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Some Legal Aspects of California Recovery Legislation

CALIFORNIA'S recently enacted recovery legislation was designed to enforce for intrastate commerce the provisions of codes of fair competition promulgated under the National Industrial Recovery Act, as well as to preserve for California, so far as possible, by means of state codes for local industries, a standard of living relatively higher than in other sections of the United States. Assembly Bill 2432, commonly known as the California Recovery Act,[1] sought the first end; Assembly Bill 2400, commonly known as the Supplement to the California Act,[2] the second.

It is the purpose of this article to see if the objects of these acts are real and worth attaining or if their very necessity has been nullified by action of the National Recovery Administration since their enactment. We shall probe the practicality and legality of the methods of enforcement set up by the acts. We shall survey the work already accomplished under them. Finally, we shall ponder a perplexing economic future long enough to block out the possibilities and functions of independent recovery legislation in California.

Throughout we shall assume that the recovery act and its basic predicates do not fall within the category of unconstitutional legislation; that the codification of industry is not the taking of property without due process of law.[3] Obviously, this is a large question, distinct from the instant one, whose unfavorable disposition would eliminate the writer's effort or the reader's indulgence in this article. Since this whole course of legislation is so recent and so novel, the writer feels he must humbly state that his following observations are no more than hypothetæ and possible theories open to the courts rather than

[1] Cal. Stats. 1933, c. 1039.

[2] *Ibid.*, c. 1037.

[3] For discussion of the constitutional aspects of the recovery program, see: MCLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE UNITED STATES (1933) 719; Handler, *The National Industrial Recovery Act* (1933) 19 A. B. A. J. 440; Wahrenbrock, *Federal Anti-Trust Law and the National Industrial Recovery Act* (1933) 31 MICH. L. REV. 1009; *Some Legal Aspects of the National Industrial Recovery Act* (1933) 47 HARV. L. REV. 85-93.

conclusions demonstrable by precedent. Moreover, this article by no means pretends to survey completely the state legislation but only to comment upon various aspects of it which have worked confusion.

I. HISTORY AND INTERPRETATION OF STATE RECOVERY LEGISLATION

A history of the state legislation shows what it intended to accomplish. When the National Industrial Recovery Act[4] was enacted by Congress, informed opinion declared that the powers conferred by it were grounded in Congress' right to regulate interstate commerce.[5] The National Industrial Recovery Act itself provided that:

> "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof *in any transaction in or affecting interstate or foreign commerce* shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense." [6]

Faced by this limitation of function of the federal government confining its power to interstate commerce, the members of the state legislature were confronted with the predicament of intrastate commerce under the codes. In the first place, was local commerce to be free to compete with interstate commerce, and thereby to gain a tremendous competitive advantage over such interstate commerce? In the second place, would a person in California who observed a national code incur the possibility of prosecution for violation of the state anti-trust laws, since the partial immunity in the National Recovery Act from liability under the federal anti-trust laws would not extend to intrastate com-

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[4] Public No. 67, 73d Cong., 1st Sess., approved June 16, 1933.

[5] Many expressions from the NRA itself furthered this belief. General Hugh S. Johnson's statement in Press Conference, June 20, 1933, N. R. A. Official Release No. 5, contains the following:

"Q. Is there any industry that operates wholly within state? How would you handle that situation?

A. That presents a purely legal question. If an industry is contained within the borders of one state they probably can find plenty of smart lawyers to tell them that they would not come under the Federal law. I have enough to do without bothering about that. There are two phases to this thing: the first is to try to get everybody started back to work at once and to increase purchasing power. A limited basic code is what we are asking from these people right now—to include in the first code only minimum wages, maximum hours of labor and what is needed to protect them against chisellers on the fringe of the industry."

The statement of Dudley Cates, Assistant Administrator, June 22, 1933, to United Typothetæ of America, N. R. A. Official Release No. 7, is as follows:

"In many cases it may be necessary to ask state legislatures to bring state laws into harmony with the National Recovery Act. While the Act cannot affect state laws governing purely intra-state commerce, Nira will control intra business affecting inter-state business." See N. R. A. Official Release No. 7, June 22, 1933; *ibid.* No. 27, July 5, 1933.

