The Constitutionality as Police Power Measures of Recent Pennsylvania Statutes Regulating Unfair Competition

William H. Wood
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The struggle for existence among all types of businessmen has been intensified tremendously by the recent economic depression, and this, in turn, has caused considerable attention to be given to the problem of eliminating certain types of unfair competitive practices which have become prevalent in many businesses. As the striving for customers has grown keener, these unfair competitive practices have changed from comparatively minor annoyances to hazards which many businessmen feel threaten their very existence. Thus, the type of competition which, in a simpler and more primitive society was deemed to be the life of trade, is now looked upon in many quarters as being likely to cause its death.

During the past few years the General Assembly of the Commonwealth of Pennsylvania considered the situation so serious as to make several types of regulatory statutes a necessity. Accordingly, at the past two regular legislative sessions the following acts were passed, primarily for the prevention of unfair competitive practices on the part of various businessmen:

(1) The Act of June 5, 1935, P. L. 266 which legalizes contracts fixing the resale price of trademarked articles.¹

(2) The Act of July 1, 1937, P. L. 2672 which prohibits the sale of merchandise at less than cost.²

(3) The Act of July 1, 1937, P. L. 2465 which inter alia fixes the maximum trade-in allowance for used automobiles and which prohibits the sale of new automobiles for less than cost.³

(4) The Act of June 2, 1937, P. L. 1193 which inter alia requires retail gasoline dealers to post the prices for which gasoline is sold.⁴

*A.B., Bucknell University, 1932; L.L.B., Dickinson School of Law, 1935; Special Deputy Attorney General, Pennsylvania Department of Justice, 1936-1937-1938.

¹ 173 PS 7 to 11.
² 273 PS 201 to 207.
³ 375 PS 1301 to 1322.
⁴ 458 PS 161 to 174.
It will facilitate discussion of the specific provisions of these four statutes as proper exercises of the police power if brief consideration first be given to the general principles which prescribe the bounds of police power regulation.

It is well established that a police power statute must meet two tests if it is to be valid under Federal and State Constitutions. These are:

(a) Is the objective sought to be attained by the statute within the recognized field of police power regulation?

(b) Are the means adopted by the statute reasonably related to the attainment of the desired objective?

It is obvious that the second of these tests can only be considered in connection with the specific provisions of the statutes now under discussion, but it will conserve both time and space to discuss the first test with respect to the general aim of all four statutes.

As will be brought out in greater detail later, the general objective of each of these statutes is the regulation or prohibition of certain common business practices detrimental to the general public welfare chiefly in that they encourage destructive price wars and foster the growth of monopolies.

It has long been recognized that the police power of a state government includes the power to pass legislation for the protection of the public welfare, as distinguished from the public health, safety or morals. It is equally well

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5This discussion is concerned only with the validity of these statutes as police power measures, or in other words, with ascertaining whether, as valid exercises of the police power they are saved from violating the provisions of the 14th Amendment of the Federal Constitution and Article I, Sections 1, 9 and 26 of the Pennsylvania Constitution. The possible effect of other constitutional provisions upon these acts is beyond the scope of this article.


7For examples of cases where the statute involved did not meet this test see Bryan v. Chester, 212 Pa. 259 (1905), (Ordinance designed to improve the aesthetic features of a particular locality by regulating billboards); Treigle v. Acme Homestead Association, 297 U. S. 189, 80 L. ed. 575 (1936), (Statute changing rights of withdrawing members of Building and Loan Associations).

8The question as to whether or not the means adopted are arbitrary or discriminatory is sometimes viewed as a separate test of validity: Treigle v. Acme Homestead Association, 297 U. S. 189, 80 L. ed. 575 (1936). However, it would seem that if a statute be reasonably related to the attainment of the end sought, it is of necessity neither arbitrary nor discriminatory.

For examples of cases where the statute involved did not measure up to this test see Liggett v. Baldrige, 278 U. S. 105, 73 L. ed. 204 (1928), (Pennsylvania statute requiring all owners in corporation operating pharmacy to be registered pharmacists); Weaver v. Palmer Bros. Co. 270 U. S. 402, 70 L. ed. 654 (1926), (Pennsylvania statute prohibiting use of shoddy in bedding).

established that the police power comprehends the authority to regulate or prohibit many types of unfair competition.\(^\text{10}\)

In view of past decisions, it is clear that the chief and general objective hoped to be attained by these statutes is entirely proper and within the field of police power regulation. It is in order, therefore, to consider the reasonableness and efficiency of the means provided by them for the accomplishment of their aims.

