers, rectifiers, blenders or vintners offer to sell, and sell distilled spirits or wine to wholesalers in this state, not less than ten days prior

to the date that the distilled spirits or wine are offered for sale.

(2) The fair trade contracts mentioned in subsection (1) shall contain:

- (a) The brand of the distilled spirits or wine sold;
- (b) The age of the distilled spirits sold;
- (c) The proof of the distilled spirits or wine sold;
- (d) The sale price of the distilled spirits or wine sold, computed according to the size of the containers sold;
- (e) The stipulated minimum resale price, at which the wholesaler shall resell to the retailer, and manner arrived at in the amount prescribed by paragraph (a) or (b) of subsection (1) of KRS 244.390, and in the manner prescribed by subsection (3) of KRS 244.390; and
- (f) The name and address of the wholesalers to whom the distilled spirits or wine shall be offered for sale and sold.

Sec. 244.410 (2554e-4) Contracts of wholesalers; filing; contents. (1) All wholesalers of distilled spirits or wine, whether the distilled spirits or wine bear private labels or not, shall file with the department, the number of copies the department may require, of the fair trade contracts under which the wholesalers offer to sell and sell such distilled spirits or wine to retailers in this state, not less than ten days prior to the date that the distilled spirits or wine are offered for sale.

(2) The fair trade contracts mentioned in subsection (1) shall contain:

- (a) The brand of the distilled spirits or wine sold;
- (b) The age of the distilled spirits sold;
- (c) The proof of the distilled spirits or wine sold;
- (d) The sale price of the distilled spirits or wine sold, computed according to the size of the containers sold;
- (e) The stipulated minimum resale price, at which the purchaser or retailer shall resell to the consumer, arrived at in the amount prescribed by paragraph (c) of subsection (1) of KRS 244.390 and in the manner prescribed by subsection (3) of KRS 244.390, except that there shall not be included any mark-up for transportation charges; and
- (f) A statement by the wholesaler that with every lot, or portion of a lot of distilled spirits or wine sold to a retailer, the invoice will contain the stipulated minimum resale price below which the retailer shall not resell to the consumer.

Sec. 244.420 (2554e-5) Nonresident producers and importers to sell under fair trade contract. (1) If a nonresident distiller, rectifier, blender, vintner, owner or his agent, is not licensed by this state, as to those brands sold in this state, he shall sell the brands under fair trade contracts in the manner prescribed for similar resident licensees.

(2) If an importer, or anyone for him, offers to sell or sells distilled spirits or wine in this state, he shall do so under fair trade contracts in the manner provided for resident licensed wholesalers.

Sec. 244.430 (2554e-6) Amendments to fair trade contracts may be filed. (1) All licensees who have filed fair trade contracts with the department may file amendments to those contracts, effecting any changes in the stipulated minimum resale price contained in the original contract filed.

(2) Amendments which change the resale price shall be filed ten days before such amendments become effective.

JUDICIAL DECISIONS

See p. 110, Vol. II.

The Kentucky Fair Trade Act is the only statute relating to a discount on books; and in the absence of resale price maintenance contracts, a book store may sell at a discount. Op. Atty. Gen. (Sept. 13, 1940); P-H, Trade & Ind. Ser., par. 97107.

Non-contracting parties with notice of price restrictions are bound under the Fair Trade Act. Op. Atty. Gen. (Oct. 16, 1940); P-H, Trade & Ind. Ser., par. 97114.

The Distilled Spirits and Wine Fair Trade Act (Rev. Stat., Baldwin, 1942, secs. 244.380 to 244.430 incl.) held not to be violative of either State or Federal constitutional provisions. *Reeves et al. v. Simons* 289 Ky. 793, 160 S. W. (2d) 149 (1942).

B. PROHIBITION OF SALES BELOW COST

JUDICIAL DECISIONS

See p. 113, Vol. II

Constitutionality of Statute.

The Unfair Practices Act, enacted for the purpose of safeguarding the public against the creation and perpetuation of monopolies and to encourage competition, is valid. It is competent for the legislature to fix minimum prices for all commodities and services dealt in, produced, rendered, or furnished, regardless of whether or not the particular business is one affected with a public interest. *Moore v. Northern Kentucky Independent Food Dealers' Assn.*, 286 Ky. 24, 149 S. W. (2d) 755 (1941).

The provisions of the Act prohibiting a retailer from selling commodities below his cost when done for the purpose of injuring competitors and destroying competition, is not invalid for indefiniteness as applied to one who operates both a grocery and a meat market. *Moore v. Northern Kentucky Independent Food Dealers' Assn.*, *supra*.

Application of Statute.

Scope.

The Act was passed under the State's police power and does not have a retroactive effect to invalidate contracts made before its passage, or impair the obligations of such contracts nor vested rights. *Kentucky Utilities Co. v. Carlisle Ice Co.*, 279 Ky. 585, 131 S. W. (2d) 499 (1939).

Intent to Injure.

In an action for treble damages and an injunction against selling below cost, the intent of the principal is an essential element; the Act does not provide for a presumption of guilt or unlawful intent, and a court will not presume that the alleged acts were done for

the purpose of injuring competitors or destroying competition. *Kentucky Utilities Co. v. Carlisle Ice Co.*, *supra*.

Evidence of circumstances under which defendant wholesaler contracted with a retailer, in order to meet competition, to sell ice, at low prices, but refused to renew the contract after the effective date of the Act, held to establish that defendant acted in good faith and without intent to destroy competition, *Kentucky Utilities Co. v. Carlisle Ice Co.*, *supra*.

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

JUDICIAL DECISIONS

See p. 114, Vol. II

Constitutionality of Statute.

The provisions of the Unfair Practices Act prohibiting price discrimination between different sections, etc., but exempting motion picture films is not invalid or "discriminatory." *Moore v. Northern Kentucky Independent Food Dealers' Assn.*, *supra*.

Application of Statute.

Intent to destroy the competition of a regular established dealer in the community must exist in a case of price discrimination. *Kentucky Utilities Co. v. Carlisle Ice Co.*, *supra*.

The anti-discrimination provisions of the Act apply to one discriminating between different municipality-consumers as well as between private consumers. Op. Atty. Gen. (Mar. 30, 1940); P-H, Trade & Ind. Ser., par. 97064.

2. Special Prohibitory Laws

See p. 114, Vol. II

Stat. Ann. (Baldwin's Carroll, Supp. Feb. 1941),
secs. 4814-10 & 4814-12.

Tobacco

Sec. 4814-10. Discrimination Prohibited. - No warehouse or warehouseman shall discriminate against any grower of tobacco by failing to accord to such grower or growers all privileges and services extended to any other grower, nor shall any warehouse or warehouseman refuse to admit any tobacco to the warehouse floor so long as there is space available or reserved space for the placing of said tobacco upon the floor for the purpose of sale.

Sec. 4814-12. Rebates Prohibited. - No warehouse or warehouseman shall give a rebate of any part of the warehouse charges or commissions to any person as an inducement for the purpose of influencing the sale of tobacco on any warehouse floor thereby discriminating against any grower or growers, nor shall any warehouseman pay or offer anything of value directly or indirectly for the delivery of tobacco to any warehouse by trucks or by any other conveyances whatsoever. Nor shall any warehouseman extend to any customer any special privilege or service not extended all customers on like terms and considerations. Nor shall any warehouseman furnish any trucks or any other conveyance as an inducement to any person to sell tobacco at any particular warehouse. Nor shall any warehouseman finance or help to finance or secure the financing of any truck or any other means of conveyance for the purpose of thereby inducing the hauling of tobacco to any particular warehouse.

LOUISIANA

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 118, Vol. II

Constitutionality of Statute.

The Fair Trade Act constitutes a proper exercise of "police power" and does not violate the State constitutional provision prohibiting "combinations in restraint of trade." *Pepsodent v. Krauss Co.*, — La. —, 9 So. (2d) 303 (1942).

Section 2 of the Fair Trade Act, defining unfair competition as wilfully and knowingly advertising, offering for sale, or selling, below prices fixed by Fair Trade contracts, and making such practices actionable by the injured party, violates Section 14 of Article XIX of the Louisiana Constitution in so far as it applies to non-signers of such contracts. *International Cellucotton Products Co. v. Krauss Co., Ltd.* (Civ. Dist. Ct. 1941); CCH, Trade Reg. Ser., par. 52662; *Brown Forman Distillers Corp. v. Richmond, d.b.a. Royal Family Liquor Stores Inc.* (Civ. Dist. Ct. 1941); P-H, Trade & Ind. Ser., par. 97200; CCH, Trade Reg. Ser., par. 52673. Contra: *Pepsodent v. Krauss Co.*, *supra*.

Application of Statute.

The Fair Trade Act (Gen. Stat. Ann., Dart, 1939, secs. 9809.1 & 9809.2) is not to be construed as permitting only contracts which provide that the buyer will not resell the commodity except at the exact price stipulated by the vendor; hence a contract providing that buyer will not resell a commodity at less than minimum retail or resale price complies with the act, inasmuch as the Act contemplates a minimum price and places no restriction on sales at prices in excess of those stipulated. *Pepsodent v. Krauss Co.*, *supra*.

A retailer having due notice of minimum resale price contracts made by the seller with other retailers, may be enjoined from selling at less than such minimum prices though he is not a party to the contract. *Pepsodent v. Krauss Co.*, *supra*.

A manufacturer had a series of contracts with retailers wherein it was agreed that the manufacturer's products would not be sold by the retailers "at a price less than the minimum retail sale or resale prices in effect at the time of the sale" of such products. Pursuant to these contracts, the manufacturer circulated schedules wherein he fixed minimum retail prices for its products. The defendant was a non-contracting retailer, but had knowledge of the prices so fixed and sold below them. Held: these contracts are in restraint of trade and illegal and void, they were not the kind of contracts authorized by the Fair Trade Act; the Fair Trade Act is in derogation of the common law and must be strictly construed, and cannot be extended by implication. The Act permits only contracts which provide that the buyer will not resell "except at the price stipulated by the vendor" - which means a definite and fixed price; the present contracts fix only a "minimum" price - one below which the retailer cannot go, but not prohibiting him from selling above it; there is a decided difference between the two phrases. *Mennen Co. v. Krauss Co., Ltd.* (Dist. Ct. La.) 37 Fed. Supp. 161 (1941). Contra: *Pepsodent v. Krauss Co.*, *supra*.

B. PROHIBITION OF SALES BELOW COST

See pp. 116 to 118, Vol. II

Gen. Stat. Ann. (Dart. Supp., 1941), c. 2A, secs. 4931.1 to 4931.8
Unfair Sales Act

In 1940, Louisiana adopted an Unfair Sales Act reading as follows:

Sec. 4931.1. Title - Unfair Sales Act. - This act shall be known and designated and may be cited as the Unfair Sales Act.

Sec. 4931.2. 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 per cent 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 six (6) per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(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 and discounts from the state or any governmental agency allowed for the payment or collection of any taxes; 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 ($\frac{3}{4}$) of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage, 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 two (2) per cent of the cost to the wholesaler as herein set forth adding thereto freight charges and cartage but before adding thereto a markup.

(c) When used in this act, the term "replacement cost" 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 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 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 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 shall be governed by the provisions of paragraphs (a) or (b) of section 2, respectively.

(e) The term "cost to the retailer" and "cost to the wholesaler" as defined in paragraphs (a) and (b) of this section shall mean bona fide costs; 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.

(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 tangible personal property to the purchaser for consumption or use other than resale of (or) further processing or manufacturing.

(g) 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.

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

Sec. 4931.3. Unfair advertising. - 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, impairing and preventing fair competition and thus injuring public welfare 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 monopoly in any line of commerce.

Sec. 4931.4. Sale at less than cost - Penalties - Proof. - 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 less than twenty-five (\$25.00) dollars and not more than five hundred (\$500.00) dollars for each offense and each offense shall constitute a separate violation of this act. 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. 4931.5. Injunction or restraining order - District attorney or injured party - Attorney's fees. - 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 district attorneys, in the respective districts, to institute proceedings 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, and any person bringing suit under the provisions of this section, being successful in the prosecution of such suit or proceedings for injunction relief, shall be allowed a reasonable attorney's fee, to be set by the court having jurisdiction over such cause.

Sec. 4931.6. Exempted sales. - 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 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 the government or governmental institutions; (g) where the price of merchandise is made in good faith to meet competition; (h) where merchandise is sold by any officer acting under the order or direction of any court.

Sec. 4931.7. Constitutionality - Provisions severable. - If any section, sentence, clause or provision of this act shall, for any reason, be declared invalid or unconstitutional, it is the intention of the legislature that the remaining portions shall not be affected but that said remaining portion shall remain in full force and effect.

Sec. 4931.8. Defendant and witness required to testify - Production of books and papers - Immunity from criminal prosecution. - Any defendant, or any witness, in any civil action brought under the provisions of this act may be required to testify, and the books,

records, invoices and all other documents of any such defendant, may be brought into court and introduced as evidence, but no defendant, or any witness in any such civil action shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, and no testimony given or produced shall be received against him upon any criminal proceeding or investigation.

JUDICIAL DECISIONS

See p. 118, Vol. II

The Unfair Sales Act is inapplicable to a jobber doing business out of the State, Op. Asst. Atty. Gen. (Nov. 6, 1940); P-H, Trade & Ind. Ser., par. 97122.

Several companies engaged in business of a similar character and affiliated through stock ownership are subject to the Unfair Sales Act, and may not sell to one another without complying therewith because they are distinct entities; a wholesaler may legally give to the retailer the benefit of a cash discount received by the wholesaler from the manufacturer. Op. Exec. Asst. to Atty. Gen. (Nov. 27, 1940); P-H, Trade & Ind. Ser., par. 97129.

MAINE

A. RESALE PRICE MAINTENANCE

See p. 121, Vol. II

L. 1937, c. 204, sec. 1

Amended by L. 1939, c. 83 to read as follows:

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, 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.

B. PROHIBITION OF SALES BELOW COST

See p. 124, Vol. II

L. 1939, c. 240

Unfair Practices Act

Sections 2 and 4 of the 1939 Act were amended by L. 1941, c. 40 to read as follows:

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 be punished by a fine of not more than \$500. In all prosecutions under this section, proof 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 and destroy competition.

Sec. 4. Person injured may bring bill in equity.

(a) Any person damaged or who is threatened with loss or injury by reason of a violation or 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.

(c) In all proceedings under this section, proof 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 and destroy competition.

MARYLAND

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 129, Vol. II

Constitutionality of Statute.

The Maryland Fair Trade Act (minimum resale price provisions on trade-marked, etc., commodities) is constitutional; this Act is not in conflict with the Sherman Anti-trust Act in view of the Tydings-Miller amendment to the latter Act. *Schill v. Remington Putnam Book Co.*, 179 Md. 83, 17 Atl. (2d) 175 (1941).

Application of Statute.

Scope.

A copyrighted book, although unique to a certain extent, is a "commodity" within the meaning of the Act. Publisher may control the resale price of such a book against a non-contracting retailer; court rejected retailer's contention that such books were not in "free and open competition" with other books inasmuch as one book was never a substitute for another, and that one copy of a literary work could not be in competition with another copy of the same work, particularly in view of Act's definition of producer to include "publisher." *Schill v. Remington Putnam Book Co.*, *supra*.

The court in the above case also held that the contract was not rendered unenforceable; (1) because the contract contained exemptions regarding books sold for circulating or public service purposes and not for resale, and for charitable, religious or educational purposes, and books sold to book clubs, government

agencies, and mail order houses, and other miscellaneous sales; or (2) because the fair trade prices were specified in the publisher's current monthly catalogue pursuant to a contractual provision, rather than in the contract itself.

B. PROHIBITION OF SALES BELOW COST

See pp. 130 to 133, vol. II

L. 1937, c. 211, and L. 1939, c. 248
Unfair Sales Act

These laws were repealed by L. 1941, c. 330, and five new sections were enacted in their stead. The new sections became effective June 1, 1941 and are as follows:

Sec. 111. This Act shall be known and designated, and may be cited as the "Unfair Sales Act".