[6] §3 (f). Italics added.

merce?[7] Finally, if the federal government could not regulate intrastate commerce, how were such local industries to rehabilitate themselves and secure the advantages of codification?

Assembly Bill 2432 attempts to answer the first two questions; Assembly Bill 2400 aims to meet the third. Assembly Bill 2432 provides that federal codes will regulate intrastate commerce. Applying federal codes to intrastate commerce,[8] section 2 of the enactment states:

> "It shall be unlawful for any person, firm, association or corporation engaged in the State of California in intrastate commerce in any business

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[7] Just how far the concerted action provided by the codes violates state and federal anti-trust laws is an intricate question in itself. Of course, violation of anti-trust laws presupposes voluntary action on the part of the accused, and these may argue the compulsory nature of the codes precludes voluntary action. However, the NRA has exerted real effort to induce industry itself to formulate the codes and has made scant use of the compulsory features of the Act. Moreover, many codes provide expressly that they be voluntarily signed by members of the industry. See Code of Fair Competition for Iron and Steel Industry, approved August 19, 1933.

Considered, then, as voluntary agreements, unclothed with the exemption of the Act, would the codes violate the Sherman Anti-Trust Act? Practically all the codes carry provisions against selling goods below the cost of production, but it is at least doubtful if this subjects them to the penalties of the anti-trust laws. There is no Supreme Court decision which holds that an agreement not to sell below the cost of production should be condemned. See Jaffe and Tobriner, *The Legality of Price Fixing Agreements* (1932) 45 HARV. L. REV. 1164. In fact agreements to exchange cost data have been upheld, providing this was not done merely to fix prices.

But many codes provide for "reasonable" or "over-all" or "averaged" costs, or even, in some cases, named prices, and the validity of this activity is more doubtful. An ancient and questionable distinction formerly held price fixing by agreement was an infringement of the Act, and illegal *per se*. United States v. Trenton Potteries Co. (1927) 273 U. S. 392. Recently in Appalachian Coals, Inc. v. United States (1933) 288 U. S. 344, the Supreme Court, in applying the "Rule of Reason" to a price-fixing agreement, broke the archaic taboo, and indicated that it may in the future view these agreements with more liberality, although it pinned much of the decision on the limited power in the market of the immediate defendants before it.

Codes also provide for limitation of production. Code for Petroleum Industry, art. X, § 3; Code for Cotton Textile Industry, art. III; Code for Textile Bag Industry, art. IV. Despite some strong minority opinions, the Supreme Court has consistently held efforts in this direction are forbidden. American Column & Lumber Co. v. United States (1921) 257 U. S. 377.

Turning to the state law, there is less chance of violation of the anti-trust laws by observance of a code. An amendment, Cal. Stats. 1909, p. 593, to the Cartwright Act, Cal. Stats. 1907, p. 984, legalizes agreements "the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed" Hence efforts at establishing costs and prices should have statutory protection. This would not hold true of production agreements. The only sensible rationale of Endicott v. Rosenthal (1932) 216 Cal. 721, 16 $P_{.}$ (2d) 673, is that this case forbade production agreements.

[8] The objection has been raised that this is an unconstitutional delegation of power from the state to the federal government. This question in turn resolves itself into whether the delegated powers are administrative or legislative. The

> within any trade or industry or subdivision thereof, or in any transaction affecting intrastate commerce, to fail to comply, as to such commerce, with the terms of any code of fair competition approved, prescribed or issued for said trade or industry or subdivision thereof under Title I of that certain act of Congress of the United States entitled 'An act to encourage National industrial recovery, to foster fair competition, and to provide for the construction of certain useful works and for other purposes,' approved June 16, 1933, and commonly known as the National Industrial Recovery Act, or with the terms of any agreement entered into by such person, firm, association or corporation, under the authority of said title, or with the terms or conditions of any license issued to such person, firm, association or corporation, pursuant to said title."