**ACT OF JUNE 5, 1935, P. L. 266.**

*(Fixing Resale Price of Trademarked Commodities)*

This statute renders lawful those contracts between buyers and sellers or manufacturers of trade-marked articles\(^\text{11}\) wherein the resale price of such articles is fixed.\(^\text{12}\) It also authorizes contracts providing that vendees of such articles shall not resell them except to sub-vendees who agree, in turn, not to resell them except at the price stipulated.\(^\text{13}\)

The act provides that contracts fixing resale prices shall not govern in the case of closing out sales, judicial sales and sales of damaged or deteriorated goods.\(^\text{14}\). It sets forth that to knowingly and wilfully sell any commodity at less than the price stipulated in any contract entered into pursuant to its provisions shall constitute unfair competition actionable at the suit of any person damaged thereby, whether or not the person making the sale was a party to the price maintenance contract.\(^\text{15}\)

Prior to the passage of this act contracts fixing the resale prices of goods were considered illegal as being in restraint of trade and, therefore, contrary to public policy.\(^\text{16}\) However, the mere fact that this statute legalizes contracts which were once contrary to public policy does not invalidate it.\(^\text{17}\)

\(^{10}\) Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164 (1912); (Statute prohibiting sale of goods at lower rate in one place than in another for purpose of destroying or preventing competition); Newman v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507 (1932); (Statute prohibiting licensing of laundries if schedule of prices indicate they will engage in unfair competition); Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193 (1937); (Statute regulating chain stores for purpose of mitigating evils of competition between chains and independents); Peterson Baking Co. v. Bryan, 290 U. S. 570, 78 L. ed. 105, 90 A.L.R. 1285 (1934); (Statute regulating weight of loaves of bread, partly to prevent unfair competition among bakers); Nebbia v. New York, 291 U. S. 502, 526, 78 L. ed. 940, 950 (1934); Sears Roebuck and Co. v. Federal Trade Commission, 258 Fed. 307, 6 A.L.R. 358 (1919).

\(^{11}\) The statute refers specifically to articles bearing the trademark, brand or name of the producer.

\(^{12}\) Section 1, 73 PS 7.

\(^{13}\) Section 1, 73 PS 7.

\(^{14}\) Section 1, 73 PS 7.

\(^{15}\) Section 2, 73 PS 8.

\(^{16}\) Dr. Miles Medical Co. v. John D. Park and Sons Co., 220 U. S. 373, 55 L. ed. 502 (1911); Ford Motor Co. v. Quinn, 70 Pa. Super. 337 (1918).

One of the chief purposes of this change of attitude as to the economic desirability of untrammeled competition was to regulate the use of trademarked articles as "loss leaders." An article used as a "loss leader" is one which is offered for sale at a greatly reduced price (often below cost) for the purpose of attracting customers. This is done usually with the hope that it will prove possible to retain such customers or to sell them other merchandise at excessive prices. One result of this practice is to impair the valuable good-will which usually exists in connection with a trade-marked article. Furthermore, when a trade-marked article is offered as a "loss leader," the value of similar articles held by competing merchants is reduced, which often leads to price wars. This, in turn, tends to create monopolies.18

While there may be a wide difference of opinion as to whether or not a regulation of the use of trade-marked articles as "loss leaders" is reasonably related to the advancement of a proper legislative purpose,19 the propriety of such regulation is certainly fairly debatable and in such cases the judgment of the Legislature is held to be conclusive.20 It must be presumed that the Legislature found as a fact that the type of unfair competition referred to in this statute is so prevalent and detrimental to the general public welfare as to necessitate regulation. Therefore, in the absence of clear and definite proof to the contrary, it may be said that the regulation of the use of trade-marked articles as "loss leaders" is reasonably related to the end sought, namely, the prevention of destructive price wars and the growth of monopolies.21

Considering now the question as to whether the specific means adopted by the Act of 1935, P. L. 266 to regulate the use of trade-marked articles as "loss leaders" are reasonable, it is apparent that they are, in the main, neither arbitrary nor discriminatory.


20 Cases upholding Fair Sales Acts closely analogous to the Act of 1935, P. L. 266 have been upheld in a number of states: Old Dearborn Dist. Co. v. Seagram Distillers Corp., 299 U. S. 183, 81 L. ed. 109 (1936); Bristol Myers Co. v. Tischhauser, 18 F. Supp. 228 (1936); Johnson and Johnson v. Wiessbard, 191 A. 873; 121 N. J. Eq. 585 (1937); Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937); Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2nd) 929, 104 A.L.R. 1435 (1936); Max Factor and Co. v. Kunsman, 5 Cal. (2nd) 446, 55 Pac. (2nd) 177 (1936).
The act does not impose an absolute prohibition upon the use of trade-marked articles as "loss leaders" but, by authorizing contracts fixing the resale price of such articles, it affords producers or vendors who have been harmed by the practice, and who are most in need of relief, an effective method of guarding against it in the future. The effectiveness of the statute is further assured by the provision authorizing the recovery of damages from persons selling trade-marked articles for less than the price stipulated in a price maintenance contract.

