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Are Montana's Price Fixing Statutes Valid?

F. E. COAD*

The recent tendency to attempt to legalize certain price fixing devices by state statutes has hit Montana as it has most other states. This article will discuss the validity of several of these statutes under general constitutional provisions, federal and state, the federal anti-trust laws, and particularly under our almost forgotten anti-trust provision of the Montana Constitution. Three price fixing statutes will be discussed:

1. The 1937 statute legalizing resale price maintenance contracts, misleadingly named the "Fair Trade Act."

2. A companion statute, also passed in 1937, intended to forbid any merchant from knowingly selling be-

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1The NRA experimented with price fixing and restraints on competition. Since its demise, merchant associations have induced most state legislatures to legalize restrictive practices, particularly price fixing devices. Nearly all states adopted the resale price maintenance law, and many others adopted the other acts which Montana has passed. The reaction to this experiment is just beginning to set in, as the effects of these acts is becoming apparent with the resumption of normal business and stronger competition.

2Art. XV, §20.

3Chap. 42, LAWS OF MONTANA 1937, R.C.M. 1947, §§85-201 to 85-208. The merchants' associations that originally drafted these acts and presented them to the various legislatures certainly did their best to sweeten their product with nice sounding titles and declarations of high purpose to cover their price fixing intent. They called resale price maintenance "fair trade." They used "cost" for minimum prices, and "cost surveys" to cover a schedule of minimum prices. They stated a purpose to preserve competition or prevent monopolies. The so-called Unfair Practices Act was originally drafted by the Food and Grocery Conference Commission representing: National Retail Grocers' Assn.; Assoc. Grocery Mfrs. of America; Nat. Chain Store Assoc.; National American Wholesale Assn.; National Retail Owned Wholesale Grocers; National Voluntary Groups Institute; see 32 ILL. L. REV. 816, 846 n. 184 (1938), 57 YALE L. J. 391 at 408, n. 70 (1948). The Montana Unfair Practices Act appears to have been copied from California's act complete with mistakes in spelling. There have been some variations of specific provisions of this act elsewhere. The "Fair Trade Acts" are also fairly uniform acts.

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low prices fixed between manufacturer or distributor and some competing merchant.⁶

3. A statute forbidding sales below "cost" as defined therein, which is part of the 1937 "Unfair Practices Act."⁷

In order to understand where these statutes fit into the common law of restraints of trade, as reinforced by the anti-trust laws, federal and state, and how much they attempt to adopt, modify or drastically change such common law principles, it is necessary to give a brief resumé of the history and more important principles of the current common law on this subject. It is beyond the scope of this article to attempt a comprehensive survey of this field of law. The field is too big and there are too many ramifications. But a few general principles will be helpful.

The doctrine of a common law principle opposed to restraints of trade developed very early. It was a principle devised by the courts to break down monopolies created by the guild merchants or granted by the Crown, at the time the industrial revolution was beginning to develop large scale manufacturing and wide distribution of products, and ran squarely into the opposition of such entrenched monopolies. The principle can be compared to the principle that restraints on alienation of land were opposed to public policy, which was used to break down the base of feudal power through control of land. Both were revolutionary devices developed by the courts to break the entrenched power of a few at its source. Both have continued as strong bulwarks against the redevelopment of such power.

One of the earliest reported cases decided in 1415, the Dyer's

⁶Ch. 80, §1, Para. 2, LAWS OF MONTANA 1937.
⁷Ch. 80, §§3 et seq., LAWS OF MONTANA 1937, am. Ch. 50, LAWS 1939; am Ch. 100, LAWS 1941; am. Ch. 21, LAWS 1945; R.C.M. 1947, §§51-103 to 51-118.

The inclusion of two unrelated subjects in one section of the statute, the inclusion of three very distantly related subjects in the one act, and the complete inadequacy of the title of the act to give even a lawyer familiar with the law of unfair competition any idea of the subjects covered, raises a question whether the whole act is not invalid under Art. V, §23, Constitution of Montana, both because of a defective title not indicating the contents of the act, and for including more than one subject in the act, and worse, in one section of the act. See: Russell v. Chi. B. & Q. Ry. Co. (1908) 37 Mont. 1, 94 P. 501. The title gives inadequate notice to lawyers and certainly does not give effective notice to the public, which is the purpose of the constitutional requirement; State v. Dist. Ct. of Lewis and Clark Co. (1914) 49 Mont. 146, 140 P. 732; State v. Dixon (1921) 59 Mont. 58, 195 P. 841; Martin v. State Highway Com. (1939) 107 Mont. 603, 88 P.(2d) 41.
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Case,' held a contract restraining a man from working at his trade to be invalid. This illustrated one primary purpose of the basic principle, to prevent exploitation of the working man through contracts restricting his right to work at his trade. Control of labor was one of the basic sources of power of the guild merchants. This is still a most important protection to the laboring man today. It is codified in the Montana code with fewer justifications than the common law allowed.

Monopolies were declared to be against public policy in a case decided in 1602, in which a crown grant of a monopoly was held invalid as a violation of common law principles and acts of Parliament. This illustrates the basic purpose of the rule against restraints of trade to break down and prevent monopolies.

Perhaps the leading English case on price fixing was decided by Lord Mansfield in 1758. He not only held an agreement fixing the price of a necessity invalid, but a crime as well, and held: "... at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence, and ought to be discountenanced." This might be said to be the earliest statement of the modern rule that price fixing is illegal per se.

Agreements not to compete were also held invalid, unless justified, in very early cases. All such direct restraints of competition, by contract, agreement or combination, which were not justified by some other legitimate business purpose, came to be held invalid. Montana appears to have adopted this as a constitutional principle. In addition other, indirect, restraints of

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7Anonymous—"Dyer's Case" (1415) Year Book, 2 Hen. V., Vol. 5, pl. 26; Handler, CASES ON TRADE REGULATION 102. J. Hull there said: "... the condition is against the common law, and per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king."


9The case of the Monopolies (K.B. 1602) 11 Co. Rep. 84; Moore, K.B. 671; Noy, 173; 77 Eng. Rep. 1260; Gordon, MONOPOLIES BY PATENTS, 199-232; Handler, CASES ON TRADE REGULATION 68.


12U.S. v. Addystone Pipe and Steel Co. (CCA 6th, 1898), 85 Fed. 271, has an exhaustive and masterly survey of common law principles. There is conflict in the law of this subject which is beyond the scope of this article.

trade may be illegal both at common law or under the anti-trust laws.\textsuperscript{14}

Direct restraints of trade may be justified where they are necessary and ancillary to another legitimate business purpose, providing they do not involve monopoly power or an attempt to create it.\textsuperscript{15} However price fixing agreements are rarely justifiable and require more justification than other restraints.\textsuperscript{16} Price competition is the main essential of competition and requires careful protection.

We are concerned here primarily with price fixing and hence with the rules against price fixing in the common law, but it is well to remember that the common law rule against price fixing is only a specific application of the principle of opposition to monopolies and monopolistic practices. Price fixing was illegal because it eliminated competition and tended to create monopolies.