In order that any provision of the Cartwright Act or of California law which might condemn action under federal codes be removed,[9] the section also declares, as to the terms of any such code:

> "It shall be lawful for any such person, firm, association or corporation to do or omit any act or thing required or permitted to be done or omitted by any of such terms."

The other statute, Assembly Bill 2400, provides that state codes may be adopted for industries not regulated by national codes, and it also sets up an additional means of enforcement for national codes.

As has been said, the federal government, in the summer of 1933, was neither thought to have, nor expected to assume, the power to issue codes governing local industries that were not "in" or "affected" by interstate commerce. Since the writer was somewhat active in the preparation of the assembly bill, he can state that its prime purpose was to apply the recovery program to purely local, intrastate industry. As originally framed, section 2 of the bill read that "The provisions of this act shall apply only to those engaged in the State of California in

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legislature has the power to delegate administrative powers. Thus the courts have sustained an act giving the horticultural commissioners the power to declare infected orchards, etc., public nuisances. Los Angeles County v. Spencer (1899) 126 Cal. 670, 59 Pac. 202. To the same effect: Trinity County v. Mendocino County (1907) 151 Cal. 279, 90 Pac. 685; Keech v. Joplin (1909) 157 Cal. 1, 106 Pac. 222. There is no question that the powers conferred on the NRA are most sweeping and probably go farther than any previous delegation of alleged "administrative" power. See *Some Legal Aspects of the National Industrial Recovery Act, op. cit. supra* note 3, at 93 *et seq.*

[9] Congress may not have the power to regulate intrastate commerce and thus not have the power to grant immunity from state anti-trust acts. *Some Legal Aspects of the National Industrial Recovery Act, op. cit. supra* note 3, at 105 *et seq.* Since most states have anti-trust acts, and thirty-three such statutes specifically condemn price fixing, the problem assumes an important aspect. For a study of state legislation, see Legis. (1932) 32 COL. L. REV. 347. The following statutes therefore provide that codes issued under NRA are exempt from local anti-trust acts: Cal. Stats. 1933, cs. 1037, 1039; N. J. Laws 1933, c. 372; N. Y. Laws 1933, c. 781; Ohio H. B. No. 705, approved July 12, 1933; Utah S. B. No. 10, approved July 31, 1933; Va. S. B. No. 19, 1933; Wis. Laws 1933, c. 746. Colorado has merely suspended the application of its previous laws. Colo. Stats., Extraordinary Sess. 1933, c. 1.

any business within any trade or industry or subdivision thereof *in intrastate commerce* for which no code of fair competition is approved, prescribed or issued" under the National Industrial Recovery Act. By the deletion of the italicized words, through amendment at the legislature, the provisions of the act were extended to all commerce, both intra and interstate. This alteration carried the legislation far beyond its original scope.

As a result, it become necessary to face the situation where both state and federal governments issued codes for the same interstate industries. Hence the statute was changed to include a proviso that NRA codes would supersede codes issued under the state act. Although doubt later arose whether this section meant that NRA codes superseded CRA codes in their entirety or only as to conflicting provisions, the legislative intent probably was, as the Attorney-General held,[10] that the local codes were completely nullified by the federal. Of course, when this provision was inserted in the bill, it was never expected that the federal government would step into the sphere of intrastate commerce; the federal codes were to take precedence only for the field in which they were to operate: interstate commerce.[11]

Even if all state codes are superseded by federal codes, Assembly Bill 2400 still has a distinct function. This service is separate and apart from that rendered by Assembly Bill 2432, which merely authorizes state officials to enforce federal codes. The "Supplement" adds a new equipment to the coterie of enforcement devices. In including in section 5 a provision requiring that every employer in a codified industry secure a license from the state, a powerful and unique means for code enforcement was appropriated. If the employer violates the code, the Division of Corporations proposes to revoke his license, and, in such event, it is believed the employer will be forbidden to continue in business.