Sec. 112. When used in this Act the following terms shall have the following meanings:

(a) "Cost to the Retailer" shall mean the invoice price 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 performed 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 (3-4) of one percent (1%) of the cost of the merchandise to the retailer as herein defined, after adding thereto freight charges but before adding thereto cartage and mark-up.

(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 five percent (5%) of the cost to the retailer as herein set forth, after adding thereto freight charges and cartage, but before adding thereto the mark-up.

(b) "Cost to the Wholesaler" shall mean the invoice cost of merchandise to the wholesaler or the replacement cost of the merchandise to the wholesaler, which-

ever is lower; less all discounts except customary discounts for cash, to which shall be added:

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

(2) Cartage to the retail outlet if performed 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 ($\frac{3}{4}$) of one percent (1%) of the cost of the merchandise to the wholesaler, as herein set forth, after adding thereto freight charges, but before adding thereto cartage.

(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 one percent (1%) 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 Cost" shall mean the cost per unit for 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 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 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 shall be governed by the provisions of paragraph (a) or (b) of Section 112, respectively.

(e) The terms "Sell at Retail", "Sales at Retail", and "Retail Sales", 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.

(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 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) The term "Retailer" shall mean and include each and every person, partnership, corporation or association engaged in the business of making sales at retail within this State; providing 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) The term "Wholesaler" shall mean and include each and every person, partnership, corporation or association engaged in the business of making sales at wholesale within this State; providing 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.

(i) Any person, partnership, corporation or association who is engaged in the business of making sales at retail within this State, and who buys direct from the manufacturer or its agent, broker, or representative, or at wholesale, and receives any wholesaler's prices and discounts on merchandise to be sold at retail, must add to the invoice cost or the replacement cost of such merchandise, both the wholesale mark-up of one percent (1%) and the retail mark-up of five percent (5%) in order to cover a proportionate part of the cost of doing business, in the absence of proof of a lower cost by such retailer.

Sec. 113. No retailer shall, with intent to injure a competitor or competitors, or destroy any competition, advertise, offer to sell or sell at retail any item of merchandise at less than cost to the retailer as defined in this Act, 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, as defined in this Act. 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 a competitor or competitors, or destroy competition. Upon complaint of any person claiming to be injured, the Circuit Court of any county and the Circuit Courts of Baltimore City shall have jurisdiction to enjoin any such retailer or wholesaler from the commission of any act prohibited by the provisions of this Act.

Sec. 114. The provisions of this Act shall not apply to advertisement or offers to sell, or 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 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 the government or governmental institutions.

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

(h) Where the price of merchandise is made in good faith to meet competition.

Sec. 115. 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.

MASSACHUSETTS

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 138, Vol. II

Retailer's acts of knowingly and wilfully selling below minimum resale prices held in violation of Fair Trade Law and enjoined. *Eastman Kodak Co. v. E. M. Electric Co.* (Dist. Ct. Mass.) 36 Fed. Supp. 111 (1940).

Where plaintiff's refusal to sell was found to be non-discriminatory, an injunction restraining sales below minimum prices was granted under the Act. *Elizabeth Arden Sales Corp. v. Johnson Wholesale Perfume Co., Inc.* (Super. Ct. 1941); P-H, Trade & Ind. Ser., par. 97165.

A liquor distributor was held to have abandoned its fair trade system of doing business when it informed defendant retailer that there would be no objection to posting fair trade prices and then underselling them, and when the distributor had not been reasonably diligent in prosecuting price cutters; also held that defendant had cut prices "knowingly" but not "wilfully," and that the products were in "open" but not "fair" competition. *Schenley Distributing Co. v. H. Hollender Co.* (Super. Ct. 1940); P-H, Trade & Ind. Ser., par. 97128.

C. ANTI-DISCRIMINATION LEGISLATION

2. Special Prohibitory Laws

See p. 140, Vol. II

Ann. Laws (Supp. 1940), c. 94, sec. 48-0
Marketing of Milk

This section provides as follows:

Sec. 48-0.

(B) No milk dealer shall discriminate by selling or offering to sell milk to certain purchasers at a price lower than that for which milk is sold or offered for sale to other purchasers purchasing on a similar basis as to grade, quality and quantity, in any market established by the board, for the purpose of destroying competition of any regularly established milk dealer, or preventing the competition of any person firm or corporation, who or which in good faith intends and attempts to become a milk dealer.

(C) The prohibition against locality discrimination contained in the preceding paragraph shall be deemed to include and prohibit any scheme of rebates, refunds, commissions or discounts, whether in the form of money or otherwise, or in the form of extending to certain purchasers special services or privileges not extended to all other purchasers.

(D) Any person who, either as director, officer, agent or servant of any person, firm or corporation engaged in the business of a milk dealer, assists or aids, directly or indirectly, in any violation of paragraph (B) or paragraph (C) of this section shall be equally guilty with the person, firm or corporation for whom or which he so acts.

(E) Any person, firm or corporation, whether as principal, agent or servant, violating any provision of said paragraph (B) or said paragraph (C) shall be punished by a fine of not less than fifty nor more than two hundred dollars.

MICHIGAN

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 143, Vol. II

Application of Statute.

The sales tax imposed by this State is a "privilege fee" exacted from retailers for the right to do business within the State, and sales of proprietary remedies by retailers at the minimum prices (established by manufacturers under the Fair Trade Act) but without adding the sales tax to these minimum prices were proper; the Fair Trade Act not expressly requiring the addition of such tax to the minimum price. *Niles Laboratories, Inc. v. Simon*, (Dist. Ct. Mich.) 33 Fed. Supp. 962 (1940).

B. PROHIBITION OF SALES BELOW COST

See pp. 143 to 146, Vol. II

Stat. Ann. (Henderson, Supp., 1941), secs. 28.79(1) to 28.79(12)
Certain Unlawful Trade Practices

Sec. 28.79(1) Legislative finding; state policy. Sec. 1. The legislature of the state of Michigan hereby finds: improper and misleading uses of the words "wholesale," "employee" and similar terms or phrases in connection with certain sales; and likewise improper and misleading uses of the words "manufacturer," "broker," "wholesaler," and similar terms or phrases denoting that the seller of a product is something other than a retailer thereof; and likewise the other practices hereinafter prohibited, are harmful to the welfare of the people of this state in the following ways, among others; consumers are misled into believing they are buying goods at a substantial discount from regular

retail prices, when in fact they are not; trade is diverted from established retail outlets offering various customer services (such as free deliveries, exchange privileges and credit facilities) to establishments not offering equal services but selling at substantially the same price, to the detriment of the consumer, who is deprived of the benefit of such services without receiving compensating advantages; purchases by business concerns, at discounts from current retail market prices, of goods, wares, and merchandise purchased not for business use but for the personal use of individuals, divert trade unfairly from established retail outlets, resulting in a loss of sales tax revenues and in a trend to higher retail prices. The legislature, acting in the exercise of the police power of the state, declares that the public policy of the state requires, and that the general welfare of the people of the state will be benefited by, the suppression of the trade practices hereinafter defined.

Sec. 28.79(2) Definitions. Sec. 2. When used in this act:

(a) The term "person" includes any individual firm, copartnership, joint adventure, association, municipal or private corporation whether organized for profit or not, company, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) The term "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(c) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

Sec. 28.79(3) Unlawful trade practice; improper advertisement, claim or implication that sale or transfer is at wholesale. Sec. 3. It shall be an unlawful trade practice for any seller or transferor of any goods, wares, or merchandise to advertise, claim, or imply that any sale or other transfer of goods, wares, or merchandise is a sale or transfer at wholesale unless such sale or transfer is made to a transferee for resale and unless such sale or transfer is not subject to the provisions of the sales tax law, being Act No. 167 of the Public Acts of 1933, as amended or hereafter amended.

Sec. 28.79(4) Same; improper use of term "employee" in connection with signs, advertising or notices referring to sales or transfers. Sec. 4. It shall be an unlawful trade practice for any seller or transferor of any goods, wares, or merchandise to use the word "employee" or any derivative thereof or synonym thereof, in connection with signs, advertising, notices, or other written or printed matter in any way referring to sales or other transfers of goods, wares, or merchandise, if such sales or transfers are made or offered to or for others than bona fide employees of such seller or transferor.

Sec. 28.79(5) Same; improper incorporation of certain terms in business name or use in describing busi-

ness; implication by manufacturer, etc., that selling price to individual consumer is other than retail price. Sec. 5. It shall be unlawful trade practice for any person engaged in selling goods, wares, or merchandise to individual consumers, to incorporate in his business name or otherwise to use in describing his business, the words "manufacturer," "miller," "wholesaler," "broker," or any derivative or synonym for any of them, unless such person is in fact engaged in one or more of such businesses in addition to his business of selling goods, wares, or merchandise to individual consumers. In cases where a person is engaged in manufacturing, milling, wholesaling, or brokerage and is in addition engaged in making sales to individual consumers, it shall be an unlawful trade practice for such person to imply directly or indirectly in connection with sales to individual consumers that the selling price is other than a retail price unless the sale is for resale.

Sec. 28.79(6) Same; improper use of catalogues or receipt of orders for purchase of merchandise in name of or on credit of employer or at discounts available to employer; exceptions. Sec. 6. It shall be an unlawful trade practice for any employer to purchase or cause to be purchased, or exhibited catalogues for the purchase of, or receive orders for the purchase of, any goods, wares, or merchandise in the name of or on the credit of such employer, or at special discounts available to such employer, for any other purpose than for use or resale in the regular course of business of such employer, and it shall be an unlawful trade practice for any employer to authorize any of his or its officers, agents, or employees, during working hours or on the premises of the employer, to perform any of the acts hereinabove in this section described: *Provided, however,* That this section shall not apply to purchases by an employer for the purpose of resale to his employees of equipment, tools, candy, chewing gum, meals, or tobacco.

Sec. 28.79(7) Same; display of price tags in excess of regular retail price to imply offer for sale at reduction therefrom. Sec. 6a. It shall be an unlawful trade practice for any person, in connection with an offer or exhibit of any goods, wares, or merchandise for sale at retail, or an exhibit of samples, catalogues or other forms of advertising listing goods, wares, or merchandise for retail sale, to display price tags or price quotations in any other form, which are substantially in excess of the prices at which such goods, wares, or merchandise are regularly or customarily sold at retail by such person or by the person issuing such samples, catalogues or other advertising, so as to imply falsely that the goods, wares or merchandise are offered for sale at a reduction from an indicated regular retail price.

Sec. 28.79(8) Injunctive relief; payment of sales tax. Sec. 7. The circuit court of the county where any unlawful trade practice is committed shall have jurisdiction and power, on petition of any person, and on a showing that the commission of such unlawful trade

practice has caused damage or threatens to cause damage to the petitioner or those represented by petitioner, to enjoin the commission of such unlawful trade practice or practices. The court may, in any case where such injunction is sought or issued, require and order the defendant or defendants in such proceeding to pay to the state board of tax administration any sum which the court finds should have been paid, but was not paid as a sales tax (pursuant to the provisions of Act No. 167 of the Public Acts of 1933, as amended or hereafter amended) in connection with any sales or sales consummated in the course of the unlawful trade practice or practices complained of.

Sec. 28.79(9) Rescission of sale and recovery of purchase price; time. Sec. 8. Any person to whom is sold any goods, wares or merchandise in the course of an unlawful trade practice, as hereinabove defined, may at his option, on discovery of such unlawful trade practice and on due notice to the seller, rescind such sale and recover back from such seller the price or any portion thereof theretofore paid by such person to such seller: *Provided*, That the right of rescission created herein must be exercised, if at all, within six (6) months subsequent to the date of the sale complained of.

Sec. 28.79(10) Sale of own products by employer to employees. Sec. 9. Nothing in this act shall be deemed to prohibit the sale by an employer to his employees of his own products or property at any price.

Sec. 28.79(11) Severing clause; application of act to person or circumstances held invalid, construction of holding. Sec. 10. Should any provision or 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 or of the act, it being the legislative intent that this act shall stand, notwithstanding the invalidity of any such provision or section.

Should the application of any provision of this act to any person or circumstances be held to be invalid for any reason, such holding shall not be construed as affecting the application of the provisions of this act to any other person or circumstance.

Sec. 28.79(12) Repeal. Sec. 11. All acts and parts of acts insofar as inconsistent with the provisions of this act are hereby repealed.

MINNESOTA

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 151, Vol. II

Constitutionality of Statute.

The Fair Trade Act is constitutional. See, *James Heddon's Sons v. Callender*, (U.S. Dist. Ct., Dist. Minn.) 29 Fed. Supp. 579 (1939).

Application of Statute.

Scope.

Plaintiff is entitled to an injunction restraining sales below the stipulated minimum price only with respect to merchandise acquired by defendant after receiving notice of the existence of plaintiff's contracts covering Minnesota. *James Heddon's Sons v. Callender, supra.*

The Fair Trade Act requires no particular form of contract. Op. Asst. Atty. Gen. (Sept. 18, 1940); P-H, Trade & Ind. Ser., par. 97119.

Defenses - General.

Though wrongdoing of other retailers is no defense to wrongdoing on part of defendant in selling plaintiff's trade-marked products below the stipulated Fair Trade price, yet if plaintiff acquiesces in violations by other retailers, plaintiff's suit to enjoin defendant would be lacking in equity. *James Heddon's Sons v. Callender, supra.*

Failure of complaint to allege that the merchandise sold by defendant was acquired by him after notice of the existence of price restrictions did not render complaint defective, but such matter is defensive and can properly be raised in answer. *James Heddon's Sons v. Callender, supra.*

B. PROHIBITION OF SALES BELOW COST

See pp. 151 to 156, Vol. II

Stat. (Mason, Supp. 1940), secs. 3976-41,
3976-42, 3976-45, 3976-46 & 3976-47
Unfair Trade Practices

These sections were amended in 1941 by Minn. L. 1941,
c. 326 to read as follows:

Sec. 3976-41. Certain acts to be unfair discrimination.—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 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 qualities 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 prices made in good faith to meet legal competition of any other person in such locality.

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.

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, restau-

rants, 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, not including customary cash discounts, plus the cost of doing business at said location by said vendor.

The term "customary cash discounts", as used in this Act, means any allowance, not exceeding two per cent, whether a part of a larger discount or not, made to wholesale or retail vendor, where the wholesale or retail vendor pays for merchandise within a limited or specified time.

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 8 per cent 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 8 per cent 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 per cent 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 per cent above the current delivered invoice or replacement cost.

Any sale made by a wholesale vendor at less than 2 per cent 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 per cent 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.

Sec. 3976-45. Exceptions.—The provisions of *Nason's Supplement 1940*, Sections 3976-41, 3976-42, as amended by this act, and *Nason's Supplement 1940*, Section 3976-43 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 merchandise 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 legal prices of a competitor selling the same commodity, articles, goods, wares or merchandise in the same locality or trade area.

Sec. 3976-46. Violations — 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 *Nason's Supplement 1940*, Sections 3976-41 and 3976-42, as amended by this act, and *Nason's Supplement 1940*, Sections 3976-38 and 3976-43, shall be guilty of a misdemeanor.

Any person who either as director, officer or agent of any firm or corporation or as agent of any person violating the provisions of *Nason's Supplement 1940*, Sections 3976-41 and 3976-42, as amended by this act, and *Nason's Supplement 1940*, Sections 3976-38 and 3976-43 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.

Sec. 3976-47. Courts may restrain violations of act.

(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 damages 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) No person shall be excused from attending and testifying or from producing books, papers, contracts,

agreements, and documents, in any case or proceedings instituted or brought under the provisions of Mason's Supplement 1940, Sections 3976-37, 3976-38, 3976-39, 3976-40, 3976-43, 3976-48, and 3976-49, and Mason's Supplement 1940, Sections 3976-41, 3976-42, 3976-45, 3976-46, and 3976-47, as amended by this act, or in obedience to a subpoena, in any such case or proceedings, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, in any such case or proceedings, or in obedience to a subpoena, in any such case or proceedings.