The basic principle that agreements and combinations to fix prices are illegal per se has continued to the present day.\textsuperscript{17} It was stated by J. Taft in his masterly survey of common law principles in the Addystone Pipe case.\textsuperscript{18} It is the rule used by the

\textsuperscript{14}\textit{RESTATEMENT, CONTRACTS}, §515.

\textsuperscript{15}See the Addystone Pipe and Steel Co. case, cited note 12, \textit{supra}, which laid down this principle which has since been fairly generally followed, though there are cases which do not. It is adopted by the \textit{RESTATEMENT OF CONTRACTS}, see §§513-519.

\textsuperscript{16}The U.S. Supreme Court has repeatedly held that price fixing agreements are illegal per se under the anti-trust laws. See cases cited note 18 \textit{infra}. A contract for another purpose, having an incidental effect on prices, is weighed under the "rule of reason" to determine its effect on competition. As a rather extreme example, see National Assoc. of Window Gl. Mfrs. v. U.S. (1923) 263 U.S. 403, 44 S.Ct. 148, 68 L.Ed. 358. Virtually all anti-trust cases not involving agreements illegal per se, fall in this group. Most states follow the same theory; see note 17 \textit{infra}. A minority say that price fixing agreements are illegal only if unreasonable, or tending to have a monopolistic operation; see note 25 \textit{infra}.

\textsuperscript{17}The general rule in the states is that agreements to fix prices are illegal per se under the common law principle against restraints of trade. See cases cited in note 24, \textit{infra}. Also: American Laundry Co. v. E. W. Dry-Cl. Co. (1917) 199 Ala. 154, 74 So. 58; Joslin v. Steffen Ice & Ice Cr. Co. (1936) 143 Kan. 409, 54 F.(2d) 941; More v. Bennett (1881) 140 Ill. 69, 39 N.E. 888, 33 Am. St. Rep. 216, 15 L.R.A. 361; Evans v. American Strawboard M. Co. (1904) 114 Ill. App. 450; Hunt v. Riverside Coop. Club (1903) 140 Mich. 538, 104 N.W. 40; Schwartz v. Laundry & Linen Supply Drivers Union (1940) 339 Pa. 353, 1 A.(2d) 438; General Elec. Co. v. Willey's Carbide Tool Co. (1940) 33 F. Supp. 969. This is not an exhaustive list of cases stating this rule.

The minority rule is that such contracts are invalid if they tend to have a monopolistic operation. See cases in note 25, \textit{infra}.

\textsuperscript{18}U. S. v. Addystone Pipe and Steel Co., cited note 12, \textit{supra}.
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United States Supreme Court in construing the federal anti-trust laws. Section One of the Sherman Act states a principle for application to interstate and foreign commerce similar to the common law rule against restraints of trade. It has no flat prohibition of price fixing such as the Montana Constitution contains, but is construed in the light of the common law to have that effect.

The English courts drifted away from their early determined opposition to monopolies and practices restricting competition and began to tolerate such things, so long as the powers were not shown to be abused. They changed the old rule to one holding that only unreasonable restraints of trade were illegal. Monopolies were tolerated if they did not unduly abuse their powers.

In this country most courts discovered quite early that there was no practical way to prevent a monopoly from abusing its powers—the only practical rule was to prevent monopolies. Our anti-trust laws were enacted to enable the courts to break down monopolies and keep others from arising. The English are now discovering, too late, that the monopolies and combinations in restraint of trade which grew up everywhere under the modified rule have eliminated most competition. For the most part large businesses there have followed a consistent practice of high margins and low volume of sales, with low wages, which has definitely been against the public interest. Furthermore manufacturing businesses have stagnated, have not replaced their productive equipment, and are so far behind the times that they cannot compete effectively in world markets. There are of course exceptions. The English are now trying to solve the problem by nationalizing the more essential industries, which have been

\[\text{\textsuperscript{[19]}}\]  In the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal per se under the Sherman Act. This is true whether the fixed price is legal or illegal. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale. U. S. v. Line Material Co., 333 U.S. 287; 68 S.Ct. 550, 92 L.Ed. 704; and see earlier cases cited in note 21 of that case. Other recent authorities that price fixing is illegal per se under the Sherman Act: U. S. v. Paramount Pictures Corp. (1947) 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1261; U. S. v. U. S. Gypsum Co. (1947) 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746; Schine Chain Theatres v. U. S. (1947) 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245.

the worst offenders. This of course simply creates another type of monopoly even more difficult for the public, including labor, to deal with. But there does not seem to be any other solution after such a situation has been allowed to arise. A large share of the present "socialist" attitude in England is caused by abuses of monopoly power which have developed over many years under the relaxed rule tolerating monopolies and restrictive trade practices.

While there have been a few cases tending to follow the English rule and some other deviations from the early strict common law principle, in this country, our anti-trust laws and opposition to monopolies have prevented them from being carried so far as in England where they opened Pandora's box to all sorts of price fixing arrangements and other restrictions on competition.

The majority rule in this country in the absence of statute is that contracts fixing resale prices are illegal restraints of

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This was the opinion given by Mrs. Margaret Cole, a Fabian socialist and member of the English Labor Party, recommended by Sir Stafford Cripps to speak on Labor policy in the United States, in a speech at Montana State University, Nov. 7, 1949.


Another small group of cases distinguishes between partial and complete restraints of trade as though that were virtually the whole test of validity; as an illustration see Diamond Match Co. v. Roebel (1887) 106 N.Y. 473, 13 N.E. 419, holding a restraint valid because Montana and Nevada were omitted. There are other deviations and minority rules.

At first glance, the Montana case of Quinlivan v. Brown Oil Co., (1934) 96 Mont. 147, 29 P.(2d) 374, might be construed to be deviating from the majority rule, though it is not. The case involved a lease containing a covenant that the lessee would not sell oil below prices fixed by the lessor at its stations. This was held valid, and to justify the lessor in inducing the lessee to breach a contract with a third person to give premium coupons with these products. The court stressed the fact that the lessor had no monopoly or power to control prices that could injure the public. It stated the further rule that whether such a restraint is reasonable depends on whether it affords only fair protection to the interest of the party in whose favor it is given, and that it is not so large a restraint as to interfere with the interests of the public. These statements do sound a bit like the minority rule, but when read in the light of the common law do not mean that at all. A grantor or lessor may restrict the use of the property to prevent competition with his business. Such restrictions are valid so long as they do not involve a monopoly or attempt to create a monopoly or a party

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trade under the common law principle.\textsuperscript{22} A number of states held to the contrary that they were not illegal unless they tended to have a monopolistic operation.\textsuperscript{22} The Sherman Act was held to invalidate such contracts in interstate commerce\textsuperscript{26} until amended by the Miller-Tydings amendment to specifically allow such contracts with respect to branded merchandise in interstate commerce where the state allows such contracts.\textsuperscript{27}

Montana put its anti-trust provision in the Constitution, in Article XV, Section 20, which reads:

or combination with power to injure the public, and so long as they are not broader than necessary to protect the grantor or lessor. Oregon Steam Nav. Co. v. Winsor (1873) 20 Wall. 64, 22 L.Ed. 315; Wright v. Ryder (1868) 36 Cal. 342, holding contra to preceding case re validity of same contract, but recognizing validity of such restraints; Dunlop v. Gregory (1851) 10 N.Y. 241; Hitchcock v. Anthony (CCA 6th, 1897) 83 Fed. 779; Dick v. Sears Roebuck (1932) 115 Conn. 122, 160 A. 432; Hall v. Wesser (1879) 7 Mo. App. 56; Fry v. Partridge (1876) 82 Ill. 267; American Strawboard Mfg. Co. v. Haldeman Paper Co. (CCA 6th, 1879) 83 F. 619. This is the general rule. It is a rule of conveyancing, allowing restrictions on use of property, with an exception to protect the interest of the public. All the Montana case does is to state the rules for protecting the public without mentioning the basic conveyancing rule. The case does not adopt the minority rule tolerating reasonable restraints.