It is usually necessary, in considering any statute which contains the slightest suggestion of price regulation, to refer to the inevitable argument that no species of price regulation is reasonably related to the protection of the public welfare except in businesses "affected with a public interest." Businesses within this category are limited to the following: (a) public utilities; (b) certain trades and occupations, such as the occupation of innkeeper; (c) businesses operating under such circumstances as to be of particular public concern, such as the keeping of grain elevators.

However, the limitation of price regulation to these so-called businesses "affected with a public interest" (although adopted in numerous cases) has been an unsatisfactory and unsubstantial restriction, and in the comparatively recent case of Nebbia v. New York, the Supreme Court of the United States has limited greatly the operation and relaxed the rigidity of this principle. In view of this decision it is safe to say that upon proper occasion and by appropriate measures price regulation is no longer improper per se in businesses which are not within the established category of businesses "affected with a public interest."

Furthermore, it is to be remembered that this statute does not represent an unconditional price regulation by the Legislature. Rather, it merely affords certain persons the right to fix prices by contract.

It does, however, extend the duty of abiding by the prices thus fixed to persons who were not parties to any price maintenance contract. Here, perhaps, lies the greatest objection to the validity of this act as a reasonable exercise of the police power. Since it makes even persons who were not parties to price maintenance contracts liable to suits for damages for knowingly selling trade-marked articles at prices below those fixed in such contracts, it may well be viewed as arbitrary in that such persons have not acceded to the resale price thus


fixed, and, in fact, may even have been unaware of it at the time the article was purchased.

However, statutes containing this same provision have been upheld by other courts, including the Supreme Court of the United States, and even if the Pennsylvania courts were to consider it invalid, the act is severable and the remainder likely will be sustained as a proper exercise of the police power.

It is not a valid objection to this statute that the use as "loss leaders" of ordinary articles not bearing trade-marks is equally detrimental to the public welfare as is the use of trade-marked articles. It is within the province of the legislature to aim regulatory measures at whichever particular phase of a general problem is most in need of attention.

Nor can the act be objected to as tending to foster monopolies, for it provides expressly that it shall not be deemed to authorize price maintenance contracts between wholesalers, producers or retailers.

"In several of the decisions of this court wherein the expressions 'affected with a public interest' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the bases that the requirement of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

In the case of Rohrer v. Milk Control Board, 322 Pa. 257 (1936), the Supreme Court of Pennsylvania seems to view with favor this more liberal attitude, for in that decision it upheld the constitutionality of the Pennsylvania Milk Control Law, and the business of producing and selling milk is not within the class of businesses "affected with a public interest," as that category had been established in the earlier cases involving price regulation. On the other hand, the Dauphin County Court, which is the court before which the constitutionality of most police power statutes is first raised, has indicated that it still regards price regulation as being limited to businesses of the type which have always been recognized as being "affected with a public interest": Heinel Motors et al. v. William D. Teefy et al., 295 Commonwealth Docket, 1937 (not yet reported); Sperry and Hutchinson Co. v. Boardman et al., 308 Commonwealth Docket, 1937 (not yet reported); Scudder v. Smith, 45 Dauphin County 209 (1937).

It has been indicated in several cases that price fixing by private parties is subject to the same limitations as legislative price fixing: Fairmount Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893 (1927); O'Gorman and Young, Inc. v. Hartford Fire Insurance Co., 282 U. S. 251, 75 L. ed. 324 (1913); Dist. Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164 (1912).

It has been argued that this provision can be sustained on the theory that a price maintenance contract attaches something in the nature of an equitable servitude to the articles involved, and that this restriction follows the article into the hands of all purchasers. This, however, would require that the section be construed as applicable only to persons who purchase articles with knowledge of the existence of a price maintenance contract: Washington ex. rel. Seattle Title Trust Company v. Roberge, 278 U. S. 116, 73 L. ed. 210 (1928).

In the Dearborn Case it was held that this provision was not arbitrary or unreasonable because its application could be avoided by removing the trademark before sale.

Section 3, 73 PS 11.


Section 3, 73 PS 9.
ACT OF 1937, P. L. 2672.

(Prohibiting the Sale of Merchandise at Less Than Cost)

The Act of June 5, 1935, P. L. 266 which was designed to prevent the use of trade-marked articles as "loss leaders," was followed by the Act of July 1, 1937, P. L. 2672 which was enacted to prevent the use of any type of merchandise as "loss leaders."

As has been shown, the Act of 1935, P. L. 266 accomplished its purpose by authorizing contracts fixing the resale price of trade-marked goods. The Act of 1937, P. L. 2672, on the other hand, attempts to abolish the general use of loss leaders by prohibiting the sale of all merchandise at less than cost.