Here is a most effective means of exacting compliance with a code, a provision that business men have avidly but unsuccessfully sought for national codes. The state, being a smaller political entity, can effectuate such a licensing system when it may be unworkable on a national scale. The enforcement of national codes by the state's licensing system adds to the instruments usually supplied by the codes a highly desirable enforcement mechanism. The Division of Corporations comprises a corps of technicians trained in this special work, familiar

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[10] Op. Calif. Att'y Gen. No. 8790, Sept. 18, 1933.

[11] A number of states, besides California, have provided for the issuance of state codes by state authorities for intrastate industries: Wisconsin, New Jersey, Ohio, and Utah.

with local conditions, that can accomplish quicker and more drastic enforcement than any distant national association. It is this means of enforcement which the assembly bill sought to supply national codes.

The legislative intent was by no means clearly expressed. While the statute states "the provisions of this act shall apply only to those engaged in the State of California" in industries to which no federal code had been issued, it also says:

> "In the event that any code is approved, prescribed or issued under Title I of the said act of Congress commonly known as the National Industrial Recovery Act for any trade or industry or subdivision thereof, such code shall supersede any code or codes approved under the provisions of this act for such trade or industry or subdivision thereof and shall immediately become the code of fair competition provided for in this act for the said trade or industry or subdivision thereof and shall be enforceable as such under the provisions hereof."[12]

Apparently the statute is contradictory in that it declares itself inoperative if a federal code "is approved" and yet contains provisions designed to enforce just such an approved federal code. The enforcing provisions are, of course, nugatory if the statute itself is ineffective once such a national code is approved.

When the section is more closely studied it appears possible that the legislature may have intended that no code should be approved under the state act if a code for such industry *had* previously been approved under the federal law. But if a state code were *first* established and later superseded by a federal code, then the latter would be enforceable under this act. Hence, Assembly Bill 2400 reads its "provisions . . . shall apply only" to industries for which "the provisions of no code of fair competition which is approved, prescribed or issued under said act of Congress [the National Industrial Recovery Act] *have* been made applicable by any law of this State."[13] This refers to codes already issued by the national government and made applicable to intrastate commerce by Assembly Bill 2432. But the act provides that if a state code is *first* issued, and then *later* superseded by a federal code, the latter is enforceable under the state act.

Federal codes which supersede state codes are then enforceable by the state's licensing system. On the other hand, a state industry if not first regulated by a state code cannot apply for state licenses for enforcement of a national code. The state code—although later entirely nullified by the national—is apparently a condition precedent.

Just why this condition was exacted is not apparent, except that as a practical matter the legislature may have felt that the state officials' familiarity with an industry actually administered under a state

[12] Cal. Stats. 1933, c. 1037, §2.
[13] *Ibid.*

code qualified them to enforce a national code. It certainly seems wasteful for the state to build up an enforcing mechanism for a state code, to issue licenses to each employer in the industry, to grapple with its problems, to train state officials to police and administer it, then, suddenly, upon the approval of a federal code, to find this work completely destroyed. Far wiser, surely, to continue this administration under the provisions of the federal code. On the other hand, no such reasoning supports the administration of a national code for an industry which at no time was governed by a state code.

But it must be admitted that the legislative meaning is far from clear. While the above interpretation may be desirable for the purpose of practical administration, it faces difficulties. Section 5, containing the licensing provision, alludes to "any State code of fair competition." On the other hand, section 2, which says the national code is enforceable under the act, does not declare that a national code becomes a *state* code. It merely says that it becomes "the code of fair competition provided for in this act." Is it, then, a *state* code enforceable by licensing?

Assume that the national code does become such a "state" code. Then, according to section 2, the Chief of the Division of Corporations may, prior to approval, impose conditions regarding it. He may amend it and provide exceptions and exemptions to it. Is it not anomalous to provide that the national code "supersedes" the state code (section 2) when at the same time it is to be approved only on such conditions as the Chief imposes, as the Chief may later amend it, and as he may make exceptions and exemptions to it? Moreover, the Chief is to approve codes only with the concurrence of the Director of the Department of Industrial Relations. Does this section mean that national codes are in a state of animated suspension during the interval before the Director gives his consent?[14]

Not only do these theoretical difficulties beset the thesis that the national code becomes a state code enforceable by a licensing system, but certain legal questions also arise. Offenders will claim they are exposed to double jeopardy, since there is a possibility of dual punishment. As to this, there is grave doubt, because there are theoretically two offenses against two different sovereigns, the state and nation.[15]

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[14] The writer wishes to express his indebtedness to Mr. John A. Gorfinkel of the San Francisco Bar, formerly with the Division of Corporations, for his helpful suggestions in regard to the above text.