\textsuperscript{26} Rule established in: Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911) cited note 24 supra. This is still the rule where the Miller-Tydings amendment does not authorize the agreement: U. S. v. Univis Lens Co. (1942) 316 U.S. 241, 62 S.Ct. 1088, 86 L.Ed. 1408, concerning unfinished lens blanks for glasses not covered by the amendment.

\textsuperscript{27} 15 U.S.C.A. §1; the two provisos were added by the Miller-Tydings Amendment in 1937.
"No incorporation, stock company, person or association of persons in the state of Montana, shall directly or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporation, or stock company, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, or in case of foreign corporations, prohibiting them from carrying on business in the state."

This expresses the common law opposition to monopolies, and specifically forbids individuals to combine or contract to fix prices "in any manner whatsoever." This adopts the majority common law view that price fixing is a direct restraint of trade and illegal per se. It cannot be construed to tolerate monopolies or combinations in restraint of trade, or reasonable price fixing."

In 1937 Montana passed a resale price maintenance statute modeled after those passed in most other states and commonly mislabeled "Fair Trade Acts." This Act in effect allows contracts to fix the resale price of branded merchandise in free and open competition with similar merchandise.

In the light of the majority common law rule that resale price maintenance was illegal price fixing, the plain wording of the Montana Constitution forbidding contracts fixing prices "in any manner whatsoever" can hardly be interpreted to allow legislation legalizing resale price maintenance contracts. This is reinforced by the interpretation given the much more general language of the Sherman Act as forbidding such contracts, until it was specifically amended. The Miller-Tydings amendment cannot be construed to overrule our constitutional restriction even as to interstate commerce, because it only allows such contracts where they are legal by the state law."


5Ch. 42, LAWS OF MONTANA 1937.

5Under the Miller-Tydings amendment, resale price maintenance contracts are valid only "... when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia, in which such resale is to be made, or to which the commodity is to be transported for such resale. . . ."
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The second price fixing statute adopted by Montana in 1937 apparently was intended to make resale price maintenance contracts binding on third persons who were not parties to the contract. It appears to have been added to the anti-discrimination statute, to which it is not pertinent, by mistake. Consequently it appears to be unenforceable for lack of meaning. Such statutes have been adopted in a number of other states. New York held one unconstitutional as delegating legislative power and denying due process. Two other states held such statutes do not violate due process or equal protection clauses, and the United States Supreme Court has affirmed this holding so far as the Federal Constitution is concerned.

The Montana Constitution flatly forbids an individual to fix prices by contract with someone else and the legislature cannot authorize it. So the contract on which the price fixing under this type of provision would have to depend is void. This is an attempt to extend the protection given the seller by extending his price fixing beyond persons bound by contract to those with notice of such contracts with others. It also is within the purpose and intent of the constitutional prohibition.

The wisdom of the drafters of our Constitution in putting in it such a flat prohibition of price fixing is illustrated by a study of the effects of resale price maintenance laws by the Federal Trade Commission in 1936. The Commission concluded:

"The essence of resale price maintenance is control of price competition. Lack of the adequate enforcement of the anti-trust laws leaves a broad field for the activities

\[\text{Ch. 80, §1, para. 2, LAWS OF MONTANA, 1937.}\]

The paragraph refers to selling below prices fixed in contracts entered into pursuant to Sec. 1. The preceding paragraph does not refer to contracts. The provision is the same as §16904 of the Calif. act inserted in their Fair Trade Act by amendment, Ch. 280, LAWS OF CAL., 1933. It was put into the wrong act in Montana, and hence is meaningless.


\[\text{Summary and Conclusion, Federal Trade Commission, Dec. 13, 1946, p. LXI. An economist also comments:} \]

"If legislation is to be substituted for competition, then price will lose its significance, channels of distribution will become ossified, marketing procedures static, and enterprise paralyzed." John C. Cover, Legislative Barriers to Marketing Progress, 209 THE ANNALS p. 176 (1940).
of organized trade groups to utilize it for their own advantage and to the detriment of consumers.’

This is especially pertinent to Montana where enforcement of the state anti-trust laws is conspicuous by its absence.

In the light of experience with the fair trade acts it seems axiomatic that if price competition is removed from the retail level and moved back to the wholesale or manufacturing level, as these acts permit, there is a strong tendency for such larger merchants to avoid price competition. There has been a great reduction of price competition in a number of fields, particularly groceries and drugs, under these acts." Conversely, as long as free price competition is maintained at the retail level, it is very difficult for manufacturers or distributors to restrain competition. It is bound to break loose somewhere among the multitude of retailers.

Incidentally, even valid resale price maintenance laws allow no horizontal agreements or conspiracies at any level—between producers, between wholesalers, or between retailers—to fix prices." Also the Act requires that the price be set by the owner of the brand "or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name." It is suspected that this provision has been rather widely overlooked.

The third price fixing statute forbids sales below "cost" as cost is defined therein. Now "cost" usually means what the merchandise cost the seller, its purchase price, but not under the double-talk in this Act. The Act specifically requires the inclusion of all costs of doing business, including sales expense and all fixed costs or overhead. The only thing omitted is the mark-up for net profit. This would drastically narrow the field of price competition close to the vanishing point on goods sold in volume at low net profit. For instance the amount of price competition left in the grocery business would be slight. The statute raises several serious constitutional problems.

This provision of the Act was before the Montana Supreme

*See note 4 supra.
*Ch. 80, §3 et seq., LAWS OF MONTANA 1937; am. Ch. 50, LAWS 1939; am. Ch. 200, LAWS 1941; am. Ch. 21, LAWS 1945; (the so-called "Unfair Practices Act"); R.C.M. 1947, §§51-103 to 51-118.
*Before amendments.
Court in 1939 for a test of its constitutionality, on one issue only, in the case of Associated Merchants of Montana v. Ormesher. The appeal did not send up the evidence and raised only the single, very broad issue of whether the provision violated the due process clauses of the federal and state constitutions. Consequently the Court decided only one issue, namely, whether this provision, given the most favorable interpretation possible, violated such due process provisions. Many other possible constitutional objections were not raised or considered and are not precluded by this decision. The Court found it necessary to make some drastic limitations on the broad provisions of the Act before holding it constitutional under the due process clauses. This opinion will be discussed with the specific constitutional objections raised by the Act.