JUDICIAL DECISIONS

See p. 156, Vol. II

Constitutionality of Statute.

The Unfair Practices Act does not discriminate unfairly between retailers who do business on a cash and carry basis with a low overhead and others with higher overhead in view of the fact that by its own terms it expressly permits sales below cost in an endeavor made in good faith to meet the "local" prices (now "legal" prices by virtue of 1941 amendment) of a competitor. *Fredericks v. Burnquist*, Atty. Gen., 207 Minn. 590, 292 N. W. 420 (1940).

The provisions of the Unfair Practices Act prohibiting sales below cost for the purpose or with the effect of injuring competitors and destroying competition are within the police power of the State and do not violate constitutional "due process" requirements; the parts of the 1937 Act held unconstitutional in *Great Atlantic & Pacific Tea Co. v. Erwin*, 23 Fed. Supp. 70 (1938) have been cured by amendment in 1939. *McElhone v. Geror*, 207 Minn. 580, 292 N. W. 414 (1940).

Application of Statute.

"Cost of Doing Business"; "Cost," Etc.

In *McElhone v. Geror*, *supra*, The Minnesota Supreme Court announced the following four conclusions regarding the provisions of the Unfair Practices Act:

(1) It is not unreasonable to define cost as the actual current delivered invoice or replacement cost, whichever is lower, plus the cost of doing business at the location by the seller.

(2) It is not unreasonable to make the manufacturers' published list prices, less current discounts, plus the cost of doing business, "prima facie evidence" of cost to the retailer.

(3) It is not unreasonable to make the "cost of doing business" for the immediately preceding twelve month period "prima facie evidence" of current cost of doing business.

(4) It is not unreasonable to make a sale at less than 10% above the manufacturers' published list price, less discounts, or in the absence of such list price, at less than 10% above the current delivered invoice or replacement cost, for the purpose or with the effect of injuring competitors, prima facie evidence of violation of the Act.

The phrase "not including" should be construed as though it read "disregarding and ignoring." A retailer in determining his cost under the Act cannot use the ordinary 2% discount for cash for purposes of reducing the amount of cost; but if he receives a larger cash discount than 2%, anything he receives in excess thereof may be used to reduce the cost. Op. Atty. Gen. (May 28, 1941); P-H, Trade & Ind. Ser., par. 97173.

Under the phrase "actual current delivered invoice or replacement" cost, a merchant may base his selling price on what he actually paid for the goods or on the replacement cost, whichever is lower, discounts being taken into consideration as provided by law. For example, a grocer who anticipated a shortage in sardines and as a result laid in a supply, might sell them at a cost based upon what he paid for them plus the cost of doing business over and above 2% - to compel him to use a daily price quotation would be to compel him to sell above "cost" as defined in the Act. If the market became flooded with sardines, this same grocer would be able to sell his sardines at what it would

cost him to replace his stock, or in other words at the current replacement cost, if such replacement cost is lower than what he actually paid for the goods - the replacement cost must necessarily be the present existing replacement cost, which may vary from day to day. Op. Atty. Gen. (July 31, 1941); P-H, Trade & Ind. Ser., par. 97183.

Intent to Injure.

Sales below cost which have the effect of injuring competition may be prohibited regardless of intent. In view of the fact that habitual sales below cost, such as result in injury to competition, may properly be regarded by the legislature as detrimental to public welfare, their prohibition by the Act, regardless of intent, is not objectionable on constitutional grounds. Intent to injure is not essential to violation; this is not fatal to the Act. *McElhone v. Geror*, *supra*.

The burden is on the defendant-vendor to show that his competitor's price which he claimed to be meeting is a "legal" price; and it is not incumbent on the prosecutor to prove that a competitor's price is illegal in order to prove a prima facie case against a vendor who alleges that he in good faith attempted to meet such price. Op. Atty. Gen. (May 28, 1941); P-H, Trade & Ind. Ser., par. 97173.

MISSISSIPPI

See pp. 165 to 169, Vol. II

No new material.

MISSOURI

C. ANTI-DISCRIMINATION LEGISLATION

2. Special Prohibitory Laws

See pp. 172 to 173, Vol. II

Stat. Ann. (Supp. 1940), sec. 12432.28a
Milk Products

Sec. 12432.28a. Agreements between manufacturing plants fixing prices, assigning territory, etc., prohibited. It is hereby declared to be unlawful for any group of two or more expressly owned manufacturing plants or their agents to agree upon or fix prices of milk products, or to divide or assign any territory in the State of Missouri served by a cream buying station to any manufacturer licensed by this Act, or to assign or attempt to assign any cream buying station to any manufacturing plant, or to refuse to buy cream or milk offered for sale at the regular price then being paid by such manufacturing plant to other cream stations or sellers, or to agree not to purchase said cream or milk from said cream station or other seller, or to agree, or attempt to agree that cream stations must, should or ought to sell their products to any particular manufacturer, and the violation of this provision shall constitute a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment.

MONTANA

B. PROHIBITION OF SALES BELOW COST

See pp. 177 to 187, Vol. II

Rev. Codes Ann. (Anderson & McFarland, Supp. 1939)
Unfair Practices Act

Section 3946.7 of the Unfair Practices Act was amended by L. 1941, c. 100, to add an additional exception, known as (e), and reading as follows: "To the State of Montana or any of its institutions."

NEBRASKA

B. PROHIBITION OF SALES BELOW COST

See p. 197, Vol. II

L. 1941, c. 123, secs. 1 to 7

Unfair Sales Act

In 1941 Nebraska passed an Act patterned after the "unfair sales act" type of legislation. It reads as follows:

Sec. 1. This act shall be known and designated, and may be cited as the unfair sales act.

Sec. 2. (a) In this act, unless the context otherwise requires, the term *cost to the retailer* means the actual cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts, 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 of one per cent of the cost to the retailer as hereinafter 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 six per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup. (b) The term *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 by 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. (c) 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 of subsection (a) hereof. (d) The term *cost to the retailer* as defined in subsection (a) hereof means bona fide costs; and purchases made by retailers at prices

which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer. (e) The terms *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) The terms *sell at wholesale*, *sales at wholesale* and *wholesale sales* mean 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 include any transfer of such property where title is retained by the seller as security for the payment of the purchase price. (g) The term *retailer* means every person, partnership, corporation or association engaged in the business of making sales at retail within this state: *Provided*, 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) The term *wholesaler* means every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state: *Provided*, 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.

Sec. 3. 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 substantially to lessen competition, or unreasonably to restrain trade, or to tend to create a monopoly in any line of commerce.

Sec. 4. The publication of any advertisement in contravention with the provisions of this act by any newspaper at the request of the retailer or wholesaler shall not render the owner of the newspaper or his agents or servants liable for any penalty as in this act provided.

Sec. 5. Any person damaged, or who is threatened with loss or injury, by reason of a violation of this act shall be entitled to sue in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation of this act.

Sec. 6. 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 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 the government or governmental institutions; (g) where the price of merchandise is made in good faith to meet competition; (h) where merchandise is sold by any officer acting under the order or direction of any court; (i) where merchandise is sold by manufacturers or processors.

Sec. 7. 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.

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws (Predatory Price Practices)

See pp. 199 to 200, Vol. II

JUDICIAL DECISIONS

See p. 200, Vol. II

The case of *Hompes v. B. F. Goodrich Co. et al.*, 137 Neb. 84, 288 N. W. 367 (1939) established the following principles under the Junkin Act (Comp. Stats. 1929, secs. 59-801 to 59-822):

(1) The allowance by a manufacturer of a volume discount to stores controlled by it was not of itself a violation of the Act, but if the purpose of the discount was to make it possible to undersell one dealing in the manufacturer's product and assist in carrying out an unlawful conspiracy or combine, liability would be established.

(2) Where retail prices were uniformly maintained by stores controlled by a manufacturer, the fact that those stores obtained a larger discount than an independent dealer because of the larger volume of their sales did not violate the Act.

(3) Discounts permitted by a manufacturer uniformly to all of its dealers, as well as to stores controlled by it, in order to meet like prices of competitors on similar products, did not violate the Act.

(4) A person may do business with whomsoever he desires and may refuse business relations with any person whomsoever, whether the refusal is based on reasons, whim, or prejudice without violating the Act.

(5) One engaged in business has the right to meet competitive prices on merchandise of a similar class, character and quality, without violating the Act.

(6) A volume bonus, providing a discount to a dealer in accordance with the amount of purchases he makes, is entirely lawful under the Act, unless an intent is shown to grant it as a means of injuring or destroying the business of another.

The case of *O. G. Pierce Co. v. Century Indemnity Co., et al.*, 136 Neb. 78, 285 N. W. 91 (1939) established the following principle under the same Act:

The section (59-806) requiring that prices be uniform and fair contemplates a cause of action on the part of a corporation against other artificial or natural persons who enter into any contract, combination or conspiracy, or give any direction or authority to do any act, to drive such corporation out of business; the word "person" including both natural and artificial persons.

NEVADA

See pp. 205 to 207, Vol. II

No new material.

NEW HAMPSHIRE

B. PROHIBITION OF SALES BELOW COST

See p. 210, Vol. II

L. 1941, c. 92, secs. 1 to 8
Unfair Sales Act

In 1941 New Hampshire passed an Act patterned after the "unfair sales act" type of legislation. It reads as follows:

Sec. 1. Definitions.

I. 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 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 per cent 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 per cent of the total cost at the retail outlet; except as hereinafter provided in paragraph VIII.

II. 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, 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 per cent 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 per cent of the total cost at the wholesale establishment.

III. 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 I and II.

IV. The terms "cost to the retailer" and "cost to the wholesaler" as defined in said paragraphs I and II 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.

V. 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-mentioned terms shall include any such transfer of property where title is retained by the seller as security for the payment of the purchase price.

VI. 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,

VII. 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.

VIII. 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, both the wholesale mark-up of two per cent and the retail mark-up of six per cent shall be added in determining the "cost to the retailer" of such merchandise.

Sec. 2. Prohibition. Any retailer who, with intent, or effect, of injuring competitors or destroying 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 or effect as aforesaid, advertises, offers to sell or sells at wholesale any item of merchandise at less than cost to the wholesaler, shall be fined not more than three hundred dollars. 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 a violation of this act.

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 markdown; (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. Superior Court Jurisdiction. 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 this act; and it shall be the duty of the several county solicitors, in their respective counties, to enforce, and restrain the violation of, this act.

Sec. 5. Conflicting Laws. Whenever the application of any provision of any other law of this state conflicts with the application of any provision of this act, this act shall prevail.

Sec. 6. Constitutionality. If any provision of this act, 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. Act Named. This act shall be known, and may be cited, as the "Unfair Sales Act".

Sec. 8. Takes Effect. This act shall take effect sixty days after its passage.

NEW JERSEY

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 214, Vol. II

Application of Statute.

Scope.

Retailer who purchased merchandise prior to date system of contracts was executed is not bound by the price restrictions as to the merchandise so bought by him; the Act not applying to merchandise acquired before receipt of notice that price-fixing contracts have been entered into (following New Jersey law). *Charmley Drug Shop v. Guerlain, Inc.*, (Dist. Ct. Dist. N. J.) 113 Fed. 247 (1940).

The purpose of the Fair Trade Act is not to abridge the purchaser's right to fix the sales price of a commodity, but to preclude a sale with the aid of the producer's good will, below a minimum price when that is necessary to protect such good will against injury; the Act enjoins not the bare disposition of the commodity, but rather a use of another's trade-mark, brand, or name in accomplishing such disposition which is considered an assault upon the good will, inimical alike to the good will and business of the producer and the distributor of the goods. *Pazen v. Silver Rod Stores, Inc.*, 130 N. J. Eq. 407, 22 Atl. (2d) 237 (1941).

The Act should be construed to effectuate its complete purpose, which is not alone to protect the owners of brands, but also to protect retailers and the consuming public. *Frank Fischer Merchandising Corp. v. Ritz Drug Co.*, 129 N. J. Eq. 105, 19 Atl. (2d) 454 (1941).

Parties Entitled to Establish Resale Prices.

The protection of the good will of a "distributor"

of a commodity as well as the protection of the good will of a "producer" is within the reason and spirit of the Act; but an agreement between a wholesaler and a retailer fixing minimum retail prices for 18 brands of cigarettes produced by 11 different manufacturers, none of whom had established either minimum wholesale or retail prices, which contract was one of a system for price maintenance formulated by a group of wholesalers, was in effect a "horizontal contract" rather than a "vertical contract" and was violative of "public policy" as defined by common law and reiterated by the Fair Trade Act, and, therefore, was void. *Pazen v. Silver Rod Stores, Inc., supra.*

A distributor of products sold under the trade-mark of a manufacturer or producer is entitled to fix minimum retail prices therefor, although the distributor acts without the authority or consent of the owner of the trade-mark. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.*

Price maintenance contracts which are the result of agreements between manufacturers or producers, and which amount to "horizontal price-fixing" are not valid under the Fair Trade Act nor the Sherman Anti-Trust Act. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.* (See, also, Combination Sales for same case).

Manner of Establishing Resale Prices.

The prices established must be uniform throughout the State, and uniformity cannot be obtained unless the manufacturer or distributor effectively binds all retailers selling the product to maintain the established price; and a wholesaler-distributor of products bearing the trade-mark of the manufacturer did not sufficiently comply with the requirements of the Act where he gave notice of contracts with certain retailers to only 1,200 out of approximately 5,800 retailers in the State. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.*

However, the Act is state-wide in application; a court cannot draw the line where competition begins in one section of the State and ends in another section;

the Act does not call for a distinction as to competitive areas where the manufacturer has failed to bind all retailers to maintain the minimum prices fixed by him; but the execution of one contract with one retailer in the State, no matter where the retailer is located, is a sufficient execution of contracts to bind all other retailers having notice. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.*

Combination Sales.

An agreement between manufacturers of two different products, permitting the sale of their respective products, in combination, at a price less than the sum of the fair-trade price fixed for each individual unit, is invalid under the Fair Trade Act and also under the Sherman Act, as amended, and is not enforceable. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.*

Where a distributor operating under the Fair Trade Act combined two identical trade-marked articles into a combination package to be resold at the regular price of one article plus 1¢, the distributor "abandoned" its price structure under the Act, and was not entitled to restrain the sale of the product at less than the minimum price. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.*

Likewise, where a distributor operating under the Act sold a combination package made up of three identical articles to be resold at 49¢, though the fair-trade price of the individual article was 19¢, the distributor "abandoned" its fair-trade price schedule. *Frank Fischer Merchandising Corp. v. Ritz Drug Co., supra.*

Where a producer operating under the Fair Trade Act combined two trade-marked articles into a combination package for resale at a price less than the aggregate price of the articles if sold separately and independently of the combination, the producer abandoned its price structure under the Act as to those items which had been combined, and so was not entitled to restrain price cutting on said articles. *Bathasweet Corp. v. Weissbard Bros., 128 N. J. Eq. 135, 15 Atl (2d) 337 (1940).*

Defenses - General.

Where contracts fixing minimum retail prices exempted from their provisions physicians, dentists, veterinarians, clinics, hospitals and charitable institutions, the exemptions were not contrary to the Act nor did they justify a non-contracting retailer in violating the Act. *Burroughs Wellcome & Co., Inc. v. Weissbard Bros.*, 129 N. J. Eq. 563, 20 Atl. (2d) 445 (1941).

Abandonment of System of Fair Trade Contracts.

See, also, *Combination Sales*, *supra*.

When a manufacturer sold pharmaceutical preparations to wholesalers who in turn sold them to retailers to whom contracts to maintain minimum prices were mailed by the manufacturer, and the manufacturer sought to stop price-cutting brought to its attention, a non-contracting retailer could not escape an injunction on the ground that the manufacturer had permitted others to cut prices below the minimum. *Burroughs Wellcome & Co., Inc. v. Weissbard Bros.*, *supra*.

Parties, Pleadings, Proof, and Practice.