[15] United States v. Ratagczak (N. D. Ohio 1921) 275 Fed. 558; United States v. McCann (D. Conn. 1922) 281 Fed. 880; State v. Rhodes (1922) 146 Tenn. 398, 242 S. W. 642, 22 A. L. R. 1544.

More difficult is the problem of evolving a coördinated policy on the part of the federal and state governments. In dealing with violations a harmonious policy would be essential. To block out such a policy should offer no insuperable difficulties. In any event the state officials would undoubtedly follow the lead of the National Recovery Administration.

At least it can safely be said that the advantage of quick enforcement of codes by informed local officials, through a state licensing system, outweighs the minor effort required to effectuate a uniform administration. It is regrettable, however, that state enforcement of federal codes is clouded by the ambiguity of the statute, leaving the legislative intent in a state of doubt and the present efficacy of this enforcement device somewhat questionable.

II. ADMINISTRATION OF CALIFORNIA RECOVERY LEGISLATION

The codes issued under the California Recovery Acts have dealt with the hours and wages of labor and unfair methods of competition.[16] If the constitutionality of the enactments are assumed, no further legal problems arise in connection with hours or wages, although various other legal complications do arise as to unfair trade practices.

What are unfair trade practices? The Act, aside from including the general condemnation of "unfair competitive practices" contained in the National Industrial Recovery Act gives no definition. Under the Federal Trade Commission Act,[17] an unfair competitive practice was interpreted to describe an activity which not only injured the public but also injured competitors.[18] Hence, the customary proviso in the Trade Practice Rules that the particular practice condemned must be committed with the "intent to injure competitors." The narrow construction which the courts have placed on the Federal Trade Commission Act has been most unfortunate, destroying much of the effectiveness of the Commission. It would be tragic, indeed, to repeat this mistake with the Recovery Acts.

There would be no justification for any undue restriction on the definition of unfair competitive practices under the Recovery Acts. No language in the Acts would sustain it. Under the state codes thus far promulgated many practices have been condemned which do not meet the narrow legalistic requirements as to unfair competitive prac-

[16] At the time of writing, 218 codes had been submitted, 69 approved, 21 withdrawn, 26 were waiting further hearing, 13 as yet unheard, 35 awaiting completion, 16 off calendar, 38 awaiting further information.

[17] 38 STAT. (1914) 717, 43 STAT. (1925) 939, 15 U. S. C. (1926) c. 2.

[18] Federal Trade Comm. v. Raladam Co. (1931) 283 U. S. 643; Sinclair Refining Co. v. Federal Trade Comm. (C. C. A. 7th, 1921) 276 Fed. 686, *aff'd*, (1923) 261 U. S. 463.

tices heretofore set up. One of the purposes of the Recovery Acts was to avoid these very restrictions, and, by force of law, remove the economic devastations of the "chiseller."

The great problem that has arisen in regard to business practice has been the question of the regulation of costs and prices. While the practically universal desire of business men is to secure the establishment in the codes of a minimum price, there has been hesitance in this regard on the part of the state recovery administration. On the other hand, there has been no dispute that the sale of goods or rendition of services below cost is an anti-social business practice. It has been condemned in practically all the state codes.