The Act purports to delegate to the Montana Trade Commission a great deal of legislative power to fix "costs," i.e. minimum prices, without in any manner indicating how such costs shall be allocated to specific products. As it reads, the Act purports to allow the Commission to fix the "cost" on the basis of "cost surveys," and to allocate such costs on an arbitrary basis. J. Angstman, in the Ormesher case, found it necessary to severely limit this power before holding the Act met the requirements of due process. He held that a merchant may use any reasonable method of estimating and allocating costs. He said:

"On this point we agree with the learned justice who

"107 Mont. 530, 86 P.(2d) 1031. For discussion of such acts under due process clauses see Thatcher, Constitutionality of the Unfair Practices Acts 30 Minn. L. Rev. 559 (1946).

"Third paragraph of J. Angstman's opinion in the Ormesher case, supra. There is a strange coincidence:

"Without exception, every case which has sustained the sales below cost provisions of an unfair practices act has been based upon a record factually incomplete, the issue having arisen upon demurrer, motion, or certified question. Under those circumstances the courts' reluctance to pronounce a violation of the principles of due process is understandable, and in some instances may have been justifiable. Other courts, in contrast, have not needed the elucidation of a factual record of the nearly insuperable obstacles confronting a merchant who attempts to comply with these statutes." Thatcher, note 40 supra at 583.

"Discussed infra.

"The Montana Board of Food Distributors is ex officio the Montana Trade Commission, R.C.M. 1947, §70-201 (3914). The Montana Board of Food Distributors is a board of three members, who must be merchants with five years experience as food distributors immediately preceding appointment, appointed by the Governor from a list of five nominees submitted by the Montana state food distributors association. Is the Trade Commission a disinterested state administrative board without personal bias? Is it qualified to hold the legislative, administrative and judicial powers which this act grants it?
wrote the opinion in the case of State v. Langley, who said: 'Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant by "cost," what business men generally mean, namely, the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in good faith. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402. In that view of the case, the standard set by the legislature is virtually reduced to "reasonableness." And it is held that "reasonableness" as "the standard of an act, which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law." People v. Curtiss, 116 Cal. App. Supp. 771, 300 P. 801, 805, and cases cited'."

This allows the merchant to use any reasonable business, i.e. accounting, system in estimating his costs and allocating them to the particular items of merchandise. So construed, of course, most of the objection to this provision is removed.

But if the Trade Commission can make a trade survey, arbitrarily fix a percentage of costs, and use this as a basis for an order against the merchant to cease and desist from sales below such "cost," the merchant is up against a great deal of coercion. In the first place he has to consider whether the considerable cost of defending a suit in court and possibly having to appeal it to the Supreme Court is worth the expense. Then the full burden of proving his business costs and proper allocation of them to particular products is thrown on him to rebut a "presumption" raised by the statute that this arbitrary figure fixed by the Commission is his "cost." This is no mean burden when you consider that cost accounting principles are a highly technical and controversial field. There is much risk that a merchant will not prevail even on a good case.


"Business" and "accounting" are interchangeable terms here, since accounting is simply the language of business.
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Inasmuch as the theory which the law allows the Commission to use as the basis for an order is absolutely erroneous and has no relation to a business concept of cost, and inasmuch as such an order does have such a coercive effect, it is desirable that this provision of the Act be held completely invalid to prevent the Commission from doing something by indirection that is basically illegal. Merchants' associations, through the Commission, have very effectively enforced such "cost" orders of the Commission by threats of prosecution. It appears that for twelve years such "cost" schedules have been effectively enforced as minimum price schedules by the merchants' associations and the Commission through persuasion and coercion.

What are "costs" of products sold by a merchant, in a business sense? First, we should mention that cost accounting is a highly controversial subject, and it is no great exaggeration to say that there are about as many theories of cost accounting as there are cost accountants. This is particularly true in the field of retail merchandising, where there is little or nothing to indicate how even rather direct costs should be allocated to specific products. Cost accounting is an attempt to allocate costs to particular products, and it involves a great deal of judgment, and many times the method used is purely arbitrary.

One basic theory of cost accounting that seems perfectly sound is to allocate to an article only such costs as are found to be definitely caused by handling it. Fixed costs, or overhead, need not be allocated at all, or may be allocated on a number of different systems that are all purely arbitrary. From the business standpoint, any product which makes anything above

That such activity may violate the Sherman Anti-Trust Act, see notes 81, 85, 90, infra.


See authorities cited note 47; Hamilton, Cost as a Standard of Price, 4 Law and Contemp. Probs. 321, 331-2 (1937); Falk, Marketing Cost Does Not Belong in Minimum Prices, 165 Printers Ink 63 (Oct. 12, 1933); Weld, Why Marketing Cost Should Be Part of Productions Costs, 165 Printers Ink 63 (Oct. 19, 1933); The Relation of Uniform Cost Accounting to Competition 139 Annals 74, 77 (1928).
the direct costs of handling it is "profitable." This profit helps carry the overhead, or fixed costs, and provide a net profit.

Take a simple example. A merchant adds a small item to his stock which his cashier can hand to customers without enough loss of time to increase his sales expense appreciably. Anything which the merchant makes above his direct costs, i.e., purchase price, freight, cartage, specific taxes and insurance, is profit to him. The item will help to carry the fixed costs of his business and provide a net profit. The item is profitable in a business sense. Whether it carries the same percentage of fixed costs as other items he sells is immaterial to the merchant. Different items often do not make the same percentage of gross profit.

Consequently, fixed costs (overhead) do not have to be allocated at all to determine whether an article is profitable in a business sense. There is no reason why a merchant cannot treat them as not a pertinent cost of sales, or allocate them on any arbitrary basis he wishes. Why not allocate them on the basis of the margin of profit above direct costs on each item, if the merchant wants to? It is perfectly reasonable. Or omit them entirely. Many merchants do. There simply is no one correct system in cost accounting for allocating fixed expenses. There are simply a lot of arbitrary rules. Omitting them from consideration entirely is the best system for the average small merchant.

Since fixed costs (overhead) have nothing to do with whether an article is profitable in a business sense, to allow the Trade Commission to allocate such costs to particular items of merchandise, as the Act purports to do, allows the Commission to fix, not "cost," but minimum prices. Price fixing of ordinary business sales is unconstitutional under the due process clause. This principle of public policy favoring free and open competition is reinforced in Montana by a constitutional provision against monopolies and outlawing price fixing by individuals. It has been held that partial price fixing, including putting a "floor" under prices, is illegal price fixing by in-

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*Great Northern Utilities Co. v. Public Service Com. (1930) 88 Mont. 180, 283 P. 294; State ex rel. Freeman v. Abstractors Board of Examiners (1935) 90 Mont. 564, 45 P.(2d) 668; Associated Merchants of Montana v. Ormesher (1939) 107 Mont. 530, 86 P.(2d) 1031, recognizes the general rule but held statute as construed and limited was not a price fixing statute; A. M. Holter Hdwe. Co. v. Boyle (1920) 263 F. 154, appeal dism. (1921) 257 U.S. 666. See also: Stranahan v. Indep. Nat. Gas Co. (1935) 98 Mont. 597, 41 P.(2d) 39, holding contract tending to create a monopoly would be void.*
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individuals under federal anti-trust laws. Eliminating any part of legitimate price competition by statute should also be held to violate the principle of free and open competition established by the Montana Constitution. Only very unusual problems seriously affecting the public interest, where price fixing seems to be a proper remedy, justify this type of regulation. J. Angstman's interpretation of this Act should preclude the Commission from arbitrarily allocating fixed costs, which cannot be said to be directly caused by its handling and sale, to the specific product. However a 1943 case, Board of Railroad Commissioners v. Sawyers' Stores, shows that it has not done so. There the Board was trying to enjoin a merchant from selling below the "cost" they had fixed for the grocery business on the basis of a statewide "cost survey." The Court held that a statewide survey could have no reasonable bearing on costs in a particular area and held the order invalid.