Right to protect one's good will, and not the extent of monetary loss or damage, held the test for determining whether the jurisdictional amount of \$3000 is involved in an injunction suit under New Jersey Fair Trade Act. *Caron Corp. v. Wolf Drug Co., et al.*, (U. S. Dist. Ct., Dist. N. J., 1941); P-H, Trade & Ind. Ser., par. 97188.

NEW MEXICO

See p. 218, Vol. II

No new material.

NEW YORK

A. RESALE PRICE MAINTENANCE

See pp. 223 to 224, Vol. II

Fair Trade Act (Thompson Supp. 1941), Art. XXIV-A, secs. 369a to 369e

In 1941, New York amended and re-enacted its Fair Trade Act to read as follows:

Sec. 369-a. Price fixing of certain commodities permitted. 1. 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 contracts:

(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.

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.

3. This article shall not be deemed or construed to apply to, or to fix or limit prices at which any commodity may be sold or offered for sale to the state of New York or to any administrative department of the state government, to any political subdivision of the state, to any municipality, to any public corporation or authority now or hereafter created by the legislature, to any college or university library or any public library incorporated by an act of the legislature, or by the board of regents of the state education department or registered by the state education department

Sec. 369-b. 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 provision of section three hundred sixty-nine-a, 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. 369-c. Exceptions. This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 369-d. Definitions. The following terms, as used in this article, are hereby defined as follows: "Producer" means grower, baker, maker, manufacturer or publisher. "Commodity" means any subject of commerce.

Sec. 369-e. Effect of partial invalidity. If any provision of this article 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.

JUDICIAL DECISIONS

See pp. 224 to 231, Vol. II

Application of Statute.

Scope.

The purpose of the Act is to protect the property of the manufacturer or producer in his trade-name or trade-mark; consequently the Act does not prohibit a sale, without the producer's trade-mark, at any price the vendor pleases; the Act interferes only when the vendor sells with the aid of the producer's good-will and then only to protect that good-will. *Pinesbridge Farm, Inc. v. Bloomingdale Bros., Inc.*, 176 Misc. 179, 26 N. Y. S. (2d) 1005 (1941).

The Act applies only to goods acquired prior to notice of the stipulated resale prices. *Frankfort Distilleries, Inc. v. Stockman*, (Sup. Ct. 1941) 105 N. Y. L. J. 1411; P-H, Trade & Ind. Ser., par. 97162.

Parties Entitled to Establish Resale Prices.

The only conduct made actionable by the Fair Trade Act is selling at less than the price stipulated in a contract made pursuant to the Act; and a contract is not made pursuant to the Act unless it is one containing provisions fixing resale prices and is made by the person whose trade-mark, brand or name is borne upon the commodity, or label, or container. *Automotive Electric Service Corp. v. Times Square Stores Corp.*, 175 Misc. 865, 24 N. Y. S. (2d) 733 (1940).

But where a price-fixing contract has been entered into by the owner of such trade-mark, brand, or name, other persons damaged by sales at less than the prices fixed may enjoin such sales. *Automatic Electric Service Corp. v. Times Square Stores Corp.*, *supra*.

Manner of Establishing Resale Prices.

The resale prices must be established by the owner of the trade-mark, brand, or name identifying the commodity; such prices may not be fixed by a holder of a franchise from a manufacturer authorizing the distribution of the manufacturer's products throughout the State, where the franchise holder is not an exclusive distributor and the manufacturer is not a party to the price-fixing contracts. *Automotive Electric Service Corp. v. Times Square Stores Corp.*, *supra*.

A temporary injunction to restrain advertising of plaintiff's products at less than prices fixed in contracts under the Act will be denied where the prices apply to the metropolitan New York area only and do not regulate prices in an upstate area where the advertising is circulated. *Frankfort Distillers, Inc. v. Waldorf Liquors, Inc.*, (Sup. Ct. 1941) 105 N. Y. L. J. 2643; P-H, Trade Reg. Ser., par. 97177.

Removal of Brand.

A manufacturer who seeks to invoke the Act for his own benefit has the obligation of dealing fairly with his customers, and may not discriminate in favor of some of his customers and against others; however, it does not savor of unfair practice, nor an imposition on the public, for any producer to sell the same article

at a less price simply because it is packed in a container that does not bear his trade-mark. *Pinesbridge Farm, Inc. v. Bloomingdale Bros., Inc., supra.*

Parties Entitled to Enforce Price Restrictions.

A vendor of gasoline has no interest in the trade names of gasoline sold by other retailers and not by himself and may not, under his contract with a distributor, insist upon the maintenance of fair trade resale prices for such brands. *Le Page v. Auto Club of N. Y., Inc.,* (Sup. Ct. 1940); CCH, Trade Reg. Ser., par. 25370.

A producer, operating under the Fair Trade Act, was entitled to an injunction restraining a retailer from selling the producer's trade-marked product below the stipulated minimum price, notwithstanding the producer packed the identical product for another in an identical jar without the producer's trade-mark or name for sale below the stipulated minimum price, where the producer would have packed the same article for defendant retailer bearing defendant's trade-mark or name for sale at a price less than that established for the product when bearing the producer's trade-mark. *Pinesbridge Farm, Inc. v. Bloomingdale Bros., Inc., supra.*

Where the manufacturer of a commodity granted a "franchise" authorizing the holder thereof to distribute its commodity throughout the State, but did not make the holder its exclusive distributor, and the holder thereafter entered into contracts with its customers fixing the customer's resale price for such commodity, to which contracts the manufacturer was not a party, the franchise holder was not entitled to enjoin a non-contracting customer from selling below the prices fixed. *Automotive Electric Service Corp. v. Times Square Stores Corp.,* 175 Misc. 865, 24 N. Y. S. (2d) 733 (1940).

Defenses - General.

Failure of the plaintiff to exercise its option under its Fair Trade contracts to repurchase the goods from the defendant, after notice of defendant's intention to sell below the stipulated prices, does not authorize defendant to violate its Fair Trade contracts under

the Act. *Hiram Walker Distributors, Inc. v. Ravett*, (Sup. Ct. 1941) 106 N. Y. L. J. 1810; CCH, Trade Reg. Ser., par. 52716.

The claim that a schedule of prices was to take effect on one day's notice is insufficient to defeat an application for an injunction, where most of the sales complained of occurred prior to the promulgation of such schedule and violated a preceding schedule. *Seagram Dist. Corp. v. Waldorf Liquors*, (Sup. Ct. 1941) 106 N. Y. L. J. 1665; CCH, Trade Reg. Ser., par. 52717.

Temporary injunctions will be granted in resale price maintenance cases despite denials of defendants; if, as defendants contend, no sales were made below the fixed prices, no harm will ensue by issuance of the restraining orders. *Talge v. Rival Drug Co.*, (Sup. Ct. 1940) 104 N. Y. L. J. 91; P-H, Trade & Ind. Ser., par. 97094; and *Dougherty v. Goldstein*, (Sup. Ct. 1940) 104 N. Y. L. J. 143; P-H, Trade & Ind. Ser., par. 97094.

A defense that the sales at less than the stipulated price were justified in view of price-cutting by a competitor is not warranted when the competitor's sales were for the purpose of closing out its stock and were therefore legal under the Crawford-Feldman Act. *Schenley Import Corp. v. Miller*, (Sup. Ct. 1940) 104 N. Y. L. J. 241; P-H, Trade & Ind. Ser., par. 97047.

A preliminary injunction in a Fair Trade case will be denied where there is evidence of price-cutting by the plaintiff. *Weinstein v. Silverman and Hill Top Liquor Store Co., Inc. v. Waldorf Liquors, Inc.*, (Sup. Ct. 1940) 104 N. Y. L. J. 373; P-H, Trade & Ind. Ser., par. 97105; *Safran v. Applefield*, (Sup. Ct. 1940) 104 N. Y. L. J. 838; P-H, Trade & Ind. Ser., par. 97112.

Defendant's excuse that sales were made below fixed prices by inexperienced employees was insufficient to deprive plaintiff of right to injunctive relief. *Eastman Kodak Co. v. H. & B. Radio Corp.*, (Sup. Ct. 1939) 102 N. Y. L. J. 375; P-H, Trade & Ind. Ser., par. 97019.

Abandonment of System of Fair Trade Contracts.

Where price-cutting in violation of price-fixing contracts under the Fair Trade Act is general and long continued, failure to take effective measures to prevent it will be regarded as a "waiver" or "abandonment"

of such rights under the Act as the contracts may have conferred. *Automotive Electric Service Corp. v. Times Square Stores Corp.*, *supra*.

Temporary injunction will be denied where plaintiff waited twenty-two months before commencing suit to restrain price-cutting. *Bristol Myers Co. v. J. Rothstein Sons, Inc.*, (Sup. Ct. 1940) 103 N. Y. L. J. 557; P-H, Trade & Ind. Ser., par. 97057.

Parties, Pleading, Proof, and Practice.

Although persons other than the owner of the trade-mark, brand, or name appearing on the commodity, may sue to enjoin sales at less than the prices fixed, where they are damaged, it is still an essential part of the cause of action that the damage be occasioned by sales below the prices fixed by the owner of the identifying trade-mark, brand, or name. *Automotive Electric Service Corp. v. Times Square Stores Corp.*, *supra*.

An injunction pendente lite, under the Act, will be denied where there is no factual showing other than affidavits upon information and belief that defendant, not a party to the agreement in which prices were fixed, had notice of such agreement and thereafter sold at prices in violation of it. *Miller v. Coliseum Wine & Liquor Store, Inc.*, (Sup. Ct. 1940) 103 N. Y. L. J. 2721; 3 CCH, Tfr. B., par. 25473.

A preliminary injunction will be denied where the plaintiff failed to submit a reply affidavit denying defendant's charge of horizontal price-fixing. *Calvert Distillers Corp. v. Leland Wine & Liquor Stores*, (Sup. Ct. 1941) 106 N. Y. L. J. 2718; P-H, Trade & Ind. Ser., par. 97178.

A preliminary injunction will be denied where a serious question is raised as to whether or not plaintiff induced price-cutting and acquiesced therein. *Calvert Distillers Corp. v. Harry Fox, Inc.*, (Sup. Ct. 1941) 105 N. Y. L. J. 211; 3 CCH, Tfr. B., par. 25595.

The drastic remedy of a temporary injunction will not be used where it appears that defendant has been violating the Fair Trade Act for two years, and there are issues of fact presented as to plaintiff's motives.

Fein v. Wohl's Drug Store, Inc., (Sup. Ct. 1940) 104 N. Y. L. J. 1434; 3 CCH, Tfr. B., par. 25550.

A complaint, seeking a permanent injunction against a retail liquor dealer selling a distiller's products below Fair Trade prices, fails to state a cause of action where it contains no allegation that the manufacturer is licensed under the Alcoholic Beverage Control law - the procurement of such a license being a condition precedent to its right to sell or to enforce a contract based on its sales. *Carstairs Dist. Corp. v. Ackerman*, (Sup. Ct. 1941) 106 N. Y. L. J. 599; CCH, Trade Reg. Ser., par. 52677.

Injunction to restrain price-cutting will be denied for failure to allege wilful violation of resale price maintenance contracts; averments on information and belief held meritless. *Citarella v. Bryant Wine & Liquor Shop, Inc.*, (Sup. Ct. 1940) 103 N. Y. L. J. 2868; P-H, Trade & Ind. Ser., par. 97093.

War.

The Federal Emergency Price Control Act of 1942 does not bar suits brought pursuant to State Fair Trade Law, even though maximum retail price established by Price Administrator conflicts with minimum retail resale price as fixed by stipulation of parties and as affected by State Fair Trade Law, in absence of showing by party complained against, that act of deviation from State law was occasioned by good faith compliance with the Federal law as the paramount authority. *Schreier et al. v. Siegel*, 36 N. Y. S. (2d) 97 (1942).

NORTH CAROLINA

C. ANTI-DISCRIMINATION LEGISLATION

2. Special Prohibitory Laws

See p. 237, Vol. II

L. 1941, c. 359, secs. 1 to 9
Farm Products

In 1941, this State passed a law regulating unfair practices by those handling farm products. The Act reads:

Sec. 1. The Board of Agriculture is hereby authorized to make rules and regulations necessary to protect producers of farm products from loss through financial irresponsibility and unfair, harmful and unethical trade practices of persons, firms and corporations (hereinafter referred to as "handlers") and their agents, who incur financial liability for farm products.

Sec. 2. No person shall act as a handler of farm products on any basis except a cash basis, until he obtains a permit from the Commissioner of Agriculture. The Commissioner of Agriculture may require from each applicant such verified information as he sees fit in order to determine the applicant's financial responsibility and reputation, and the board may make rules and regulations as to issuing permits.

Sec. 3. No such permit shall be issued to any handler who is not operating on a strictly cash basis and who is incurring or may incur financial liability to any grower, until such person, firm, or corporation shall furnish to the Commissioner of Agriculture sufficient and satisfactory evidence of their ability to carry out their contract or furnish a satisfactory bond in an amount not to exceed ten thousand (\$10,000.) dollars. The Commissioner of Agriculture may require a new bond or additional bonds up to the ten thousand dollar (\$10,000.00) limit when he finds it necessary for the protection of the producer. Such bonds shall be to the State in favor of every contract producer or consignor of farm products, and shall be continued upon compliance with all the provisions of this Act, and the faithful fulfilment of all contracts, and for the faithful accounting for and handling of produce by such handler, and for payment to the producer of the net proceeds of all consignments and sales. Any producer claiming to be injured by the fraud, deceit or

wilful negligence of any commission merchant or contractor, or by his failure to comply with this Act or with the terms of a written contract between such parties, may bring action on the bond against both principal and surety in any court of competent jurisdiction and may recover the damages found by the court to be caused by such acts complained of.

Sec. 4. No handler shall enter into any written contract with a producer in North Carolina, for the production, delivery, or sale of farm products, until he files with the Commissioner of Agriculture a true copy of the contract and it is examined and approved by the Commissioner. The Commissioner may withhold his approval in his discretion if he is of the opinion that the contract is illegal or unfair to the producer, or that the contractor is insolvent or financially irresponsible, or if for any other cause it reasonably appears to him that the contract in question might defeat the purpose of this Act.

Sec. 5. In order to enforce this Act, the Commissioner of Agriculture, upon his own motion or upon the verified complaint of any producer, shall have the following additional powers:

(a) To inspect or investigate transactions for the sale or delivery of farm products to persons acting as handlers; to require verified reports and accounts of all authorized handlers; to examine books, accounts, memoranda, equipment, warehouses, storage, transportation and other facilities, farm products and other articles connected with the business of the handlers; to inquire into failure or refusal of any handlers to accept produce under his contracts and to pay for it as agreed;

(b) To hold hearings after due notice to interested parties and opportunity to all to be heard; to administer oaths, take testimony and issue subpoenas; to require witnesses to bring with them relevant books, papers, and other evidence; to compel testimony; to make written findings of fact and on the basis of these findings to issue orders in controversies before him, and to revoke the permits of persons disobeying the terms of this Act or of rules, regulations, and orders made by the board or the Commissioner. Any party disobeying any order or subpoena of the Commissioner shall be guilty of contempt, and shall be certified to the Superior Court for punishment. Any party may appeal to the Superior Court from any final order of the Commissioner;

(c) To issue all such rules and regulations, with the approval of the board, and to appoint necessary agents and to do all other lawful things necessary to carry out the purposes of this Act.

Sec. 6. Any person who violates the provisions of this Act or the rules and regulations promulgated thereunder shall be guilty of a misdemeanor, and shall be punishable by a fine of not more than five hundred dollars (\$500.00) or by imprisonment for not more than one year, or both.

Sec. 7. If any provision of this Act is held invalid, such invalidity shall not affect other provisions which can be given effect, and to this end the provisions of this Act are declared severable.

Sec. 8. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 9. This Act shall be in full force and effect from and after July first, one thousand nine hundred and forty-one.

NORTH DAKOTA

B. PROHIBITION OF SALES BELOW COST

See p. 240, Vol. II

L. 1941, c. 291, secs. 1 to 8

Unfair Trade Practices Act

In 1941, this State passed the following Act.