The act defines cost31 as whichever is the lower of the following two figures: (1) the total consideration paid for the article at the wholesale or retail outlet, or (2) the total consideration necessary for the replacement of the merchandise at the wholesale or retail outlet, such consideration to be determined by applying to said merchandise the same cost per unit as the last quantity purchased prior to the sale of said merchandise would have cost per unit if bought at the most favorable market price available within 60 days prior to said sale. In computing cost, merchants are permitted to deduct from the amount thus computed any customary trade discounts.

The act makes it a misdemeanor to sell merchandise at less than cost,32 and authorizes the issuance of injunctions restraining violations of its provisions.33

It is obvious that this act constitutes a more direct and far-reaching interference with the previously accepted right to sell ordinary merchandise at whatever price the seller wishes, than did the Act of 1935, P. L. 266. Nevertheless, it is aimed at the same type of unfair competition as was the earlier act and its constitutionality as a police regulation should be governed by analogous principles.

The use of all types of merchandise as "loss leaders," which is prohibited by the Act of 1937, P.L. 2672, adversely affects the public welfare, just as does the similar use of trade-marked articles, in that customers are often attracted thereby for the purpose of selling them other articles at higher or excessive prices. The use of all types of merchandise as "loss leaders" also tends to destroy competition, leads to price cutting and creates monopolies.

A number of cases have already been referred to which recognize that the prevention of unfair business practices that tend to destroy competition, foster price cutting and create monopolies is a proper objective of police regulation.34

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31Section 1, 73 PS 201.
32Section 3, 73 PS 203.
33Section 4, 73 PS 204.
34See Footnote 10.
In addition, the decisions in other jurisdictions upholding statutes legalizing price maintenance contracts indicate definitely that the regulation of the use of "loss leaders" is reasonably connected with the prevention of price wars and with the growth of monopolies.\(^{86}\) It is true that those statutes were aimed solely at preventing the use of trade-marked articles as "loss leaders," but they were aimed at the same type of unfair trade practice as is the Act of 1937, P. L. 2672.

Even more in point, the courts of several other jurisdictions have held to be valid Unfair Trade Practice statutes almost identical to the Act of 1937, P. L. 2672.\(^{86}\)

Turning now to a consideration of the effectiveness and reasonableness of certain specific provisions of this act, it is to be repeated here that the act should not be held invalid merely because of its element of price fixing.\(^{86,6}\) In the first place the act does not actually fix prices, but merely prescribes a certain minimum below which merchants are prohibited from going. Otherwise they are free to sell their merchandise at any price desired. In light of the recent more liberal attitude of the courts toward price regulation, which has been discussed in some detail above in connection with the *Nebbia Case*, the Legislature did not act unreasonably or arbitrarily in taking the position that the public concern in the use of "loss leaders" justified the limited form of price regulation set forth in this act. It should be noted that in the decisions already referred to,\(^{36}\) upholding Fair Sales Acts and Unfair Trade Practice Acts in other states, the limited price regulating feature of such acts were considered in the light of the *Nebbia Case* and were held to be proper and reasonable means of preventing unfair competition, through the regulation of "loss leaders."

Serious objection to the statute could not be based on the theory that the use

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\(^{85}\)See Footnote 21.

\(^{86}\)Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Co., 82 Pac. (2nd) 3 (1938); (California Unfair Practices Act held constitutional). See also People v. Kahn, 2 Cal. Supp. 191, 60 P. (2nd) 596 (1936). In the cases of Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Co., 74 Pac. (2nd) 848 (1937), and Balzer v. Caler, 74 Pac. (2nd) 839 (1937) the California Act had been held unconstitutional as being price regulation in businesses not affected with a public interest. Rust v. Griggs, 172 Tenn. 565, 113 S. W. (2nd) 733 (1937); (Tennessee Unfair Practices Act held constitutional); Great Atlantic and Pacific Tea Co. v. Ervin, 23 Fed. Supp. 70 (1938), (Minnesota Unfair Practices Act held unconstitutional). This decision, however, expressly recognizes the validity of the objective of the statute and based its holding upon the arbitrary features of the means adopted to attain that objective.

\(^{86,6}\)In the case of New Jersey v. Packard-Bamberger & Co., decided by the District Court of Bergen County on October 24, 1938 (not yet reported), it was ruled that the New Jersey Fair Sales Act, which prohibits the sale of merchandise at less than cost by retailers, is unconstitutional. The Court ruled the Act to be invalid as price regulation on the ground that the business of retailers is not "affected with a public interest."