Other fallacies in the evidence provision of the law, which the Sawyers' Stores case was not concerned with, are:

1. Even an area survey can have no bearing on costs of a specific business.

2. Specific costs differ from business to business and article to article, and even an attempt to fix the "cost which would probably be incurred by the most efficient person, firm or corporation within such retail trade or business within the area" is purely arbitrary.

3. Even fixing average costs for the specific business as a whole is purely arbitrary because costs vary from article to article.

4. Even fixing specific costs for a specific article in a specific business at a specific time is bound to be quite arbitrary, though not as absurdly so as in the first

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"U. S. v. Socony Vacuum Co. (1940) 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129. Food and Grocery Bur. of So. Cal. v. U.S. (CCA 9th, 1942) 139 P.(2d) 973: "... agreements stabilizing such prices either at a maximum or a minimum or through a formula violate the Sherman Act. [citing many cases]."

"See State v. Abstractors Board of Examiners (1935) 99 Mont. 564, 45 P.(2d) 668. Also other cases cited note 49 supra. See also notes 92, 93, infra.

"Board of Rr. Comrs. v. Sawyers' Stores (1943) 114 Mont. 562, 138 P.(2d) 904.

"A statewide "cost survey" was authorized by amendment after this case, Ch. 21, LAWS OF MONTANA 1945. Such statewide price fixing is just as arbitrary and unrelated to real costs when the legislature provides for it. This indicates how completely divorced from the real costs of a specific item sold by a particular merchant, the "cost" fixed by the commission is intended to be—and is.
three, unless the test is the lowest possible cost which could be charged to the article on any reasonable basis.

5. Just how the Commission is expected to allow for the economic principle that volume of sales decreases cost per item is not at all clear.

The evidence the Act allows the Commission to receive and the theory it justifies for a cost estimate by the Commission are absolutely inconsistent with the basic theory of the wrong laid down in the Ormesher case. If the merchant can legally use any reasonable method of allocating his costs, as the Court there says, then the Commission should have to take direct evidence of the merchant’s costs and his methods of allocating them. If they can use some other, purely arbitrary, method, as contemplated by the Act, and then coerce him by an order and threat of suit to comply with such order and such arbitrary “costs,” they have the power to get compliance in most cases with a perfectly illegal price schedule. If these cost schedules were only presumptive evidence, the fallacy back of them would be unimportant, but they are effective orders. The whole “cost survey” idea is fallacious and only designed to do by indirection what cannot be legally done. It is a clever price fixing scheme and nothing more. Even an agreement by merchants to follow such a cost schedule might be held to be an agreement or conspiracy violating the anti-trust laws. Inasmuch as the Trade Commission is in effect appointed by the merchants under the law, it would seem to be a very transparent screen to hide behind against a charge of conspiracy to violate the federal anti-trust laws.

Forbidding sales below “cost” in the sense of cost of sale of the specific merchandise to the specific merchant on any reasonable business basis, would seem to be going to the absolute limit of what could possibly be designated as unfair competition without going over the line into price fixing and elimination of perfectly legitimate competition, even with the required “intent.” Without the intent to injure competitors or destroy competition, such a statute would probably be invalid in this state even if it forbade only sales below cost in the sense of purchase price."

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The Act requires that the price cutting be done "for the purpose of injuring competitors and destroying competition." The Ormesher case gave considerable weight to this phrase in determining that the Act was aimed at unfair competition, not price fixing, and indicated that proof of such intent is necessary to show a violation of the Act. The Court said:

"The statute here considered is not a price-fixing statute. Its aim and object is to prevent unfair competition in business. As a means to that end the Act prohibits sales of commodities below cost when done 'for the purpose of injuring competitors and destroying competition.' It fixes a minimum price only, leaving in the seller the discretion to sell at whatever price above that he chooses. The minimum price is fixed not as an end in itself, but to prevent ruinous price-cutting injuring or destroying competitors."

The Sawyers' Stores case held that proof of such intent was necessary to prove a violation of the Act, and that general evidence that price cutting was harmful to business or competitors was wholly inadequate to show such intent. The Court said:

"Proof of sales at less than cost, if that had been established by the evidence, would not in itself be proof of the unlawful purpose to injure competitors and destroy competition. No presumption of such purpose arises from the mere fact of such sale being made."

Where, as in this statute, the nature of the offense is vaguely defined in the Act, the requirement of such a specific intent to injure is necessary to the validity of the Act. Otherwise it would be too vague to enforce. The Act contains severe criminal and civil monetary penalties, and provides for forfeiture of corporate charters for three violations. The intent provision

prohibiting sales of cigarettes below cost: Serrer v. Cigarette Service Co. (1947) 148 Ohio St. 519, 76 N.E.(2d) 91, noted in 61 HARV. L. REV. 878 (1948); Rust v. Griggs (1938) 172 Tenn. 565, 113 S.W.(2d) 733 held such a statute without an intent clause required "intent or effect" of injuring competitors by implication. Montana's constitutional provision should make such an act without an intent clause invalid. Contra holding under due process clause only: McIntire v. Borofsky (1948) 95 N.H. 174, 59 A.(2d) 471. The Pa. and N.J. cases are obviously more aware of the price fixing purpose of this type of legislation and its danger to our system of free enterprise.

Note 40 supra.
Italics ours.
Note 52 supra.
Ch. 80, §11, LAWS OF MONTANA 1937.
Amendment to §12 of act in Ch. 50, §1, LAWS OF MONTANA 1939.
Ch. 80, §8, LAWS OF MONTANA 1937.
cannot be minimized by construction or eliminated from this Act, without making the Act objectionable as not defining the offense adequately. It is an entirely different matter where a statute forbids a specifically defined act regardless of intent.

The phrase "purpose to injure competitors and destroy competition" indicates a rather specific intent to injure specific individuals and something a lot stronger than intent to cut prices. It is suggestive of the requirement of the rule of "malice" in the common law of unfair competition, slightly modified. A typical definition of such "malice" is:

"Any injury to a lawful business, whether the result of a conspiracy or not, is prima facie actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare. To defeat this plea of justification the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring the plaintiff, and not to benefit themselves."