The undesirability of the practice from the economic standpoint is evident. Below-cost selling does not make for the free competition which even the orthodox *laissez faire* economy conceives.[19] Such competition, theoretically at least, leads to the survival of the efficient producer as against the inefficient. Yet it is not his greater efficiency that induces the below-cost seller's low price. His is a losing price, induced by either a desire to drive his competitor out of business, which may be parcel to his attainment of monopoly, or his willingness, due to a larger financial resource, to take a present loss in the hope of a future upswing. At this date there is a general recognition that the monopoly motive for the practice is entirely indefensible. As has been pointed out,[20] the use of price-cutting by a large concern to drive out a local competitor while elsewhere higher prices are charged is a device perennially used to attain monopoly. The Standard Oil and American Tobac-

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[19] SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932) 347.

[20] "Ever since the debates which preceded the enactment of the Clayton Act it has therefore been clear that at least some forms of competitive practice are but stages on the road to monopoly, and it has been customary to refer to these as methods of "unfair" or "destructive" competition. Such, for example, is the establishment of a special low price, in a particular locality where a competitor is operating in order to drive the competitor out of business, while a higher price is maintained in other localities where there are no competitors. Local price cutting of this character has come to be generally recognized as "unfair competition." There are many other practices of the same tendency and import which have, however, not yet been so *generally and definitely recognized as destructive of competition,* but which are in fact equally so. One of these forms of destructive competition occurs when a relatively more powerful concern with greater financial staying power either secretly or openly sells persistently below its own cost of production until another concern with smaller financial resources but perhaps more efficient and with lower production costs is driven from the market, thereby defeating the operation of competition in the sense of the word used by economists which would make survival depend on relative efficiency and lowness of cost." Dickinson, *The Anti-Trust Laws and the Self-Regulation of Industry* (1932) 18 A. B. A. J. 601. (Italics added.)

co monopolies made use of it; and its employment for such a purpose is now universally condemned as unfair.[21]

The below-cost selling motivated by a willingness to take a loss because of larger capital facilities has an effect little different from the first. Modern industry counts numberless huge investments of capital frozen into specialized forms of equipment. Even if relatively inefficient, these plants must hang on in the competitive struggle unless the capital invested is to be sacrificed. Through one reorganization after another, these concerns, ever replenished by new financial contributions, seek to master their rivals, not by greater efficiency but by greater resource. They cannot operate profitably; they can, however, due to greater capital, sell below cost. Here, again, as in the case of the would-be monopolist, selling below cost penalizes the minor financial unit, which may be as efficient—or even more so—than the price-cutter. If one of the chief ends of the competitive system is to eliminate the inefficient producer, a basic argument against below-cost selling is that it has no place in such a system.[22]

It is claimed that from a pragmatic standpoint, the practice is socially harmful. Selling below cost endangers high labor standards. Experience demonstrates that when cut-throat competition reaches below the cost level, the first retrenchment is in wages and working conditions. The tendency is to increase hours of work, reduce wages, and economize on superior equipments or quarters designed for the employees' protection. Below-cost selling inevitably has its pull toward sweat-shop conditions, and must be judged in the light of this fact.

Due to these anti-social consequences, the practice had earned some condemnation by the courts even before the Recovery program. Although no great latitude was permitted by orthodox legal concepts in striking down the practice, the courts have, at least to some extent, utilized statutory prohibitions against it. The Sherman Act was held to forbid the practice of selling below cost for the purpose of attaining a monopoly.[23] If the purpose of selling below cost is not "in good

[21] In his excellent study of industrial mergers, Handler examines the courts' reactions to the use of "predatory" or unfair trade tactics by combinations, concluding, "It can therefore be said that except for the *Knight* case, no combination whose methods of competition have been predatory in the ordinary sense has been upheld." Handler, *Industrial Mergers and the Anti-Trust Laws* (1932) 32 COL. L. REV. 179, 252.

[22] Dickinson, *op. cit. supra* note 20, at 602.