On December 1, 1938, Judge Valentine, in the Court of Quarter Sessions of Luzerne County, in the case of Commonwealth v. Hodin, 33 D. & C. 449a (1938); quashed an indictment charging a violation of the Act of 1937, P. L. 2672, on the ground that the act is unconstitutional. This holding of unconstitutionality was based chiefly upon the theory that the general sale of commodities is not "a business affected with a public interest" and that it is, therefore, improper to fix the prices of such sales.

\(^{87}\)See Footnotes 21 and 36, supra.
of "loss leaders" is not prevalent in all types of business, and that a blanket prohibition is, therefore, unreasonable and unnecessary. The principle is now well established that an exercise of the police power is not invalidated by the fact that in the general field regulated there may be a few situations which do not require such regulation.\(^8\) The Legislature, if it deems it necessary, is entitled to aim a general prohibition at a prevalent practice, even though a few innocent situations be affected.

The act contains adequate exemptions for any unusual situations for it sets forth that its provisions shall not apply to clearance sales, judicial sales, liquidation sales, charity sales, sales of perishable or damaged merchandise, and sales at prices reduced to meet those of competitors.\(^8\)

The definitions of cost adopted by the statutes are in the main sufficiently definite to be workable and sufficiently elastic not to be arbitrary.

It should be noted, however, that these definitions make no provision for reckoning or including "overhead cost" or "cost of doing business." Accordingly, it might be argued that a merchant could comply with the statute by selling his goods just above cost as therein defined, and still offer a species of "loss leader" by omitting his cost of doing business from the sale price of such article.

Whether this would render the entire statute unreasonable on the ground that it is ineffective is debatable.

There are certain other more objectionable features among the specific provisions of this act. In the first place, it may well be that the sections which prohibit the sale or offer for sale of any merchandise at less than cost, regardless of the intent of the merchant in making such sale, or the effect upon competitors of such sale, are arbitrary and unreasonable.\(^4\) In the case in which the California Unfair Trade Practices Act was upheld,\(^4\) it was intimated that a prohibition upon such sales, regardless of the intent or effect thereof, was arbitrary and unnecessary. A similar intimation was expressed in the case which declared the Minnesota Act unconstitutional.\(^4\) It is argued that, in order to accomplish the objective of this act, it is only necessary to prohibit those sales at less than cost which are made for the purpose of, or with the effect of, destroying competition.\(^2a\)

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8\(^{8}\) Section 5, 73 P.S. 205.

4\(^{8}\) Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893 (1927).


2a\(^{2a}\) On November 28, 1938, Judge Gardner, in the Court of Quarter Sessions of Allegheny County, in the case of Commonwealth v. Zasloff, 88 Pitts. L. J. 597, 33 D. & C. 447a (1938), quashed an indictment charging a violation of the Act of 1937, P. L. 2672, on the ground that the act is unconstitutional. Judge Gardner's decision is based largely on the theory that the act is arbitrary and unreasonable in prohibiting sales at less than cost, regardless of the intent or effect of such sales.
The only answer to this objection would seem to be that it was permissible for the Legislature to consider intent and effect to be elements so indefinite and difficult to prove that, in order to make the act efficient, it was necessary to impose a general prohibition against sales at less than cost. That this may be done under some circumstances often has been indicated.\footnote{Otis v. Parker, 187 U. S. 606, 47 L. ed. 323 (1903); Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184 (1912); Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679 (1916); Merrick v. Halsey & Co., 242 U. S. 568, 61 L. ed. 498 (1917).}

Clearly, however, this act is not as likely to be sustained by the Pennsylvania courts as is the Act of 1935, P. L. 266, which merely regulates the use of trade-marked articles as "loss leaders." The earlier act not only lacked the arbitrary features of this statute, but the propriety of its objective was strengthened by the protection it afforded to the valuable good-will which is usually an incident of trade-marked articles. Furthermore, acts similar to the Act of 1935, P. L. 266 have been sustained in a number of courts of other jurisdictions, including the United States Supreme Court, whereas there seems to be a split of authority as to the constitutionality of acts such as the Act of 1937, P. L. 2672. It is submitted that a few simple amendments correcting the arbitrary features referred to above would strengthen greatly the constitutionality of this act.

**THE ACT OF JULY 1, 1937, P. L. 2465.**

(Fixing Trade-in Allowances on Used Cars)

Another recent legislative measure which relates to unfair competition, although it is less comprehensive than the two statutes already discussed, is the Act of July 1, 1937, P. L. 2465 which regulates the activities of automobile dealers. This act embodies numerous regulations of the used car business but, in view of the scope of the present discussion, we are concerned chiefly with its price fixing features.