J. Holmes used the term "disinterested malevolence" to sum up this idea that the act must be done to injure the other party and

"To the objection that such an act was unconstitutional for providing criminal penalties for acts done without criminal intent, a Calif. case said:

"It is our opinion, however, that selling below cost is not made a public offense except where it is done for the purpose, that is with the specific intent, of injuring competitors and destroying competition."


not to benefit himself." At the common law, the existence of any purpose to benefit the party's own business justified any legal act as competition, no matter how ruthless it might be.

For instance, in one case a party threatened to run a competitor out of business, and by deliberate and ruthless price cutting did just that, but was held not guilty of legal wrong because his primary purpose was to benefit his own business, which justified his act. Consequently quite ruthless price competition is legal at common law. The growth of very large corporative businesses has created a problem because such businesses have the economic power to drive smaller competitors out of business by local price cutting. The classic example of this was the way the old Standard Oil Co. eliminated competitors, area by area, primarily by ruthless local price cutting, while making the loss up by high prices elsewhere. Such practices may be used to eliminate competition. The "below cost" Act removes the justification of "competition" for such ruthless acts. It would seem to outlaw any deliberate use of price cutting for the deliberate purpose of injuring or destroying a competitor.

This does not mean intent to maintain ordinary price competition which might cause competitors to lose profits they might have made under higher prices they were trying to maintain. The economic power of the offender should be an important consideration. For a large, competitively powerful, merchant, or group of merchants, to complain that a small competitively insignificant competitor, who is cutting prices below the level they are trying to...
maintain, to draw business, is trying to injure them is highly absurd. To claim that such merchant is trying to "destroy competition" is ludicrous. To argue that a small bit of price competition can destroy competition would be pure fantasy, since competition is essentially price competition. Proof of loss of profits caused by price competition does not show the required intent to destroy competition, or even to injure competitors. Intent to injure means something more specific.

Another analogy for aid in determining the meaning of such intent provision is mentioned by the Circuit Court of Appeals, Ninth Circuit, in Food and Grocery Bureau of So. Cal. v. U. S. where it discusses the somewhat similar intent provision of the Robinson Patman Act forbidding price discrimination in interstate commerce, which reads:

"... for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

The Court said:

"The italicized words [quoted above] show that, similar to the California Unfair Practices Act, the Robinson-Patman Act makes illegal the price competition of the kind protected by the Sherman Act only where it 'discriminates to his [a competitor's] knowledge against competitors' or is 'for the purpose of destroying competition or eliminating a competitor.' No such limitation appears in the price stabilizing activities of the appellants."

This "purpose of injuring competitors and destroying competition" is a fact issue which the Commission must present some quite specific evidence on to prove any offense, as held in the

"California amended its act by changing the "and" in the intent clause to "or," thus making either "intent to injure competitors or to destroy competition" the requirement. It also added a provision to the effect that proof of selling below cost is presumptive evidence of intent to injure competitors or destroy competition. (Another instance of doing by indirection what would probably have been invalid done directly). This was held valid in Mering v. Yolo Grocery & Meat Market (Cal. App. 1942) 127 P. (2d) 955; People v. Pay Less Drug Store (1944) 25 Cal. App. (2d) 108, 153 P. (2d) 9. These cases were not concerned with a constitutional anti-trust provision such as Montana's, or the federal anti-trust laws with respect to interstate commerce. Such changes would be of dubious validity in Montana. See also note 69, supra, re interpretation as well as validity.

(1943) 139 F.(2d) 973.
The difficulty of proving the necessary intent is obvious. But in order to protect our system of free and open competition, which the Montana Constitution establishes as state policy, a strict requirement of definite proof of such "intent" is necessary. Removal of the intent requirement from the Act would make the Act forbid legitimate price competition, which would seem to violate our Constitution. Two states recently held such statutes without such intent clauses to be invalid under their due process clauses.\textsuperscript{19}

There are also some other serious constitutional objections to provisions of this Act which were not raised in the Ormesher case and in no way decided by that decision. These objections are:

1. That the title of the Act is defective, violating Art. V, Section 23, Constitution of Montana.\textsuperscript{20}

2. That there is an unconstitutional delegation of administrative and judicial authority to a commission which is in effect appointed by the merchants themselves\textsuperscript{21} and which can hardly be said to be a disinterested public commission which would represent the public without bias.\textsuperscript{22}

3. That it interferes with and attempts to regulate interstate commerce in a field which Congress has already preempted by general regulatory laws.

4. That it attempts to legalize practices affecting interstate commerce which the federal government has forbidden by the Sherman Anti-Trust Act.\textsuperscript{23}

5. That it violates the Montana anti-trust provision in our Constitution, Art. XV, Section 20.

The last three are related subjects involving the policy of the federal anti-trust laws as to interstate commerce, and the Montana anti-trust provision as to both intrastate and interstate commerce.

First, what is meant by interstate commerce under the Sherman Anti-Trust Act? The Supreme Court has given a very

\textsuperscript{19}See note 52 supra.
\textsuperscript{20}See note 54 supra.
\textsuperscript{21}See note 6 supra.
\textsuperscript{22}See note 43 supra.
\textsuperscript{23}This would seem to be too obvious to require comment.
liberal interpretation of interstate commerce for the purpose of applying the Sherman Act and to prevent state interference with interstate commerce." In a recent case J. Rutledge said:

"With the extension of the Shreveport influence" to general application, it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it. . . . Given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. . . ."

The Circuit Court of Appeals for this circuit has specifically held that retail sales of merchandise which have come into the state from elsewhere are transactions governed by the Sherman Anti-Trust Act. The Court said:


"The Shreveport Rate Cases (1913) 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341.

Mandeville Island Farms v. Amer. Crystal Sugar Co., cited note 78 supra, holding a combination fixing purchase price of beets from local farmers violated the Sherman Act. The Court further said: "For monopolization of local business, when achieved by restraining interstate commerce, is condemned by the act. C. E. Stevens Co. v. Foster K. Co., 311 U.S. 255."

A local monopoly at the opposite end of the chain of distribution is equally bad: U. S. v. Paramount Pictures (1947) cited note 19 supra, holding that maintaining a monopoly by owning the only movie house in town might violate the act if the monopoly was acquired or maintained by practices in restraint of trade. See also Local No. 167 v. U. S. (1933) 291 U.S. 293, 54 S.Ct. 396, 78 L.Ed. 509.

The Department of Justice interprets the Sherman Act broadly as including local restraints at the retail end of the chain of commerce, and has filed a considerable number of suits to stop such practices, some of which have led to fines; see CCH Trade Regul. Rep. Some of these concern retail practices in a city or town only.
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U.S. 293, 297, 54 S.Ct. 396, 398, 78 L.Ed. 804, states that the control of prices 'in the state of destination where the interstate movement ends may operate directly to restrain and monopolize commerce.'

"The cases cited by the district judge in one of his rulings sustain his holding that agreements stabilizing such prices either at a maximum or a minimum or through a formula violate the Sherman Act. [citing six Supreme Court and one Federal case]."

There seems no doubt that under the current cases cited, a restraint of trade in local retail sales of goods which have come into the state in interstate commerce, even though involving only one city or town, may violate the federal anti-trust laws.