[23] In Story Parchment Co. v. Paterson Parchment Paper Co. (1930) 282 U. S. 555, 562, the plaintiffs sought damages under the Sherman Anti-Trust Act, alleging a conspiracy of paper manufacturers selling goods "below the point of fair profit and finally below the cost of production," thereby destroying "normal prices." In this regard the Court said: "Upon a consideration of the evidence we

faith to meet competition, but to effect by such discrimination, a substantial lessening of competition, or to create a monopoly," it violates the Clayton Act.[24] The Federal Trade Commission[25] in the case of

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are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound." One of the bases for the dissolution of the defendant for violation of the Sherman Anti-Trust Act in United States v. Corn Products Refining Co. (S. D. N. Y. 1916) 234 Fed. 964, *aff'd*, (1919) 249 U. S. 621, was the finding: "VIIh. I find that during the years 1910 and 1911 the defendants having control of the prices at which glucose and starch could be manufactured, lowered prices to a sum less than a fair profit, for the purpose of securing the trade to themselves, and harassing, annoying, and if possible, driving out their competitors, and that this was done with the same monopolistic intent." 234 Fed. at 1010.

[24] Porto Rican American Tobacco Co. v. American Tobacco Co. (C. C. A. 2d, 1929) 30 F. (2d) 234, 236, wherein the court said: "If the appellant discriminated in price between different purchasers—those of the United States and of Porto Rico—and the purpose of such discrimination was not in good faith to meet competition, but to effect, by such discrimination, a substantial lessening of competition, or to create a monopoly, the statute is violated, and the appellee, if injured thereby, is entitled to injunctive relief. Section 26 of Title 15, U. S. C. A. Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors. Standard Oil Co. v. United States, 221 U. S. 1, . . . United States v. American Tobacco Co., 221 U. S. 106, . . ."

[25] The Federal Trade Commission in the following decisions has held that the sale of goods below cost in order to attract business from competitors is an unfair method of competition. Federal Trade Comm. v. Sears Roebuck & Co. (1919) 1 Fed. Trade Comm. Dec. 163; Ward Baking Co., Complaint No. 21, Annual Report 1918, p. 57; United Drug Co., Complaint No. 22, Annual Report 1918, p. 58; American Mailing Device Corp., Complaint No. 66, Annual Report 1918, p. 63; Cutler Mail Chute Co., Complaint No. 84, Annual Report 1918, p. 64; United States Food Products Corp., Complaint No. 38, Annual Report 1920, p. 122; The Oakes Co., Complaint No. 344, Annual Report 1920, p. 184; New England Bakery Co., Complaint No. 345, Annual Report 1920, p. 134; Crocker Bros., Complaint No. 580, Annual Report 1920, p. 149; Baltimore & Philadelphia Steamboat Co., Complaint No. 869, Annual Report 1922, p. 135; Waldes & Co., Complaint No. 947, Annual Report 1923, p. 185.

The Commission in the revision of its Group One rules has held as to selling below cost the following: "...The selling of goods below cost with the intent and with the effect of injuring a competitor and where the effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade, is an unfair trade practice." In the following conferences, since 1926, the Commission has proscribed selling below cost as an unfair means of competition; Waxed Paper Industry Conference, 1928, 1929; Flat Glass Industry Conference, 1928; Grocery Industry Conference, 1929; Fertilizer Industry Conference, 1929; revised, 1931; Cut Stone Industry Conference, 1929; revised, 1931; Petroleum and Petroleum Refining Industries Conference, 1929; revised, 1931; Plumbing and Heating Industry Conference, 1929; revised, 1931; Face Brick Industry Conference, 1929; revised, 1931; Kraft Paper Industry Conference, 1929; revised, 1931; Lime Industry Conference, 1929; revised, 1931; Barber Supply Dealers' Industry Conference, 1929; Concrete Mixer and Paver Industry Conference, 1929; revised, 1931; Sled Industry Conference, 1930; Warm Air Furnace Industry Conference, 1930; Bituminous Coal Conference (Utah) Industry, 1930; revised, 1931; Struc-

Sears, Roebuck & Co. v. Federal Trade Comm.[26] issued an order commanding the company to desist from, among other things, "selling, or offering to sell, sugar below cost through catalogues circulated throughout the states and territories of the United States and the District of Columbia among its customers, prospective customers and customers of its competitors." [27] However, the Circuit Court of Appeals held that the order was too sweeping, stating: "We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away." [28] The order was restricted to a prohibition of the sale of the product when false representations were made as to the superior ability of the company to sell at a lower price.