Sec. 1. This Act shall be known and designated as the "North Dakota Unfair Trade Practices Act."

Sec. 2. (1) When used in this act, the term "cost" shall mean the actual invoice cost of the merchandise or the replacement cost of the merchandise whichever is lower; less all trade discounts, advertising allowances, including customary discounts for cash, to which shall be added (a) transportation including cartage cost, not otherwise included in the invoice cost or the replacement cost of the merchandise; provided, that where a manufacturer publishes a list price, proof of such list price, less all discounts, shall be prima facie evidence of "cost."

(2) When used in this Act the term "replacement cost" 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 prior to the date of sale or the date upon which it is offered for sale by the seller.

(3) 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 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 shall be governed by the provisions of paragraphs (1) or (2) of Section 2, respectively.

(4) 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 purchase for consumption or use other than resale of further processing or manufacturing, provided, however, that sales to contractors or subcontractors engaged in any type of building operation or the repair of buildings or other improvements upon real estate shall be deemed sales for consumption and not for further processing or manufacturing. The terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(5) 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 purchase for purposes for resale or further processing or manufacturing, provided, however, that sales to contractors engaged in any type of building operation or the repair of buildings or other improvements upon real estate regardless of further processing or manufacturing of the material sold, shall be deemed retail sales and not wholesale sales. 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.

(6) The term "retailers" 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 retail and sales at wholesale, such term shall be applied only to the retail portion of such business.

(7) The term "wholesaler" shall mean and include every person, partnership, corporation or association engaged in the business of making sales at wholesale within the 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.

Sec. 3. 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. The inhibition against sales below cost as defined herein, shall embrace any scheme of special rebate, collateral contract or any device of any nature whereby such result is, in substance or in fact, effected in violation of the spirit and intent of this Act.

Sec. 4. Any retailer or wholesaler who shall advertise, offer to sell, or sell any article of merchandise at less than cost to such retailer or wholesaler as defined in this Act, or who gives, offers to give, or advertises the intent to give away any article of merchandise, with the intent, or with the effect of injuring competitors and destroying competition shall be guilty of a misdemeanor. Proof of any such advertising, offer to sell or to give away, or sale or gift of any article of merchandise by any retailer or wholesaler at less than cost as defined in this Act, shall be prima facie evidence of a sale below cost.

Sec. 5. In addition to the penalties provided, the Courts of this State are invested with the jurisdiction to prevent and restrain violations of this Act by injunctive proceedings, and it shall be the duty of the Attorney-General and the several State's Attorneys to institute suits in equity in behalf of the State, to prevent and restrain violations hereof. 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 the District Court against any damage or threatened loss or injury by reason of a violation hereof.

Sec. 6. 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 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 the government or government institutions; (g) where the price of merchandise is made in good faith to meet legal competition; (h) where merchandise is sold by any officer acting under the order or direction of any court; provided, however, that any retailer or wholesaler claiming the benefits of any of the exemptions herein above provided, shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of said exemptions.

Sec. 7. Any party of record to any civil action or proceedings instituted or brought pursuant to the provisions of this Act may be required to testify in such proceedings and to produce books, papers, tariffs, contracts, agreements and documents before the Court in such proceedings, providing, however, that no person compelled under the provisions of this section to testify or produce evidence tending to incriminate him shall be prosecuted for any crime which such testimony or evidence tends to prove or to which the same relates. This section shall not exempt any person from prosecution for perjury.

Sec. 8. 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.

JUDICIAL DECISIONS

See p. 240, Vol. II

(No cases were found construing this new law. Relevant opinions of the Attorney General are set forth).

An advertising plan whereby with each dollar's worth of merchandise purchased, plus 8¢ in cash, a customer might secure a piece of dinner ware which actually cost the retailer 10¢, held to violate the Act. Op. Atty. Gen., Apr. 28, 1941; P-H, Trade & Ind. Ser., par. 97171.

The Act applies to all sales at retail; the Act exempts bona fide clearance sales provided the merchandise is advertised and marked as such; the sales of perishable, imperfect, or damaged goods; the final liquidation of any business; sales to charitable or relief agencies; and on contract to government departments or institutions. Op. Asst. Atty. Gen., May 8, 1941; P-H, Trade & Ind. Ser., par. 97172.

The Act does not apply to sales to a government internment camp. Op. Atty. Gen., June 7, 1941; P-H, Trade & Ind. Ser., par. 97176.

The sale of two or more articles as a merchandising unit for a combined price equal to or in excess of the combined cost does not violate the Act. Op. Asst. Atty. Gen., July 9, 1941; P-H, Trade & Ind. Ser., par. 97182.

The Act does not require a sale at a profit, it only forbids sales below cost. Op. Asst. Atty. Gen., Aug. 27, 1941; P-H, Trade & Ind. Ser., par. 97192.

The word "free" may not be used in connection with combination offers under the Act; there must be a combined price which is not below cost. Op. Asst. Atty. Gen., Oct. 22, 1941; P-H, Trade & Ind. Ser., par. 97199.

OHIO

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 249, Vol. II

Resale price maintenance contracts originated by and made between jobbers, fixing prices selected by jobbers on all commodities of a general class sold within the State, and given retailers to sign with the alternative of being sued, are in effect horizontal contracts and violate the Fair Trade Act; in this case, substantially all the cigarette jobbers in the State agreed with cigarette retailers. *Rayess v. The Lane Drug Co.*, 138 Ohio St. 401, 35 N. E. (2d) 447 (1941).

B. PROHIBITION OF SALES BELOW COST

See p. 249, Vol. II

Code Ann. (Baldwin's Throckmorton, Supp. 1941),
secs. 6402-10 to 6402-21
Unfair Cigarette Sales Act

Sec. 6402-11. (Definitions.)

When used in this act: (a) The term "cost to the retailer" shall mean the invoice cost of the cigarettes to the retailer, or the replacement cost of the cigarettes 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 the cost of doing business by the said retailer as evidenced by the standards and the methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred, and must include, without limitation, labor (including salaries

of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising.

(b) In the absence of proof of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business to the retailer shall be presumed to be six per centum of the invoice cost of the cigarettes to the retailer or of the replacement cost of the cigarettes 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.

(c) The term "cost to the wholesaler" shall mean the invoice cost of the cigarettes to the wholesaler, or the replacement cost of the cigarettes 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 a wholesaler's mark-up to cover in part the cost of doing business, which wholesaler's mark-up, in the absence of proof of a lesser cost of doing business by the said wholesaler as evidenced by the standards and methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred, including without limitation, labor, salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery, delivery costs, all types of licenses, taxes, insurance and advertising, shall be two per centum of said invoice cost of the cigarettes to the wholesaler, or of the replacement cost of the cigarettes 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.

(d) In the absence of proof of a lesser or higher cost of doing business, the cost of doing business to the retailer, who received in connection with the retailer's purchase not only the discounts ordinarily allowed upon purchases by a retailer but also in whole or in part the discounts ordinarily allowed upon purchases by a wholesaler, shall be presumed to be six per centum of both the invoice cost of the cigarettes to such retailer or the replacement cost of the cigarettes to such 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 and "wholesaler mark-up".

(e) In all advertisements, offers for sale or sales involving two or more items at a combined price and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise) the retailer's or wholesaler's selling price shall not be below the "cost to the retailer" or the "cost to wholesaler", respectively, of all articles, products, commodities and concessions included in such transactions.

(f) The terms "sell at retail", "sales at retail" and "retail sales" shall mean and include any transfer of title to tangible personal property for a valuable consideration made, in the ordinary course of trade or

usual prosecution of the seller's business, to the purchaser for consumption or use. The terms "sell at wholesale", "sales at wholesale" and "wholesale sales" shall mean and include any such transfer of title to tangible personal property for the purpose of resale.

(g) The term "retailer" shall mean and include any person who under the provisions of section 5894-5 of the General Code of Ohio is permitted to sell cigarettes at retail within this state.

(h) The term "wholesaler" shall mean and include any person who under the provisions of section 5894-5 of the General Code of Ohio is permitted to sell cigarettes at wholesale within this state.

(i) The term "person" shall mean an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, any unincorporated organization, a receiver or trustee.

Sec. 6402-12. (Advertising or selling at less than cost; penalty.)

(a) It shall be unlawful for any retailer with intent to injure competitors, destroy substantially or lessen competition, to advertise, offer to sell or sell at retail cigarettes at less than cost to the retailer, or any wholesaler, with intent to injure competitors, destroy substantially or lessen competition, to advertise, offer to sell or sell at wholesale cigarettes at less than cost to the wholesaler and such retailer or wholesaler shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars.

(b) Evidence of advertisement, offering to sell or sale of cigarettes by any retailer or wholesaler at less than cost to him, shall be prima facie evidence of intent to injure competitors, destroy substantially or lessen competition.

Sec. 6402-13. (Who liable for unfair sales.)

Any individual who as a director, officer, partner, member, or agent of any person violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall, equally with the person for whom he acts, be responsible therefor and subject to the punishment and penalties specified in section 6402-12.

Sec. 6402-14. (Sales excepted from act.)

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 cigarettes are advertised, offered for sale or sold in bona fide clearance sales for the purpose of discontinuing trade in such cigarettes and said advertising, offer to sell or sale shall state the reason thereof and the quantity of such cigarettes advertised, offered for sale or to be sold; (c) where cigarettes are advertised, offered for sale or sold as imperfect or damaged and said advertising, offer to sell or sale shall state the reason thereof and the quantity of such cigarettes advertised, offered for sale or to be sold; (d) where cigarettes are sold upon the complete final liquidation of a business; (e) where cigarettes are advertised, offered for sale or sold by any fiduciary or other officer acting under the order or direction of any court.

Sec. 6402-15. (Competitive prices may be met.)

Any retailer or wholesaler, may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the prices of a competitor who is selling the same article at cost to him as a wholesaler or retailer. The prices of cigarettes advertised, offered for sale or sold under the exemptions specified in section 6402-14 shall not be considered the price of a competitor and used as a basis for establishing prices below cost, nor shall prices established at bankrupt sales be considered as prices of a competitor within the purview of the first sentence of this section.

Sec. 6402-16. (Contracts in violation of act are void.)

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 and void contract and no recovery thereon shall be had.

Sec. 6402-17. (Costs of cigarettes, determination; evidence.)

In determining cost to the retailer and cost to the wholesaler, the court shall receive and consider as bearing on the bona fides of such cost evidence tending to show that any person complained against under any of the provisions of this act purchased cigarettes with respect to the sale of which complaint is made at a fictitious price or upon terms or in such a manner or under such invoices as to conceal the true cost, discounts or terms of purchase, and shall also receive and consider as bearing on the bona fides of such cost evidence of the normal, customary and prevailing terms and discounts in connection with other sales of a similar nature.

Sec. 6402-18. (Cost of cigarettes purchased at forced sale may not be considered.)

In establishing the cost of cigarettes to the retailer or wholesaler, the invoice cost of said cigarettes purchased at a forced, bankrupt, closeout 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 of the cigarettes to the retailer or wholesaler within thirty days prior to the date of sale, in the quantity last purchased through the ordinary channels of trade.

Sec. 6402-19. (Cost survey of trading area may be considered.)

Where the particular trade, of which the person complained against is a member, has an established cost survey for the trading area in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the cost of the person complained against within the provisions of this act

Sec. 6402-20. (Injunctive relief for violation of act.)

(a) Any person injured by any violation of this act, or any trade association which is representative of such a person, may maintain an action in any court of

equitable jurisdiction to prevent, restrain or enjoin such violation. If in such action a violation of this act shall be established, the court shall enjoin and restrain or otherwise prohibit such violation and in addition thereto shall assess in favor of the plaintiff and against the defendant the costs of the suit. In such action it shall not be necessary that actual damages to the plaintiff be alleged or proved, but where alleged and proved the plaintiff in said action, in addition to such injunctive relief and costs of suit, shall be entitled to recover from the defendant the amount of actual damages sustained by the plaintiff.

(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 any court of general jurisdiction and the measure of damages in such action shall be the same as prescribed in subsection (a) of this section.

Sec. 6402-21. (Separability of act.)

If any of the provisions of this act shall be held invalid or unconstitutional such invalidity or unconstitutionality shall not affect other provisions which can be given effect without the invalid or unconstitutional provision and to this end the provisions of this act are declared to be severable.

OKLAHOMA

B. PROHIBITION OF SALES BELOW COST

See p. 252, Vol. II

L. 1941, c. 14, secs. 1 to 7

Unfair Sales Act

In 1941 this State passed the "unfair sales act" type of legislation. This law reads as follows:

Title of Act.

Sec. 1. This Act shall be known and designated, and may be cited, as the "Unfair Sales Act."

Definitions.

Sec. 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, 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 (3/4%) of one per cent of the cost to the retailer as herein defined after adding thereto freight charges, but before adding thereto cartage, markup and taxes, and (3) and all state and federal taxes not heretofore added to the cost as such, and (4) 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 six (6%) per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(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 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 (3/4%) of one per cent of the cost to the wholesaler as herein set forth after adding

thereto freight charges but before adding thereto cartage, markup and taxes, and (3) and all state and federal taxes not heretofore added to the cost as such, and (4) 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 two (2%) per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(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 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 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 of paragraphs (a) or (b) of Section 2, respectively.

(e) The term "cost to the retailer" and "cost to the wholesaler" as defined in paragraphs (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 the cost to the retailer and cost to the wholesaler.

(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 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.

(g) The terms "sell at wholesale", "sales at wholesale", and "wholesale sales" shall 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.

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

(1) 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.

Sale Below Cost - Unfair Competition.

Sec. 3. 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, 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.

Penalties For Advertising or Selling Below Cost.

Sec. 4. 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 (\$500.00) dollars.

Injunctive Relief Against Violations of Act.

Sec. 5. 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. Any person damaged, or who is threatened with loss or injury, by reason of a violation of this Act, shall be entitled to sue the advertiser 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; provided, this Act shall not authorize such suits or actions against newspapers, radio broadcasters, or other advertising agencies through which such advertisements are published, broadcast or otherwise made.

Sales to Which Act Not Applicable.

Sec. 6. The provisions of this Act shall not apply to sales at retail or sales at wholesale (a) where seasonable merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such; (b) 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 the government or governmental institutions; (g) where the price of merchandise is made in good faith to meet competition; (h) where merchandise is sold by any officer acting under the order or direction of any court, where merchandise is sold at any bona fide auction sale.

Partial Invalidity.

Sec. 7. 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.

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See pp. 252 to 257, Vol. II

JUDICIAL DECISIONS

See p. 257, Vol. II

The Oklahoma Anti-Discrimination Act prohibits discrimination with intent to injure or destroy competitors or competition but does not prohibit the meeting of competition. Op. Atty. Gen., Jan. 29, 1940; P-H, Trade & Ind. Ser., par. 97054.

OREGON

A. RESALE PRICE MAINTENANCE

See pp. 259 to 261, Vol. II

Code Ann. (Supp. 1935), as amended by L. 1937, c. 113

Also cited: Fair Trade Act, Comp. Laws Ann. (1940), secs. 43-401 to 43-405 inclusive.

B. PROHIBITION OF SALES BELOW COST

See pp. 261 to 265, Vol. II

L. 1937, c. 215, as amended by L. 1939, c. 495

Also cited: Unfair Practices Act, Comp. Laws Ann. (1940), secs. 43-101 to 43-111.

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See pp. 265 to 267, Vol. II

L. 1937, c. 215, as amended by L. 1939, c. 495

Also cited: Comp. Laws Ann. (1940), sec. 43-102.

JUDICIAL DECISIONS

See p. 267, Vol. II

The Oregon Anti-Discrimination Act does not apply to photographers, because it is applicable to trades, since photography has been held to be a profession. Op. Atty. Gen., Nov. 7, 1939; P-H, Trade & Ind. Ser., par. 97034.

Barbers are not subject to the Oregon Anti-Price Discrimination Act. Op. Atty. Gen., Aug. 30, 1940; P-H, Trade & Ind. Ser., par. 97106.