The act creates a Motor Vehicle Dealers' Commission\footnote{Section 4, 75 PS 1304.} and empowers it to fix the maximum price which automobile dealers may allow for used motor vehicles.\footnote{Section 5, 75 PS 1304.} The respective prices are to be based upon the average sale price of the various models of motor vehicles during the preceding thirty days, and new prices are to be fixed every thirty days.\footnote{Section 15, 75 PS 1315.} The bill provides for the selection of appraisers to appraise used automobiles before their sale to used car dealers\footnote{Section 10, 75 PS 1310.} and prohibits such appraisers from appraising vehicles at a greater amount than the price fixed by the commission.\footnote{Section 16, 75 PS 1316.} The act provides that the appraiser shall
deduct from the allowance value of the car as fixed by him, the amount necessary
to place it in good repair.\(^4\)

The act also prohibits dealers from allowing more for a used automobile
than the figure contained in the certificate of appraisal, and from selling new
cars for less than the manufacturer's list price, plus transportation costs.\(^5\)

The preamble of the statute indicates that the objective of its price regula-
ting features is two-fold,\(^6\) (a) to eliminate unfair and ruinous competition in
the used car industry, and (b) to protect the motoring public by improving
the condition of used cars on the highway. The struggle for sales among auto-
mobile dealers has induced many dealers to make excessive allowances for used
cars. This is, in effect, a type of price cutting and its result has been to force
many dealers out of business and to influence them, in an attempt to recover as
much as possible of the sum allowed for used cars to resell them without spend-
ing the money upon them necessary to place them in a safe condition. An
examination of the statute as a whole, however, indicates that its chief aim is to
regulate the severe and cutthroat competition among automobile dealers with
respect to the prices allowed for used cars.

As has been indicated, the prevention of unfair competition, which leads
to price wars and monopolies, is a proper objective of an exercise of the police
power.\(^7\) The chief issue, therefore, in considering the validity of this statute,
is whether or not the means adopted are reasonably designed to secure the end
sought and are not arbitrary or discriminatory.

In the first place, this act goes much further than either of the two acts which
have been discussed. Its operation would\(^8\) serve to fix the maximum price above
which owners of motor vehicles could not go in selling their cars to dealers, and
to fix a minimum price below which new cars could not be sold.\(^9\)

Price regulation, because it affects private rights so directly and materially,
often is held to be an arbitrary and unreasonable means of police regulation in
ordinary circumstances, and while it is not necessary for a business to be "affected

\(^4\) Section 16, 75 PS 1316.
\(^5\) Section 17, 75 PS 1317.
\(^6\) This is the only one of the four statutes now being considered in which the Legislature
expressed, by way of a preamble, findings of fact indicating the necessity for the regulation.
Such legislative findings of fact are not essential to the validity of a statute, but they render
more difficult the burden upon contestants to show that the regulation is not reasonably related
to the protection of the public health, safety, morals or welfare: Mahon v. Pennsylvania Coal
\(^7\) See Footnote 10.
\(^8\) Although the effective date of this act was set as July 1, 1937, its price regulating features
have never become operative. The Dauphin County Court, in the case of Heinel Motors Inc.,
et al. v. Teefy et al., 295 Commonwealth Docket 1937 (not yet reported), granted a preliminaiy
injunction, restraining the enforcement of the act and this injunction remained in force until
November 22, 1938, when it was made permanent. See Footnote 23.
\(^9\) The portion of this statute which prohibits the sale of new automobiles at less than the
manufacturer's list price is only a specific application of the same type of regulation prescribed
in the Act of 1937, P. L. 2672 which prohibits sales at less than cost. The validity of that
type of regulation has already been discussed and it need not be repeated here.
with a public interest” in order to justify such regulation, the objective sought to be obtained thereby must be of immediate and material concern to the public, and the price regulation must be clearly and directly related to the attainment of that objective. The Pennsylvania Milk Control Law seems to have extended as far into the field of price regulation as the courts of the Commonwealth are likely to permit with respect to a business which is not, strictly speaking, within the established category of a business “affected with a public interest.”

The Milk Control Law was held to be unconstitutional in the Superior Court by a four to three decision and constitutional in the Supreme Court by a five to two decision. It is obvious that the public concern in unfair competition in the milk business, and consequently in the adequacy and purity of the milk supply, is more vital than is its concern in the rigorous competition among motor vehicle dealers or in the adequacy of second hand cars. In other words, while the milk business may be of sufficient public interest to justify stringent price regulation, the motor vehicle industry probably is not.

On November 21, 1938, the Dauphin County Court, in an opinion written by Judge Karl Richards, held this act to be unconstitutional, squarely on the ground that the sale of new and used automobiles is not a “business affected with a public interest” and that any regulation of the prices for which such vehicles may be sold is, therefore, invalid.