Most retail merchants in Montana sell primarily goods shipped in from other states during the process of distribution from the manufacturer, which is simply the end of the chain of distribution in interstate commerce so far as the anti-trust laws are concerned. The Sherman Act fixes the basic regulatory policy for such transactions.

The Sherman Act is designed to create and maintain a system of free and open competition. It makes illegal any combination or group attempts to fix prices, as well as contracts to do so. This rule is strictly applied by the courts. They do not tolerate partial price fixing.

The state Act attempts to provide for both a considerable


"The purpose of this statute was to keep the rates of transportation and the prices of competition in interstate and international commerce open to free competition"; U. S. v. Standard Oil Co. (E.D. Mo. 1909) 178 F. 177.

"Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize the commercial intercourse among the states." U. S. v. Underwriters Assn. (1944) cited note 78, supra.

elimination of legitimate price competition, and a considerable group participation by merchants in fixing minimum prices through the guise of “cost surveys” and policing by such groups directly or through the state Trade Commission which is in effect appointed by them and consists of merchants. It gives considerable coercive power to the Commission to get compliance with minimum price orders that are based on an illegal premise. While these things may not be such price fixing that they deny “due process,” though many of these objections were not specifically presented to the Supreme Court in the Ormesher case or considered in it, they do run head-on into the contrary policy set by the Sherman Act. Furthermore, in the broad field of interstate commerce as now defined, they are an attempt to regulate a matter that the state cannot regulate because the federal government has already preempted the whole field of regulation by the anti-trust laws, Robinson-Patman Act, Federal Trade Commission Act and other general regulatory laws.

In two recent cases, the Circuit Court of Appeals for this


The Federal Trade Commission (1942) 34 F.T.C. 1431, found the Western Confectioners Assn. guilty of violating the Trade Commission Act by activities under the California Unfair Practices Act. The enforcement activities, though authorized by the state law, were found by the commission to be a program of “aiding and abetting in instituting court proceedings against manufacturers selling at prices below the costs” found by the Association’s survey, and of “disseminating threats . . . that any manufacturer who sold below the cost figures adopted would be prosecuted under the . . . Act.” The commission found prices were stabilized and increased through this program. The commission ordered an end to such price fixing and attempting to “coerce other manufacturers by threats of legal action or otherwise, to maintain uniform and minimum prices.” There was no showing of fraud in making the cost survey or that the association went beyond what the Calif. act authorized.

A similar order was issued against liquor distributors for similar operations under the Calif. act also viewed as price fixing: (1940) 31 F.T.C. 1453.

See note, 57 Yale L.J. 391, at 418 (1948) for discussion of other prosecutions. Also CCH, Trade Regul. Rep. for list of similar prosecutions and others involving local restraints affecting interstate commerce, some in areas as small as one city or town.

U.S. Constit. Art. VI; Cloverleaf Butter Co. v. Patterson (1942) 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754; Hill v. Florida (1945) cited note 77 supra; U. S. v. South-Eastern Underwriters Ass’n (1944) cited note 78 supra, which found the state statutes did not authorize the acts, but indicated state statutes could not authorize acts violating the federal law.

circuit held that trade association activities in maintaining a scale of prices based on "cost" as found in a trade survey under a California law similar to ours, by coercion in threatening prosecution under such act, without notice to the retailers that the prices so fixed were nothing more than prima facie evidence of costs in case of prosecution and without notice that an intent to injure competitors or destroy competition was also a necessary element of violation of the state Act, were illegal price fixing combinations and conspiracies violating the Sherman Anti-Trust Act. The trade associations investigated retailers' prices and used persuasion and coercion against retailers, wholesalers and manufacturers, to maintain a uniform markup and scale of prices. The Court held that these activities were not justified by the state law because the state law only forbade sales below cost with intent to injure competitors or destroy competition, and mere price cutting did not show such intent. There is a

The court commented particularly on the attempt to make retailers believe that any sale below price lists furnished by the association based on "cost surveys" automatically violated the law.

The California act was amended changing "and" to "or" in the intent clause, so only intent to injure competitors is now required. The federal court however seems to give this phrase a restricted meaning not much broader than the original phrase.

The trade association activities which the court found proved a violation of the Sherman act in the Food and Grocery Bur. case, cited note 87, were:

1. Evidence of intent to maintain uniform mark-ups by retailers.
2. Use of "cost surveys" to fix minimum resale prices; not merely to furnish rebuttable evidence in a prosecution.
3. Active investigation of retailers' prices.
4. Coercion of retailers not to sell below price lists, based on "cost surveys" provided for by the Calif. law, furnished by the Bureau. The court concluded that the Bureau conspired to compel the Bureau members and others to sell food and groceries at not less than minimum prices circulated by the Bureau, regardless of whether such sales were with intent to injure a competitor or diverted trade from him.
5. Inducing discrimination against products from out of state, shipped into the state in interstate commerce at some time, in favor of local products.
6. Putting pressure on manufacturers and wholesalers to maintain uniform prices and not cut prices.

The court held that local retail sales of goods which may at any time have been shipped in interstate commerce were within the Sherman Act as sales which would affect interstate commerce, saying:

"The Supreme Court in Local No. 167 v. U. S., 291 U.S. 293, states that the control of prices in the state of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

The court also said:

"... agreements stabilizing such prices either at a maximum or a minimum or through a formula violate the Sherman Act [citing many cases]."
reasonable implication from these cases that the state law could not justify acts which violate the federal anti-trust law even if an attempt was made to liberalize it.

Of course the state does retain a general police power and may regulate some unfair trade practices in local sales that affect interstate commerce. But only so far as price cutting is an unfair trade practice may it be forbidden. The "below cost" Act, as construed in the Ornesher case, only forbids sales below "cost," as figured on any reasonable business basis, made for the "purpose of injuring competitors and destroying competition." Given such a construction, particularly as to intent, the Act would not violate the federal anti-trust law or interstate commerce clause. But many specific provisions of the Act must be limited or eliminated to give it that meaning. Any more liberal interpretation of the Act would seem to make it legalize partial price fixing which the federal legislation forbids, and would interfere with the free and open competition which Congress has declared shall prevail in interstate commerce.

True, the Nebbia case held that a state might regulate prices in a single business where the public interest required it, even though the business was not a public utility or calling. The business involved was the milk business where health requirements of the public require considerable regulation in the public interest, and price regulation seemed necessary because of the disorganized state of the business in order to get an adequate supply of such a necessity. The case treats price fixing as an extraordinary type of regulation only justified by unusual circumstances where the public interest requires it. The case does not hold that the states can engage in general price fixing. It does not relax the general rule against price fixing in private business. It merely liberalizes the concept of a business "affected with a public interest" to include such a business which it not a public calling or public utility, where unusual circumstances make it necessary in the public interest to regulate prices. There still must be a great public interest to justify such price regulation.