2. Special Prohibitory Laws

See pp. 267 to 270, Vol. II

Code Ann. (1930)
Milk, Cream, Butterfat

Also cited: Comp. Laws Ann. (1940), secs. 34-301, 34-307, 34-308 and 34-309.

Code Ann. (Supp. 1935)
Gasoline

Also cited: Comp. Laws Ann. (1940), secs. 57-401, 57-402, 57-403, 57-404 and 57-602.

PENNSYLVANIA

A. RESALE PRICE MAINTENANCE

See pp. 271 to 272, Vol. II

Stat. Ann. (Purdon, Supp. 1938), tit. 73

Section 7 of the Act was amended by L. 1941, Act 66 to read as follows:

Sec. 1. Be it enacted, &c., That 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 the consumer bears the trademark, 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) buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

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.

(c) By any officer acting under orders of any court or in the execution of any writ or distress.

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 provisions 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) such vendor, buyer or purchaser of such commodity.

Sections 9 and 10 of the Act, as cited in the text, (sections 3 & 4 of the Act of 1935) were amended by L. 1941, Act 30 to read as follows:

Sec. 3. This act shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices, nor shall the provisions of this act apply to, or fix, or limit prices at which any books may be sold or offered for sale to a library located in this State.

Sec. 4. 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.

"Library" means the following nonprofit organizations administering a collection of books for nonprofit purposes: the national and state governments, counties, cities, boroughs, towns, townships, school districts, vocational school districts, universities, colleges, schools, archives, offices, museums and literary, educational, professional, scientific, fine arts and religious societies.

JUDICIAL DECISIONS

See pp. 272 to 373, Vol. II

Application of Statute.

Scope.

Purchase of goods by a cooperative association for resale to its individual members held not covered by the Act. *Welch Grape Juice Co., Inc. v. Frankford Grocery Co., Inc.*, (Com. Pleas, 1939); P-H, Trade & Ind. Ser., par. 97020.

Relation of Price to Value or Quantity, Etc.

Where the manufacturer of perfume had fixed the price at 50¢ for one ounce or any quantity less than one ounce, it was immaterial in a suit under the Act that the total price received by a retailer in its sales of such perfume in quantities of less than an ounce exceeded 50¢ per ounce; the price of 10¢ for containers of less than one ounce of such perfume, which price

amounted to more than 50¢ per ounce, was not the equivalent of the "price stipulated" by the perfume manufacturer, since in determining what is the "price stipulated" regard must be had to the price prescribed in reference to the quantity contractually tied to that price. *Lentheric, Inc. v. F. W. Woolworth Co.*, 338 Pa. 523, 13 Atl. (2d) 12 (1940).

Parties Entitled to Enforce Price Restrictions.

A retailer, under the Fair Trade Act, has a right of action against competing retailers who have knowingly sold trade-marked products below the stipulated prices fixed therefor. *Broxmeyer v. Polikoff* (Com. Pleas, 1940); 3CCH, Trf. Binder, par. 25517.

The Act does not require the existence of a property interest in the trade-mark, brand, or name, as a condition precedent to a suit by an injured retailer. *Terminal Drug Co. v. Victor Stores*, (Com. Pleas, 1940); P-H, Trade & Ind. Ser., par. 97098.

Parties, Pleading, Proof, and Practice.

In order to justify relief under the Act, there must be a clear showing that a sale, offer or advertisement was made knowingly in violation of a Fair Trade contract; and a bill of complaint which fails to allege that defendant had notice of the exact contents of the contract and of any subsequent changes in price lists is insufficient. *Trilling v. Sugerman*, (Com. Pleas, 1940); 3CCH, Trf. Binder, par. 25516.

B. PROHIBITION OF SALES BELOW COST

See pp. 274 to 276, Vol. VI

L. 1941, Act 344, secs. 1 to 6
Unfair Sales Act

Whereas, The practice of selling certain items of merchandise at cost or less than cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce, and,

Whereas, 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, and,

Whereas, Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases and non-payment of taxes and loans and contribute to the inevitable train of undesirable consequences, including economic depression, now therefore,

Sec. 1. This act shall be known and designated and may be cited as the "Unfair Sales Act".

Sec. 2. (1) 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, advertising allowances, promotional allowances, display allowances and any other allowances for services rendered and any other commission or remuneration received for services performed on behalf of any governmental agencies, to which shall be added (a) freight charges not otherwise included in the invoice or the replacement cost of the merchandise, (b) 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 four per cent of the total cost at retail outlet.

(2) 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, advertising allowances, promotional allowances, display allowances and any other allowances for services rendered and any other commission or remuneration received for services performed on behalf of any governmental agencies, to which shall be added (a) freight charges not otherwise included in the invoice or the replacement cost of the merchandise and (b) 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 two per cent of the total cost at the wholesale establishment.

(3) 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 subsection (1) or (2) of section two respectively.

(4) 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 merchandise where title is retained by the seller as security for the payment of such purchase price.

(5) The terms "sell at wholesale", "sale 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 merchandise to the purchaser for purposes of resale or further processing or manufacturing. The above terms shall include any such transfer of merchandise where title is retained by the seller as security for the payment of the purchase price.

(6) The term "retailer" shall mean and include every person, partnership, corporation or association other than a manufacturer (not operating a retail business or trade) engaged in the business of making sales at retail or performing the retail function within this State: Provided, That, in the case of a person, partnership, corporation or association other than a manufacturer (not operating a retail business or trade) 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.

(7) The term "wholesaler" shall mean and include every person, partnership, corporation or association other than a manufacturer (not operating a retail business or trade) engaged in the business of making sales at wholesale or performing the wholesale function of supplying any retailer or retail outlet with merchandise for retail sale within this State: Provided, That, in the case of a person, partnership, corporation or association other than a manufacturer (not operating a retail business or trade) engaged in the business of making sales both at wholesale and retail, such terms shall be applied only to the wholesale portion of such business.

(8) Every person, partnership, corporation or association other than a manufacturer (not operating a retail business or trade) engaged in the business of making sales at retail as defined in this act within this State, which, in addition to such business, shall purchase merchandise for sale at retail from manufacturers, packers, processors, growers or producers thereof, without resort to a wholesaler as such, shall be taken, deemed and construed for the purpose of this act to be engaged in business both as a wholesaler and retailer as defined in this act, and, as such, shall be subject to both the retail and wholesale mark-up provisions of this act.

Sec. 3. 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 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. 4. 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, or any person, partnership, corporation or association engaged in business both as a wholesaler and retailer as defined in this act who shall, in contravention of the policy of this act, advertise, offer to sell or sell any item of merchandise at less than cost, subject to both the retail and wholesale mark-ups provided by this act, shall be guilty of a misdemeanor, and, upon conviction thereof, be sentenced to pay a fine of not less than fifty dollars (\$50) nor more than two hundred dollars (\$200) and costs of prosecution, and, in default thereof, shall undergo imprisonment for not more than thirty (30) days. Each advertisement, offer to sell or sale shall constitute a separate violation of the provisions of this act and shall subject the offender to the penalties hereby prescribed. 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.

Sec. 5. 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 any person, partnership, corporation or association shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any loss or injury by reason of a violation of this act.

Sec. 6. 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 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 the government or governmental institutions; (g) when the price of merchandise is made in good faith to meet competition; (h) where merchandise is sold by any officer acting under the order or direction of any court; (i) where tools, equipment and materials used by employes in their trade or business or appliances and products which are used therein and are or may be beneficial to the safety, health and working conditions of such employes are sold to employes of the seller.

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See p. 276, Vol. II

L. 1941, Act 343, secs. 1 to 6

Sec. 1. Reason and Purpose.—(a) The legislature hereby finds that the existence in the Commonwealth of Pennsylvania of the practice whereby employers sell or procure for sale to employees or other persons any merchandise, not of the employer's own production, not handled in the regular course of the employer's business, or not connected with or related to his or its trade or business, is detrimental to the convenience and general well-being of the public engaged in retail business in that such practice (1) interferes with and diverts the proper and normal flow of trade and commerce from persons engaged in retail business and (2) constitutes an unfair method of competition by such employers against others engaged in commerce as retail merchants.

(b) It is hereby declared to be the policy of this act through the exercise by the legislature of its police powers to correct and to eliminate the conditions referred to above, declaring certain sales to constitute unfair competition and prohibiting same.

Sec. 2. No person, partnership, corporation or association engaged in any business or trade in this Commonwealth shall by any method or procedure, directly or indirectly, by itself or through a subsidiary agency, sell or procure for sale or have in its possession or under its control for sale to its employees or to any other person any article, material, product or merchandise of whatever nature, not of his or its own production, not handled in his or its regular course of trade or business, or not connected with or related to his or its trade or business: Provided, That this section shall not apply to the sale or distribution of (1) meals, candy, beverages, cigarettes, cigars, tobacco, (2) tools and material used or worn by employees in such trade or business or appliances and products which are used and worn by employees and are or may be beneficial to the safety, health and working conditions of such employees, (3) equipment or machinery which has previously been used by such person, partnership, corporation or association in the conduct of his or its business, or (4) goods of use in the furtherance of his or its trade or business or connected therewith or related thereto: And provided further, That the provisions of this act shall not apply to co-operative associations organized under the laws of this Commonwealth; And provided further, That nothing herein contained shall be construed to prohibit or prevent any person, firm or corporation engaged in any industry other than a

retail business or trade from owning and operating, either directly by itself, or through any agency or subsidiary, a bona fide store or stores for the sale of goods at retail to his or its employes and others under the provisions of this section.

The doing of any of the acts as prohibited above shall constitute unfair competition to any retail store operator or owner dealing in the same kind, type, nature or class of merchandise as that so sold as aforesaid within the same city or county in which such above prohibited sale occurs.

Sec. 3. Remedy.—Wilfully and knowingly selling or procuring for sale or having in possession or under control for sale, directly or indirectly, by any person, partnership or corporation or subsidiary agency to his or its employes any article, material, product or merchandise of whatever nature, not of his or its own production, not handled in his or its regular course of trade or business, or not connected with or related to his or its trade or business, is unfair competition and is actionable at the suit of any person damaged thereby. Such action shall be in equity by injunction only, and no damages shall be assessed.

Sec. 4. Constitutionality.—If any clause, sentence, paragraph or part of this act, or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act and the application of such provision to other persons or circumstances, but such decision 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 and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act would have been adopted had such invalid provisions not been included herein.

Sec. 5. Repealing Clauses.—All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 6. Effective Date.—This act shall become effective immediately upon final enactment.

RHODE ISLAND

A. RESALE PRICE MAINTENANCE

See pp. 278 to 281, Vol. II

Rev. Gen. Laws (1938), c. 393
Fair Trade Act

Section 2 of the above law was amended by L. 1941, c. 864 to read as follows:

Sec. 2. 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 trademark, 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.

SOUTH CAROLINA

B. PROHIBITION OF SALES BELOW COST

See pp. 286 to 287, Vol. II

L. 1939, Act 267, secs. 1 to 7
Unfair Trade Practices - Wholesale and Retail
Merchandising

Sec. 1. Definitions—violations.—Be it enacted by the General Assembly of the State of South Carolina: For the purpose of construing this Act:

(a) A wholesale sale shall be one deemed to be made to a person, association or 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. Wholesaler not sell at retail as low as at 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 price as low as said person, firm or corporation sells the same merchandise at wholesale in the same town or locality.

Sec. 3. Wholesaler not sell lower at retail than at 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. Exemptions—meet competition.—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, co-operative purchases for redistribution among farmers, religious institutions, or county, city, Federal or state institutions or departments: *Provided, further,* retail sales or 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 provisions 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. Invalidity.—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.

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See pp. 287 to 289, Vol. II

JUDICIAL DECISIONS

See p. 289, Vol. II

The following cases: *State v. Standard Oil Co. of N. J.*, *State v. Shell Oil Co.*, *State v. Texas Co.*, and *State v. Sinclair Refining Co.*, decided together, 195 So. Car. 267, 10 S. E. (2d) 778 (1940) established these points in holding the anti-discrimination provisions of the Code (1932), Section 6626, unconstitutional:

(1) The General Assembly may legislate against unfair discrimination and monopoly, not only by reason of constitutional provisions authorizing laws to prohibit trusts and combinations against the public welfare, but also by reason of the State's police power.

(2) The provision making it unlawful to discriminate by a sale at a lower rate in one than is charged in another "section" of the same city, "community," or "locality," is unconstitutional on the ground that sections of a city would have to be created upon some basis which would constitute a reasonable relationship to the evil sought to be corrected and therefore a city could not be arbitrarily sectionalized, and that use of undefined and unexplained quoted terms and others rendered the statute indefinite and uncertain and insufficient to define with reasonable certainty what acts are unlawful.

(3) The section is capricious in not permitting price differentials based on differences in quantities sold.

(4) The distinction between a wholesale price and a retail price is a proper basis for a price differential.

(5) The section is not invalid for omission of the word "intentionally" in connection with the purpose of injuring or destroying a competitor's business, since the word "purpose" conveys the same idea.

(6) The section declaring for the purpose of "injuring" etc., is not invalid for use of the quoted word as making purpose of merely injuring or partially destroying a competitor's business sufficient, and not requiring purpose of totally destroying such business.

SOUTH DAKOTA

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 203, Vol. II

The case of *Niles Laboratories, Inc. v. Owl Drug Co.*, 67, S. Dak. 523, 295 N. W. 292 (1940) established these points:

(1) The Fair Trade Act is not unconstitutional as permitting a "monopoly" as applied to a manufacturer which had the exclusive right to manufacture and sell its trade-marked product "Alka-Seltzer" and which also had the right to fix the retail price at which it might be sold where the product was in free and open competition with other analgesics.

(2) The Act is not unconstitutional as depriving the retailer of property without "due process of law," or as granting the manufacturer "privileges or immunities" not equally granted to other citizens in violation of the State or Federal Constitutions.

TENNESSEE

A. RESALE PRICE MAINTENANCE

See pp. 303 to 304, Vol. II

Code Ann. (Michie, 1938)

Fair Trade Act

Section 6770(4) was amended, and a new section (sec. 6770(4a)) was added, by L. 1941, c. 38A. These sections now read follows:

Sec. 6770(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.

"Library" means the following non-profit organizations administering a collection of books for non-profit purposes; the national, state, county or municipal governments; universities, colleges, schools, archives offices, museums, and literary, educational, professional, scientific, fine arts, or religious societies.

Sec. 6770(4a). Sale of books to library.—This act shall not apply to, or fix, or limit, prices at which any books may be sold or offered for sale to a library located in this state.

B. PROHIBITION OF SALES BELOW COST

See pp. 304 to 307, Vol. II

Code Ann. (Michie, 1938)

Unfair Sales Act

Section 6770(6) of the above Act was amended by L. 1941, c. 85, sec. 1, to read as follows:

Sec. 6770(6). Definitions.—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 commodity 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 per cent. (6%). In all retail sales involving more than one item or commodity, the retailer's price on individual items or commodities shall be computed on the "cost to the retailer" as herein defined. And said "cost to the retailer" in either of the above definitions shall include as a part thereof any and all taxes and/or licenses levied against said item or items by the federal state, county or municipal government.

(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 wholesaler's 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 can not 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 term "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.

JUDICIAL DECISIONS

See p. 307, Vol. II

The case of *Acme Distributing Co. v. Thoni*, 23 Tenn. 638, 136 S. W. (2d) 734 (1939) declared that a retailer of gasoline who was the most frugal in the community was not the "most efficient retailer" since under the Act the quoted words were not intended to mean that the "most frugal retailer" should be the yardstick for determining cost.

TEXAS

See pp. 311 to 313, Vol. II

No new material.

UTAH

A. RESALE PRICE MAINTENANCE

See pp. 315 to 317, Vol. II

JUDICIAL DECISIONS

See p. 317, Vol. II

Combination offers violate the Fair Trade Act where one of the articles in the combination is sold below the minimum price fixed in a resale price maintenance contract. Op. Atty. Gen., Oct. 17, 1941; P-H, Trade & Ind. Ser., par. 97202.