Little fault can be found with the result of this decision but it is submitted that the same result should have been attained without placing such strong reliance upon the “business affected with a public interest” theory. In the first place the accuracy of this principle as a rule of thumb test for determining the validity of price regulating statutes has been questioned considerably. The decision would have constituted less of an obstacle for future price regulating legislation which undoubtedly will be deemed necessary in many fields, if it had been based on the theory that the public concern in unfair competition among the automobile dealers is not so great or immediate as to justify the stringent type of price regulation embodied in this act, rather than upon the theory that no price regulation is permissible in a business not within the arbitrary classification of a “business affected with a public interest.” Also the decision invalidating this act might well have been based upon the arbitrary and unreasonable aspects of certain of its specific provisions.

The maximum price which may be allowed for used cars is to be the average price at which the various models were sold during the previous thirty days. Thus, owners of cars which are below this maximum allowance in actual

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59Section 15, 75 PS 1315.
value may receive the actual appraisal value for their cars while the owners of cars which are above the maximum allowance in actual value may receive only the maximum allowance. This is an arbitrary requirement for, since dealers may allow only the appraisal figure for a used car, the act could accomplish its end equally well by allowing every car to be appraised at its actual value.

Another unreasonable feature of the act lies in the fact that it fixes an arbitrary allowance of $50.00 for all used cars eight years or more in age. The act is equally unreasonable in that it exempts from its operation trucks of a capacity over one and one-half tons, buses and motorcycles.

Other objections which might be raised against the act are that it applies to all sales of used motor vehicles, whereas to accomplish the desired end, it need only apply to the turning in of used cars as a means of reducing the purchase price of new cars; and that there is no appeal from or review of the figures fixed by appraisers. Also, there seems to be but little actual relationship between fixing of a maximum price allowance for used cars and the adequacy and safety of such cars after their resale by dealers.

Even if the type of price regulation adopted by this act is not invalid per se, as held by the Dauphin County Court, the arbitrary features referred to above likely would render the act unconstitutional and the decision invalidating the statute probably will be affirmed.


(Requiring retail gasoline dealers to post prices)

The last of the four statutes to be discussed at this time is the Act of June 2, 1937, P. L. 1193, which regulates the retail gasoline industry in various respects. The portions of this statute which relate to unfair competition are those which require retail gasoline dealers to post in a conspicuous location at their places of business, a sign or signs showing the price for which liquid fuels are sold. The act prohibits the sale of liquid fuels at less than the prices posted and it prohibits retail dealers from attempting to evade the price posting requirements by giving articles of value or services for which payment is ordinarily required to purchasers of liquid fuels. Ostensibly the act was designed chiefly to protect the public against fraud and deception, but actually one of its main objectives was the abolition of the practice of giving secret discounts which had grown up among retail gasoline dealers.

88Section 17, 75 PS 1317.
89Section 15, 75 PS 1315.
90Section 3, 75 PS 1309.
91Section 3 (a), 58 PS 163.
92Section 3 (b), 58 PS 163.
93Section 3 (b), 58 PS 163.
94The title provides, in part, that it is "An Act to protect the public against fraud and deception. . ."
The struggle for customers among retail gasoline dealers had induced many of them to offer secret or so-called "under canopy discounts" to certain favored customers as a method of building up a clientele. As a result of this practice, competing dealers often lost a large portion of their business without being aware of the reason therefor. In many cases such dealers were moved to resort to price wars in an effort to regain their customers and in these wars numerous dealers inevitably were driven out of business. Thus the practice of giving secret discounts tended to foster the growth of monopolies.67

It seems, therefore, that a prohibition of secret discounts is related reasonably to the attainment of an objective which is entirely within the Legislature's police power. It is contends in many quarters that the policy of this act is unwise,68 but this is a question of legislative wisdom and if the desirability of the regulation is fairly debatable, the decision of the Legislature may not be reviewed.69

Whether or not the specific methods relied upon to control this type of unfair competition are unreasonable or arbitrary is a more serious question.

A few years ago the United States Supreme Court in the case of Williams v. Standard Oil Company,70 ruled that the gasoline industry is not within the category of a "business affected with a public interest," and that a statute regulating the price of gasoline was unconstitutional.71

This case, however, antedated the Nebbia decision and, as has been indicated,72 that decision established a markedly changed attitude with respect to the validity of price regulation in businesses other than the type which had been recognized as within the class of businesses "affected with a public interest."

In any event, this act, if it can be said to regulate prices at all, regulates them only in an indirect and minor respect. It merely requires that retail gasoline dealers give public notice of the prices for which liquid fuels will be sold and that liquid fuels not be sold for other prices than those published.73

It might be noted in this connection that this act was first construed by the

67It is also alleged that the use of secret discounts, by depriving some dealers of so many of their customers that they are unable to make a living, induces them to adulterate, misbrand or short measure gasoline. An additional argument against the practice is that the portion of the motoring public which does not receive the secret discount is discriminated against unfairly.