Our state anti-trust provision is incorporated in our Con-

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87Federal cases cited note 87 supra.
89The Nebbia case has not been held to liberalize the rule against price fixing beyond allowing the states greater freedom in fixing prices in single businesses where the public interest seems to require it. The case hardly appears to have intended to reverse our basic theory of a
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stition where the legislature has no power to modify it." It also makes illegal any private group activity to fix prices. It also seems clearly to imply that the policy of this state is to be one of free and open competition, free from price fixing and restrictive trade practices.\^\textsuperscript{a} This is a much stricter policy against price fixing devices and restrictions on competition than the Court could imply from the broad provisions of the due process clause alone, which was the only issue presented in the Ormesher case.\^\textsuperscript{a} The anti-trust provision seems to raise much more doubt of the constitutionality of provisions of this statute. It certainly seems to make the restrictive construction of the Act given in the Ormesher case essential to its validity.

The problem is, therefore, not how much regulation is permitted by the broad restrictions of the due process clause, but how far the state can go in making price cutting an unfair trade practice forbidden by law, in the face of federal anti-trust laws and state constitutional provisions forbidding price fixing, com-

free economy based on free and open competition, but was aimed at greater freedom in meeting situations where competition was not operating adequately to protect the public interest.

A rather clear statement of such basic theory is found in State v. Packard-Bamberger & Co. (1938) 16 N.J. Misc. 479, 2 A.(2d) 599:

"I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear; as for example the milk industry. I believe we cannot too greatly exaggerate the value and importance to the public of fixing a fair price in competition.

"Fixing the price on all goods is a very different thing from fixing the price on one kind of article. The one means destruction of all competition and of all incentives to increase excellence of the product; the other means heightened competition and intensified incentive to increase quality."

A recent case, Hood and Sons v. DuMond (1948) 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 682, said, relative to the Nebbia and subsequent milk cases:

"Production and distribution of milk are so intimately related to the public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and most difficult. These have involved detailed intricate and comprehensive regulations including price fixing."

This does not sound like legalization of unlimited price fixing by the states. The case also held that an attempt to prevent shipment of milk out of the state on the ground of inadequate supply for local use violated the commerce clause. An earlier case also held an attempt to prevent importation of milk from another state violated the commerce clause: Baldwin v. Seelig (1934) 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032.

\^\textsuperscript{a}Mont. Const. Art. XV, §20, quoted supra.
\^\textsuperscript{a}Cases cited note 49.
\^\textsuperscript{a}Notes 40, 41 supra.
plete or partial, in any form. The legislature cannot change this basic policy established by superior law. The only problems then are: First, whether there is a serious public problem requiring price fixing as an apparently necessary remedy (as in the Nebbia milk case), which obviously cannot justify general price fixing for all retail business on the theory that price cutting is harmful to the public, when historically and under the anti-trust laws price competition is considered essential to protect the public and required by the public interest. Second, whether there is a specific unfair trade practice which the state can outlaw under its police power. Predatory and ruthless price cutting with intent to injure or destroy competitors by merchants who are relatively more powerful meets this test, and is outlawed by the Act. Ordinary price competition does not, and is not barred by the Act. Intent to "injure competitors and destroy competition" are both required by the Act, so it can cover little more than the predatory and ruthless type of price cutting by relatively powerful competitors. Using specific articles as loss leaders to attract trade might possibly meet this test, if specifically legislated against, though there is conflict on this point." But the Montana law does not seem to forbid the use of loss leaders to attract trade since the obvious intent is merely price competition to attract trade, not intent to injure competitors and destroy competition.

CONCLUSION

The common law principle against restraints of trade is adopted and strengthened, particularly by specifically forbidding price fixing, in the Constitution of Montana. Price competition is the essence of competition, and removal of any part of legitimate price competition endangers our system of free enterprise. Competition is the foundation of the strength and flexibility of our economy. This justifies the hardships and losses it may cause. Even a casual comparison of our system of free competition with the English and European systems of controlled competition, monopolies and restrictive trade practices, indicates the danger of tinkering with the basic principle of our system, competition. Once the camel of controlled competition gets his head in the tent, it is most difficult to get him out again—witness our experience since the late NRA experiment with price fixing and other restrictions on competition with trade associations trying to continue the practices under author-

"Note 54 supra.
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ity of state legislation. And if the camel gets all the way in, the problem becomes acute—witness the problems of England and Europe today resulting from such practices, plus national trade barriers to protect them from outside competition. Removal of restrictive trade practices becomes most difficult when they become imbedded in the economy. It is important to stop restrictive trade practices before they become entrenched. The Montana anti-trust provision deserves a rigid application by the courts.

The "resale price maintenance" law, and its companion statute intending to make it illegal to sell below costs fixed by the merchant in a contract with a third person, seem rather obviously to violate the specific prohibition of price fixing in Article XV, Section 20, Constitution of Montana."

The "below cost" statute, aside from having a defective title which raises a serious doubt of its validity on technical grounds, and aside from delegating legislative, administrative and judicial authority to a group of merchants who cannot be said to represent the public without bias, has substantive defects as well. The Act was designed by its original drafters to enable them, through a state trade commission, to fix and enforce minimum prices. It has been most effective in accomplishing this purpose in Montana for the past twelve years, even though the Supreme Court held that it was not a price fixing act and it only forbade sales below "cost" with "intent to injure competitors and destroy competition."

The merchants, through the Trade Commission, which is made up of merchants and controlled by them through the peculiar manner of appointment provided by statute, have been able to maintain such minimum prices by persuasion and coercion, individually by threats not to sell, and by Commission persuasion and coercion by threats of prosecution. This practice is treading extremely close to the ground of a combination and conspiracy in violation of the federal anti-trust laws as to retail sales of any goods that may have come into

*It is interesting to note the attitude of the United States Supreme Court on resale price maintenance in patent cases. Recent cases had strictly limited the right of the patent holder to fix only the first resale price of the patented article. The recent case of U. S. v. Line Material Co. cited note 92 supra, raises serious doubt as to the validity of resale price maintenance on the first sale. A majority of the court could not be found to either affirm or deny the early General Electric case establishing the right of the patentee. Needless to say, the Miller-Tydings amendment is given a strict construction as in derogation of the basic common law principle against restraints of trade.
the state in interstate commerce, if it is not a violation. It appears to be just as much a violation of the state anti-trust provision both as to intrastate and interstate commerce.

In view of the effective way the "cost survey" and other provisions of the Act have enabled a minimum price scheme to be adopted and enforced, and the impracticability of the courts cutting out all such devices and leaving a law which a layman or even a lawyer not thoroughly familiar with the subject, could understand, it would seem more practical to hold the whole Act invalid. Then if the legislature wishes to pass an act forbidding sales below cost with intent to injure competitors and destroy competition—which appears to be the only valid residue of the Act—they could pass a simple act that an ordinary merchant could understand and one that could not be used to coerce him into foregoing perfectly legitimate price competition, or allow merchants to fix prices by agreement. Judicial construction of the Act has proved most ineffective, as shown by the effective price control maintained by merchants through the Trade Commission since the Ormesher case.

The original review of this act in the Ormesher case, without facts, complete issues, or experience with the act, was inadequate. The experience with the act indicates that it should be re-examined in detail. Even its constitutionality under due process clauses is doubtful: see Thatcher, note supra.