B. PROHIBITION OF SALES BELOW COST

See pp. 317 to 321, Vol. II

Rev. Stat. Ann. (Supp. 1939), L. 1937, c. 21, secs. 7 & 11
Unfair Practice Act

The above two sections of the Act were, respectively, amended by L. 1939, c. 28, and L. 1939, c. 29 to read as follows:

Sec. 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 in connection with the sale of other merchandise 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 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 in connection with the sale of other merchandise, 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 of this act for any such act.

Cost Defined.

(b) 1. When used in this act the term "cost" as applied to production shall include the cost of raw materials, labor and all overhead expenses of the producer.

2. 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: (a) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) 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 per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage.

3. 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: (a) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) 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 per cent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup, and (c) 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 six per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

4. When used in this act the term "replacement cost" 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 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.

Sec. 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 prima facie evidence in proving the costs of the person, firm or corporation complained against within the provisions of this act, unless the person, firm or corporation shall have kept a continuous, accurate and comprehensive record of the cost of business of the person, firm or corporation, in which event said record may be introduced to rebut the cost survey.

JUDICIAL DECISIONS

See p. 321, Vol. II

Wholesale and retail costs are clearly defined and distinguished under the Unfair Practices Act and a grocery store violates the Act by the intermingling of wholesale and retail sales and by advertising ". . . grocery, the store that sells wholesale and retail to everyone". Op. Atty. Gen., Oct. 20, 1941; P-H, Trade & Ind. Ser., par. 97204.

An allowance of cash discounts to retailers for advertising does not violate Sec. 3 of the Unfair Practices Act. Op. Atty. Gen., Oct. 20, 1941; P-H, Trade & Ind. Ser., par. 97203.

The Board of Education may purchase from retailers at wholesale prices without violating the Act. Op. Atty. Gen., Jan. 11, 1941; P-H, Trade & Ind. Ser., par. 97208.

A method of advertising whereby gasoline and oil service station operators gave customers books containing blank pages in which to paste stamps, issued on purchases of merchandise and redeemable when filled with stamps for 20 gallons of gasoline, \$20 in cash, or a

minimum amount of merchandise, depending upon what was found under seals broken open when the books were returned, constituted "unfair competition" and was against "public policy" under laws 1937, c. 19, sec. 14(1, 4). *State v. Russell et al.*, 118 Pac. (2d) 679 (1941).

C. ANTI-DISCRIMINATION LEGISLATION

2. Special Prohibitory Laws

See pp. 323 to 325, Vol. II

L. 1939, c. 10 Agricultural Fair Trade Act

Sec. 2 provides that the Utah State Board of Agriculture shall administer and enforce the provisions of the Act.

Sec. 7 (subdivision 3) empowers the Board of Agriculture to have and exercise general supervision over the marketing, sale, advertising, storage, transportation, trade practices and sales methods used in the selling and marketing of agricultural products within the State. Subdivision 7 of this section authorizes the said board to make, issue and publish the necessary rules and regulations.

Sec. 6. Unfair and Injurious Practices Defined-Unlawful.

It shall be unlawful for any person engaged in the production, processing, handling, marketing, sale or distribution of agricultural products or commodities to engage in or employ practices in the course thereof, which are unfair, discriminatory or injurious to the producers of such or similar products, or to the consumers generally thereof, by any act, conduct, representation, method of competition or agreement, directly or indirectly, such as:

1. Discrimination in price between different producers of agricultural commodities of like grade and quality.

2. Use deceptive, inaccurate, or unauthorized brands, labels, containers or weight or grade designations on agricultural products or commodities.

3. Make, or use, or permit the use of any false, fraudulent or misleading statements, representations,

advertisements or designations by word, act, make, publication, stencil or label concerning the character, kind, grade, quality, condition, degree of maturity, or state or county of origin of any agricultural products or commodity.

4. Sell, offer for sale or advertise for sale, any agricultural product at less than the cost thereof from the producers or wholesaler to such vendor plus six per cent, or the replacement cost thereof plus six per cent, whichever is the lower; provided, that this subsection shall not apply to agricultural cooperative associations operating under the provisions of the uniform agricultural cooperative associations act.

5. Give, offer to give or advertise the intent to give away any article, agricultural product or commodity in connection with the sale or offering for sale of such agricultural products.

6. After the grade of any particular agricultural product has been established as herein provided for, then in any and all advertisements, notices, signs or announcements wherein the price of such product is mentioned, to fail to specify in such advertisement, notice, sign or announcement the grade thereof in as prominent a manner as the price is displayed or announced.

Sec. 8. Procedure for Enforcement of Act.

Unlawful Practices.

1. Unfair or injurious practices as defined herein in handling, selling, storing, financing, marketing, grading or in any other act in connection with the movement of farm produce from the farm to the consumer are declared unlawful, and may be enjoined as hereinafter provided.

Board to Prevent Unlawful Practices.

2. The board is empowered and directed to prevent persons, partnerships or corporations from using unfair or injurious practices in agricultural commerce or trade.

Order to Desist - Request for Hearing - Complaint.

3. Whenever the board shall have reason to believe that any person, partnership or corporation has been or is violating the provisions of this act or is using unfair methods of competition in the handling of agricultural products in commerce or trade and it shall appear to the board that it would be to the interest of the public to stop such violations or unfair methods of competition it shall issue and serve upon the person, partnership or corporation an order directing such person, partnership or corporation to cease and desist from using such violations or methods of competition; the person, partnership or corporation upon which the order is served may within ten days after receiving such order, request that a hearing be had before the board. If such request is made, the board shall serve upon such person, partnership or corporation a complaint stating its charges and a notice specifying the day and place of the hearing which shall be at least ten days after the service of said complaint and notice.

Continued Violations - Suit to Enjoin - Jurisdiction of District Courts.

4. If after such hearing the board shall be of the opinion that the acts, conduct, representations, violations or methods of competition in question are prohibited by this act or regulations promulgated hereunder or if no hearing is requested and if the person, partnership or corporation charged with using such unfair or injurious acts, conduct, representations, violations or methods of competition shall fail to cease the operation thereof or after discontinuing the same, shall again commence such acts, conduct, representations, violations or methods, the board shall cause a suit to be commenced in the district court in the state of Utah, in its name as the state board of agriculture and the name of the state of Utah, within the county wherein the acts, conduct, representations or methods of competition in question were used or where such person, partnership, or corporation resides and carries on business, to enjoin and restrain such person, partnership or corporation from conducting such unfair acts, conduct, representations, violations or methods of competition. The district courts of this state shall have jurisdiction of such suits and the trial thereof shall be de novo.

District Attorneys to Conduct Proceedings.

5. It shall be the duty of the several district attorneys of this state in their respective districts to conduct such proceedings as are herein provided when requested to do so by the board.

Actions to Vacate or Amend Orders.

6. Any member of the board who is dissatisfied with its decision, at his own or another's but not the board's expense, or any party required by such order of the board to cease and desist from violating any provision of this act, may, within thirty days after notice is given of the order, commence a suit within the district court of the state of Utah against the board as defendant within the county wherein such acts, conduct, representations or method of competition were used or wherein the person, partnership or corporation resides to set aside, vacate or amend such order and the hearing shall be by a trial de novo in the district court wherein it shall have authority to either set aside, vacate, amend or affirm such order of the board.

Appeals.

7. Any party feeling aggrieved by a decision rendered by the district court under the provisions of this act may prosecute an appeal to the supreme court of the state of Utah and the rules of the code of civil procedure shall be applicable to such appeal.

Sec. 13. Investigations - Powers of Agents.

For the purpose of making any investigation required in the performance of the duties and the exercise of the powers by the board as herein designated, the board may have power to appoint, by an order in writing, any member of the board, or any other competent person who is a resident of the state, as an agent, whose duties shall be prescribed in such order. In the discharge of

his duties such agent shall have every power of an inquisitorial nature granted in this act to the board, and the same powers as a referee appointed by a district court with regard to taking evidence. The board may conduct any number of such investigations contemporaneously through different agents, and may delegate to such agents the taking of evidence bearing upon any investigation or hearing. The recommendations made by such agents shall be advisory only and shall not preclude the taking of further evidence or further investigation if the board so orders.

Sec. 14. Special Prosecutors.

The board may direct a representative to act as special prosecutor in any action, proceeding, investigation, hearing or trial relating to matters within its jurisdiction. Upon the request of the board, the attorney-general, district attorney or the county attorney of the county in which any investigation, hearing or proceeding had upon the provisions of this title is pending, shall aid therein and prosecute, under the supervision of the board, all necessary actions or proceedings for the enforcement of this title. Such proceedings may be by way of petition setting forth the facts relied upon and praying that violations of the board's orders or of this title shall be enjoined or otherwise prohibited.

Sec. 15. Substantial Compliance Deemed Sufficient.

A substantial compliance with the requirements of this title shall be sufficient to give effect to the orders of the board, and they shall not be declared inoperative, illegal, or void for any omission of a merely technical nature.

Sec. 16. Violating Restraining Orders - Warrant of Arrest.

In case of the violation of any restraining order or injunction granted after due notice under the provisions of this act, the court or judge thereof may summarily try and punish the offender. The proceedings may be commenced by filing with the clerk of the court an information under oath setting out the facts constituting such violation upon which the court or judge shall cause a warrant to issue under which the defendant shall be arrested. Either party may demand the production and oral examination of witnesses.

Sec. 17. Definitions.

As used in this act, unless the context or subject matter requires otherwise:

1. "Agricultural products" includes floricultural, horticultural, viticultural, forestry, nut, seed, ground stock, dairy, poultry, bee and any and all farm products or refinements thereof.

2. "Agricultural commerce or trade" includes the sale, purchase, bartering, offering for sale or barter, exchanging, financing, shipping, storing, handling, processing and marketing of agricultural products or commodities.

Sec. 20. Partial Invalidity - Saving Clause.

If any word, clause, sentence, paragraph or section of this act shall be declared invalid by any court of competent jurisdiction, the remainder of the act shall not be affected thereby and the legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or parts would be declared unconstitutional.

Sec. 21. Conflicting Provisions Repealed.

All laws or acts in conflict with the provisions of this act or otherwise delegating authority for the enforcement hereof, to the extent of such conflict, are repealed.

Sec. 22. Short Title.

This act may be known and cited as the "Agricultural Fair Trade Act."

L. 1939, c. 69

Motor Fuels

Sec. 3. Discriminations Forbidden. No rebates, allowances, concessions or benefits shall be allowed in any manner so as to permit any buyer to obtain motor fuel at a lower net cost than the posted prices. The inhibition hereof shall embrace all 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. 4. Violations - Suit to Enjoin. Upon violation of any of the provisions of this act by any person or corporation, any person, corporation or the State of Utah, or any of its political subdivisions, may commence a suit in any court of competent jurisdiction to enjoin further violation of this act.

VERMONT

C. ANTI-DISCRIMINATION LEGISLATION

2. Special Prohibitory Laws

See pp. 327 to 328, Vol. II

Rev. Pub. Laws' (1933) as amended by L. 1937, Art. 98.
Dairy Products

Section 7722 of the above law was amended by L. 1939, Act 210 to read as follows:

Sec. 7722. 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, or similar laws of another state and doing business in Vermont, 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.

VIRGINIA

A. RESALE PRICE MAINTENANCE

See pp. 329 to 331, Vol. II

Code Ann. (Michie, Supp. 1938)
Fair Trade Act

Sec. 1463(i) was amended in 1940 (Code Ann., Michie, Supp. 1940) to add a new subsection known as (A-1) defining "wearing apparel" and reading as follows: "Wearing apparel" means the finished product or article and does not include any material, ingredient, or component out of which wearing apparel is made, altered, or repaired.

B. PROHIBITION OF SALES BELOW COST

See pp. 331 to 334, Vol. II

Code Ann. (Michie, Supp. 1938)
Unfair Sales Act

Certain changes were made in Section 1463(2) of the Unfair Sales Act in 1940 and the new section found in Code Ann. (Michie, Supp. 1940) reads as follows:

Sec. 1463(2). Definitions.—When used in this chapter, 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 (one) freight charges not otherwise included in the cost of the merchandise, (two)

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 (three) 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 cost of the merchandise to the wholesaler or the replacement 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 (one) freight charges not otherwise included in the cost of the merchandise and (two) 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 (three) 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 this section, respectively.

(e) The term "cost to the retailer" and "cost to 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 consideration 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 the 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.

(i) The term "wholesaler" shall mean and include every person, partnership, corporation or association engaged in the business of making sales at wholesale within the 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.

(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 or any other source, thereby acting 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.

WASHINGTON

A. RESALE PRICE MAINTENANCE

JUDICIAL DECISIONS

See p. 338, Vol. II

Constitutionality of Statute.

The Fair Trade Act is constitutional as being a valid exercise of the police power, since it is in the public interest to protect trade-mark owners, distributors of identified commodities, and the public against injurious and uneconomic practices. *Sears v. Western Thrift Stores of Olympia, Inc.*, 10 Wash. (2d) 372, 116 Pac. (2d) 756 (1941).

Application of Statute.

Scope.

The Fair Trade Act was not intended to legalize horizontal agreements between competing producers or manufacturers, between competing wholesalers, or between competing retailers. Moreover, the provisions of the State Constitution that monopolies and trusts shall never be allowed and that no incorporated company shall combine or make any contract with any other incorporated company, or with any co-partnership or association of persons, for the purpose of fixing prices, limiting production, or regulating the transportation of any product or commodity, when construed as a whole, was intended to prohibit monopolies but not to prohibit resale price maintenance contracts under a statute such as the Fair Trade Act. *Sears v. Western Thrift Stores of Olympia, Inc.*, *supra*.

This case also upheld the "non-signers clause" as valid.

B. PROHIBITION OF SALES BELOW COST

JUDICIAL DECISIONS

See p. 343, Vol. II

Constitutionality of Statute.

The Unfair Practices Act is constitutional; its objects are within the State's police power; and its title is sufficiently comprehensive to meet constitutional requirements even though the title contains no reference to "cost," "cost of doing business," or "legal competitive price" appearing in the body of the Act. *State v. Sears*, 4 Wash. (2d) 200, 103 Pac. (2d) 337 (1940).

Neither is the Act unconstitutional as "discriminatory," or as denying "equal protection of the law," or as "special legislation," because it exempts motion picture films from operation thereof. *State v. Sears, supra*.

The provision permitting a cost survey to be used as evidence merely creates a rule of evidence and is not invalid for vagueness and uncertainty. *State v. Sears, supra*.

The provisions defining "article or product" as including any article, product, commodity, thing of value, service or output of a service trade, and defining "vendor" as including any person who performs work upon or improves any personal property belonging to another, are not violative of "due process" as resulting in regulation of wages in private industry; instead, the Act contemplates that labor, at the prevailing wage scale in the trade in which such person is engaged, shall be considered in determining the cost of doing business; and although it should appear that the wages paid by one prosecuted under the Act are lower than the prevailing wage scale, such person would not be guilty of violating the Act, unless such wages were wilfully paid with intent to injure competitors and destroy competition. *State v. Sears, supra*.

"Cost of Doing Business," "Cost," Etc.

It is not a violation of the Unfair Practices Act for a person to sell cigarettes in his retail stores at prices based upon his invoice or replacement cost, whichever is lower, plus his cost of doing business in cigarettes and tobacco; commodities need not be sold at a mark-up equal to the average over-all cost of doing business, but such cost may be segregated by commodities or departments. *State v. The Great Atlantic & Pacific Tea Co.*, (Super. Ct. 1941); CCH, Trade Reg. Ser., par. 52710.

"Cost" and "cost survey" are so defined as not to make the Act uncertain and indefinite on constitutional grounds. *State v. Sears, Supra.*

Coupons, Trading Stamps, Etc.

Laws 1939, c. 31, authorizes the gift, issuance and redemption of trading stamps; the Unfair Practices Act prohibits the gift of any article for the purpose of injuring competitors or destroying competition. These laws are not necessarily in conflict. Op. Atty. Gen., Aug. 2, 1939; P-H, Trade & Ind. Ser., par. 97023.