68The argument is often made that requiring prices to be posted leads to price wars, rather than prevents them. It is also argued that if every dealer posts his prices, the better equipped gasoline stations will attract the greater portion of the business, and the growth of monopolies will thus be fostered.

69See footnote 20.


71It is interesting to note that the statute involved in this case also prohibited the granting of rebates and the selling of gasoline at different prices. The Dauphin County Court, upon the basis of this decision, ruled in the case of Scudder v. Smith, 45 Dauphin County 209 (1938), that the business of selling oil and gasoline in Pennsylvania is not a "business affected with a public interest."

72See footnote 22.

73It is interesting to note that in the Act of June 5, 1937, P. L. 1689, barbers are prohibited from displaying price lists in such a manner as to be visible from outside the shop.
Department of Revenue\textsuperscript{74} as prohibiting the sale of gasoline at a discount for quantity purchases and as prohibiting the giving of premiums or services to purchasers of gasoline.\textsuperscript{76} The act, as thus construed, was attacked in several bills in equity filed in the Dauphin County Court, and in an opinion written by Judge Richards, it was ruled that those sections of the act were unconstitutional which had been construed as prohibiting the sale of gasoline at a discount or the use of premium stamps.\textsuperscript{76} In this result the decision seems unassailable for it is difficult to see any sufficiently reasonable relationship between the statute's objective of abolishing secret discounts and a prohibition against all sales of gasoline at a discount or against the furnishing of premiums, services or articles of value. Such provisions seem to be arbitrary means of effecting the purpose sought by the statute for they restrict the rights of dealers much more than is necessary to effect the desired ends.\textsuperscript{77} In order to prevent secret discounts it is only necessary to require dealers to post their prices, including discount prices and the nature of any premiums or services that are offered. The desired element is publicity for the price in effect and, in view of that, it should make little difference what that price may be or what comprises it.

Since this decision the Department of Revenue has taken the more reasonable position that the act merely requires all prices to be posted; together with a notice of any discounts, premiums or services that may be included, and that the giving of discounts, services or premiums is not prohibited.\textsuperscript{78} Operating in this form the statute is probably a valid exercise of the police power.

It may prove difficult to explain the selection of the gasoline business for this type of regulation when secret discounts constitute a prevalent and detrimental competitive practice in other types of business. Reference has already been made, however, to the principle that the Legislature may set about correcting an evil in the quarter in which it is most pernicious and that it is not necessary to proceed against it at once on every front.\textsuperscript{79} The Legislature may have felt, with good reason, that competition among retail gasoline dealers is more keen than in other businesses, and that the practice on the part of gasoline dealers of giving secret discounts is more prevalent and its evil potentialities are greater than is the case with other business men. In any event, if the courts are to be taken at their word, the burden of proving otherwise will be upon the

\textsuperscript{74}Section 13, 59 PS 173, expressly charges the Department of Revenue of the Commonwealth of Pennsylvania with the duty of enforcing the act.
\textsuperscript{75}Bulletin No. 1 issued by the Bureau of Liquid Fuels Tax on June 25, 1937.
\textsuperscript{76}Sperry and Hutchinson Co. v. Boardman, No. 308 Commonwealth Docket (1937) (not yet reported).
\textsuperscript{77}However, in the case of Commonwealth v. Latterman, 52 York 29 (1938) it was ruled that this act, as originally construed by the Department of Revenue, was constitutional.
\textsuperscript{78}Bulletin No. 6, issued September 21, 1938.
person attacking the statute, and this burden will be comparatively difficult to meet. 80

In conclusion, it is of interest to note that in none of the foregoing statutes is the problem of regulating unfair competition entirely disassociated from other considerations. In each case the general public's indirect interest in the ability of the various members in a particular business to make a living and in the prevention of the growth of monopolies is accompanied by a more immediate and direct concern. Thus, the Act of 1935, P. L. 266, which authorizes price maintenance contracts applying to trade-marked articles, not only protects merchants and manufacturers from the hazards of unfair competition, but also protects the public against being lured by "loss leaders" to purchase other articles at excessive prices. The Act of 1937, P. L. 2672, which prohibits sales at less than cost, has a similar dual effect.

The Act of 1937, P. L. 2465, which fixes prices of new and used automobiles, in addition to preventing unfair competition among automobile dealers, purports to place used cars in a safer condition for travel on the highways.

Finally, the Act of 1937, P. L. 1193, which prohibits retail gasoline dealers from giving secret discounts, also protects the general motoring public from the discrimination which arises when secret discounts are given to a favored group of customers, and from the adulteration, misbranding and short measure of gasoline which is encouraged when retail gasoline dealers are unable to make a fair margin of profit.

WILLIAM H. WOOD