Meeting Competition.

The Act is not violated by a merchant who in good faith reduces his prices to meet those of a competitor, who he in good faith believes has a legal price; the phrase "legal competitive price", as used in the Act, is not invalid for vagueness and uncertainty. *State v. Sears, supra.*

Parties, Pleading, Proof, and Practice.

The issuance of a temporary restraining order under the Act, without notice to defendant, enjoining tobacco sales below certain prices, was unauthorized against the contention that no notice was necessary because complaint charged criminal acts and prosecuting attorney could have caused an immediate arrest on criminal charges, since mere arrest does not prevent one from continuing his activities except insofar as his activities might be interfered with by confinement prior to release on bail; the Act contemplates injunctions after

a hearing, not temporary restraining orders. *State ex. rel. Pay Less Drug Stores v. Sutton*, 2 Wash. (2d) 523, 98 Pac. (2d) 680 (1940).

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

JUDICIAL DECISIONS

See p. 344, Vol. II

The provisions of the Unfair Practices Act prohibiting the sale of the same kind of merchandise at different prices at different stores owned by the same person in the same locality or city are constitutional and do not constitute an unwarranted interference with private business or operate to the prejudice of the public interest. *State v. Sears*, 4 Wash. (2d) 200, 103 Pac. (2d) 337 (1940).

2. Special Prohibitory Laws

See p. 344, Vol. II

Rev. Stat. Ann. (Remington, Supp. 1940), secs. 2867-23

Predatory Practices - Apple Industry

Sec. 2867-23. Apple industry—Practices declared unfair and prohibited. The following are declared to be unfair trade practices and are prohibited:

(a) Selling, contracting to sell, or offering or advertising for sale any apples which are not owned by or mortgaged to the seller or offerer, or which are not included within or covered by a written exclusive agency or power of authority to sell the same, naming said seller or offerer as the agent therein;

(b) Purchasing or dealing in any inferior fruit received from the producer thereof, except such fruit as is handled for the producer upon consignment, the dealer or handler remitting in full all proceeds received from said fruit less only a handling commission of not to

exceed ten per cent (10%) of the f. o. b. gross proceeds and less actual expenses properly allocated to such inferior fruit;

(c) Shipping any apples to apple markets except on a definite contract, or to a named consignee for handling on consignment, or to a purchaser on a purchase contract theretofore agreed upon; nothing herein shall apply to shipments to an established apple auction;

(d) Shipping or accepting for shipment or transportation to any point outside the area of production of such fruit, any inferior apples, by any means whatsoever, unless such apples are sorted, graded and packed in an approved container, excepting to approved processors.

The designation of the above named unfair practices shall not be construed to exclude any other practices from being so held to be unfair trade practices.

Rev. Stat. Ann. (Remington, Supp. 1940),
secs. 6294-101 to 6294-108 & 6294-119 to 6294-122
Macaroni, Noodles, and Related Products

Sec. 6294-101. Declaration of necessity and policy. 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 is hereby found and declared that the public welfare requires control and regulation of the manufacture and distribution of macaroni, noodles and related products and of persons engaged therein, in order that there may be prevented or eliminated insanitary, unhealthful, fraudulent, unfair or uneconomic practices and conditions in connection with such manufacture or distribution which endanger public health, defraud consumers, and jeopardize the public source and supply of a nourishing, healthful food. It is further found and declared that the regulation of the commercial manufacture and distribution of macaroni, noodles and related products as provided by this act is in the interest of the economic and social well being and the health and safety of the state and its people, and is a necessary subject for immediate general legislation operating uniformly throughout the state.

Sec. 6294-102. Definitions of terms. Except where the context indicates a different meaning, terms used in this act shall be interpreted and construed as defined herein.

Sec. 6294-103. "Macaroni products" defined. "Macaroni products" shall mean and include macaroni, spaghetti, vermicelli, noodles and all related products in whatever form or style the same may be prepared.

Sec. 6294-104. "Macaroni factory" defined. "Macaroni factory" shall mean any place, premises or establishments where any macaroni products are regularly prepared, processed or manufactured for sale rather than for consumption on such premises.

Sec. 6294-105. "Person" defined. "Person" shall include an individual, partnership, corporation, association or club.

Sec. 6294-106. "Distributor" defined. "Distributor" shall mean any person engaged within this state in the sale or distribution of any macaroni product by some method other than exclusively at retail at a fixed place or places of business, but shall not include any person distributing or selling macaroni products manufactured in a macaroni factory licensed under this act.

Sec. 6294-107. Permit to operate—Application and forms. No person shall operate, or participate in the management and operation of any macaroni factory within this state without a macaroni factory permit therefor, under the provisions of this act. Application for such permit shall be made in writing and under oath to the Director of Agriculture, upon such forms and with such pertinent information as he shall require.

Sec. 6294-108. Permit as distributor—Application and forms. No person shall engage within this state in the business of distributor without a permit to do so. Application for such permit shall be made in writing and under oath to the Director of Agriculture upon such form as shall be prescribed and supplied by him.

Sec. 6294-119. Sworn statement of sale prices and terms—Filing and posting copies—Revisions. Each person hereafter operating a macaroni factory or operating as a distributor, shall file with the Director of Agriculture in duplicate and under oath a written 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 macaroni 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, if no fixed place of business is maintained, upon each vehicle used in distribution of macaroni products. 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 not less than ten (10) days after its receipt by the director.

Sec. 6294-120. Unlawful deviation from filed prices and terms—Sales without fixing prices forbidden. On and after fifteen (15) days after the effective date of this act no person shall sell, or display or offer for sale within this state any macaroni product the price and terms and conditions of sale of which have not been filed and posted as provided in this act, nor shall any price be quoted nor any term, condition, rebate, discount, or allowance, be offered or accepted, unless the applicable price, term, condition, rebate, discount or allowance specified for that type of macaroni product is contained in the statement of that person then on file with the Director of Agriculture and posted as provided in this act.

Sec. 6294-121. False or misleading advertising, coloration, or picturing—Defamation of competitors—Unbranded products. In addition to the acts by this act made unlawful, it shall be unlawful in connection with the operation of any macaroni factory or the sale or distribution of any macaroni product:

(a) To sell, advertise, describe, brand, mark, label or pack macaroni or any simulation or imitation thereof in a manner which is calculated to mislead or deceive or has the tendency or capacity or effect of misleading or deceiving purchasers, prospective purchasers of the consuming public with respect to the grade, quality, quantity, substance, character, nature, origin, size, material, content, composition, color, preparation, or manufacture of such products or in any material respect.

(b) To sell, offer for sale, advertise, describe, brand, label or otherwise represent any macaroni or noodle product as being a semolina or farina product when such is not true and correct.

(c) To use yellow coloring in, or yellow transparent containers for, any macaroni product in such manner as deceptively to import or imply to purchasers, prospective purchasers or the consuming public that such product contains egg in greater proportion than is in fact present, or in such manner as to mislead or deceive in any other respect.

(d) To advertise, describe, brand, label, or otherwise represent any product as containing a food ingredient which is not macaroni, found, or is not present in the advertised quantities, resulting in purchasers, prospective purchasers or the consuming public being misled or deceived.

(e) To use photographs, cuts, engravings, illustrations or pictorial or other adoptions or devices of industry products in catalogs, sales literature or advertisements or on packages or containers or otherwise in such manner as to have the capacity and tendency or effect of misleading or deceiving the purchaser or consuming public as to the grade, quality, quantity, substance, character, nature, origin, size, material content, composition, coloring, preparation or manufacture of such products.

(f) To defame competitors by falsely imputing to them dishonorable conduct, inability to perform contracts, questionable credit standings, or any other false representations, or falsely to disparage the grade, quality or manufacture of the products of competitors or of their business method, selling price, values, grade, terms, policies or services.

(g) To fail to brand, mark or identify macaroni products so as to disclose their true character, where such failure has the tendency, capacity or effect of misleading or deceiving purchasers, prospective purchasers or the consuming public.

Sec. 6294-122. Violations as separate misdemeanors. Any person violating any provision of this act shall be guilty of a misdemeanor. Each day such violation continues shall constitute a separate offense.

WEST VIRGINIA

B. PROHIBITION OF SALES BELOW COST

See pp. 347 to 352, Vol. II

L. 1939, c. 151
Unfair Practices Act

The Unfair Practices Act is now codified as: Code
Ann. (Michie, Supp. 1941) secs. 4678(8a) to 4678(8m).

WISCONSIN

A. RESALE PRICE MAINTENANCE

See pp. 355 to 356, Vol. II

Regulation of Trading Stamps

Sec. 100.15 Regulation of trading stamps. (1) 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 of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer.

(2) 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.

(3) 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.

JUDICIAL DECISIONS

See pp. 356 to 357, Vol. II

Coupons, Trading Stamps, Etc.

The cases of *Ed Schuster & Co., Inc. v. Steffes, District Atty.*, and *Herzfeld-Phillipson Co. v. same*, 237 Wis. 41, 295 N. W. 737 (1941), in which others were allowed to intervene, challenging the constitutionality of Stat. 1939, sec. 100.15(2), established the following points:

(1) Said section of the statute (which prohibits issuance of trading stamps on the resale of goods when the price obtained, less the redemption value of the stamps, is below the minimum price fixed by producer or distributor) was not designed to prohibit issuance of stamps on resale of price fixed goods regardless of form of restriction, but complements and reinforces the policy of the Fair Trade Act by prohibiting issuance of trading stamps solely in connection with retail sales of articles covered by fair trade contracts.

(2) The State's police power is sufficient to regulate or even prohibit the issuance of trading stamps as a business device, whether redeemable in merchandise or cash.

(3) The trial court erred in holding that such stamps do not operate to reduce the resale price, and hence are not within the statutory prohibition, to the extent of 2% discount as reward for prompt payment of accounts.

(4) Such statute is not fatally discriminatory in failing to include all cash discounts from resale prices within its prohibition, because the legislature may direct a law against what it deems the evil actually existing without covering the whole field of possible abuses, though the forbidden act does not differ in kind from the acts allowed.

(5) Nor is such statute unconstitutional as discriminatory because retail stores frequently give free parking privileges with the purchase of a certain amount of merchandise, free delivery service, fancy wrapping paper, and other advantages to customers.

B. PROHIBITION OF SALES BELOW COST

See pp. 358 to 361, Vol. II

Rev. Stat. (1939), c. 56, sec. 100.30
Unfair Sales Act

Paragraphs (a), (b) and (c) of subsection (2), subsections (3) and (4), and paragraphs (d) and (g) of subsection (6) of Section 100.30 were amended by L. 1941, c. 75 to read as follows:

Sec. (100.30) (2) (a) "Cost to retailer" means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or 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 per cent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup and 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 6 per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b) "Cost to the wholesaler" means 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, 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 per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage and markup, and 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 2 per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(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 30 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.

(3) 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 * * *, impairs and prevents fair competition, injures public welfare, and * * * is unfair competition and contrary to public policy and the policy of this section * * *.

(4) Any retailer who, with the intent of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, 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, with the intent of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, 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 * * * conviction by a fine of not less than \$10, nor more than * * * \$500. * * * Evidence of any advertisement, offer to sell, or sale of any item of merchandise by any retailer or wholesaler at less than cost as defined in this section shall be prima facie evidence of intent to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

(6) (d) Merchandise is sold upon the final liquidation of any business and is advertised, marked, and sold as such;

(g) The price of merchandise is made in good faith to meet competition:

JUDICIAL DECISIONS

See p. 361, Vol. II

Application of Statute.**Scope.**

The Act was intended to prevent reckless competition by outlawing the "loss leader," as therein defined, as an instrumentality in merchandising. *State v. 20th Century Market*, 236 Wis. 215, 294 N. W. 873 (1940).

"Cost of Doing Business"; "Cost"; Etc.

The State levied a tobacco tax on cigarettes, and this action was for a declaratory judgment to determine whether such tax is included in the term "invoice cost" as used in the Act. The court held: the words "invoice cost" are technical and must be construed according to their peculiar meaning. Webster's International Dictionary defines "invoice" as a written account or itemized statement of merchandise, shipped to a purchaser, etc., with the quantity, value, or prices or charges annexed. "Invoice cost" therefore refers to the figure, price or cost shown upon the invoice accompanying the shipment of cigarettes to the wholesaler, and does not refer to "cost" as that term is generally understood. Therefore the tobacco tax on cigarettes is not included in "invoice cost of merchandise to the wholesaler" unless such tax stamps have been purchased and affixed to the tobacco product by the manufacturer before shipment. It therefore need not be included in the base upon which the mark-up provided by the statute is to be computed. *National Assn. of Tobacco Distributors, Inc. v. Simon Bros. Co., Inc.*, (Super. Ct. 1941); P-H, Trade & Ind. Ser., par. 97193.

Intent to Injure Competitors, Etc.

A sale below cost is not a "loss leader sale" prohibited by the Act, unless the sale is made with the intent, or effect, specified in the statute; and evidence that a merchant advertised merchandise at less

than cost was insufficient to warrant a conviction when there was no evidence that the advertisement was made with the intent, or produced the effect, required by the statute. *State v. 20th Century Market, supra.*

Parties, Pleading, Proof, and Practice.

In a criminal case a jury question arises where existence of intent to induce purchase of other merchandise or injure a competitor is put in dispute; and a plea of "not guilty" puts in issue every essential fact necessary to establish the offense. *State v. 20th Century Market, supra.*

The provision of the Act that proof of advertising, offering for sale, or selling, merchandise at less than cost, is prima facie evidence of violation of the Act, does not put on a defendant the burden of proof in the sense of convincing the trier of fact, but at most merely changes the order of proof by requiring the defendant to come forward with the evidence. *State v. 20th Century Market, supra.*

WYOMING

A. RESALE PRICE MAINTENANCE

See pp. 367 to 370, Vol. II

L. 1937, c. 58
Fair Trade Act

Also cited: Rev. Stat. Ann. (Courtright, Supp. 1940),
secs. 117-601 to 117-612.

B. PROHIBITION OF SALES BELOW COST

See pp. 370 to 373, Vol. II

L. 1937, c. 73
Unfair Practices Act

Also cited: Rev. Stat. Ann. (Courtright, Supp. 1940),
secs. 117-307 to 117-319.

JUDICIAL DECISIONS

See p. 373, Vol. II

Application of Statute.

Scope.

Where the evidence in a case to enjoin a merchant from organizing "suit clubs" which made a profit on the whole transaction showed that the methods used did not injure competitors or destroy competition, or that an injunction would prevent a multiplicity of suits, and

where there was a plain and speedy remedy at law by way of criminal prosecution for violation of the lottery statute, and injunction was properly denied under the Act. *Eckdale v. Hurwitz*, 56 Wyo. 19, 103 Pac. (2d) 161 (1940).

"Cost of Doing Business"; "Cost"; Etc.

By the use of the word "established" before the words "cost survey" in the Unfair Practices Act, it would seem that the legislature meant a cost survey that is generally recognized by those engaged in the trade or industry covered by such cost survey as being accurate and reliable, and where there are different phases of a general trade or industry, such survey should deal with the particular one involved in the litigation. Here, a voluntary association of gasoline wholesale and retail dealers returned the questionnaires which were incomplete and included the cost of handling items other than gasoline. Such survey was held to be biased, incomplete, and self-serving, and not to reflect the real cost of doing business. *Civic Assn. v. Railway Motor Fuels, Inc., et al.*, 116 Pac. (2d) 236 (1941).

C. ANTI-DISCRIMINATION LEGISLATION

1. General Prohibitory Laws

See pp. 374 to 378, Vol. II

L. 1937, c. 73
Unfair Practices Act

Also cited: Rev. Stat. Ann. (Courtright, Supp. 1940), sec. 117-307.

2. Special Prohibitory Laws

See pp. 376 to 377, Vol. II

Rev. Stat. Ann. (Courtright, Supp. 1934)
Petroleum and By-products

Also cited: Rev. Stat. Ann. (Courtright, Supp. 1940),
secs. 117-302 to 117-306.