The courts have, however, approved the exchange of cost statistics, as well as trade association rules requiring the adoption of uniform cost accounting systems.[29] These activities were sanctioned because they permitted stabilization of prices. This attitude, moreover, was assumed without the aid of definite statutory prohibitions of the practice of selling below cost.

Of course the entire picture changes with the Recovery program. Through the codes industry has been given a means to abolish the practice of selling below cost. The codes have practically unanimously

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tural Steel Fabricating Industry Conference, 1930; revised, 1931; Public Seating Industry Conference, 1930; revised, 1931; Electrical Industry: Outlet Box and Conduit Fittings Conference, 1930; Electrical Industry: Manufactured Electrical Mica Conference, 1930; Electrical Industry: Molded Products Conference, 1930; Electrical Industry: Flexible Cord and Heater Cord Group Conference, 1930; Crushed Stone Industry Conference, 1930; revised, 1931; Knitted Outerwear Industry Conference, 1930; Southern Hardware Jobbers Conference, 1930; Wall Paper Industry Conference, 1930; revised, 1931; Field and Grass Seed Industry Conference, 1930; Structural Clay Tile Industry Conference, 1930; revised, 1931; Steel Office Furniture Industry Conference, 1931; Trunk, Luggage and Brief Case Industry Conference, 1931; Paper Bag Industry Conference, 1931; Common Brick Industry Conference, 1931; Bituminous Coal Operators of the Southwest (Missouri and Kansas) Industry Conference, 1931; Southern Mixed Feed Manufacturers Industry Conference, 1931; Vulcanized Fibre Industry Conference, 1931; Ingot Brass and Bronze Industry Conference, 1931; Baby and Doll Carriage Industry Conference, 1931; Embroidery Industry Conference, 1931; Clothing Cotton Converters Industry Conference, 1931; Paper Bottle Cap Industry Conference, 1931; Common or Toilet Pin Industry Conference, 1931; Bank and Commercial Stationers Industry Conference, 1931; Interior Marble Industry Conference, 1931; China Recess Accessories Industry Conference, 1931; Lightning Rod Industry Conference, 1931.

[26] (C. C. A. 7th, 1919) 258 Fed. 307.

[27] *Ibid.* at 310.

[28] *Ibid.* at 312.

[29] Maple Flooring Manufacturers' Ass'n v. United States (1925) 268 U. S. 563; Cement Manufacturers' Protective Ass'n v. United States (1925) 268 U. S. 588.

condemned it. The previous record of the courts, on the whole, indicates they will uphold these provisions.

But a further question arises. Should the codes establish minimum prices in certain industries? This, of course, is a mooted point in the whole procedure.[30] While the system of setting up cost standards is effective for some industries, it fails in other instances. In certain cases it is impossible to compute a cost that is actually provable.[31] Usually it is possible to break down manufacturing costs to the cost of each unit of the manufactured article, but this is unworkable in service industries. For instance, how can the cost of giving a finger wave in a beauty shop be determined, when the shop offers approximately thirty-five other services? How can the cost of cleaning a suit be established, when each cleaner has a different location, rental, and other items of cost? Add to this the fact that these small tradesmen seldom keep books. Some proprietors of one-man shops in these industries are willing to struggle on at a pittance; hence their low wages of management make their competition, computed on a cost basis, ruinous to the whole industry. The failure of the cost system in service industries is indeed recognized by the NRA Code for the Cleaning and Dyeing Industry.[32]

In large industries where there is huge capital investment, the danger of price-fixing is that it may be manipulated to produce dividends

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[30] That the possibility of price-fixing was contemplated by Congress in enacting the Recovery Act is shown by the debate on the bill. "*Senator Connally.* Senator Wagner, the effect of this measure, so far as industrial prices are concerned, to the consumer will be, of course, to raise the level of those prices? *Senator Wagner.* Yes. *Senator Connally.* And one of the major purposes of the bill is to give industry a larger price for what it produces? *Senator Wagner.* I take it that that will be the effect of it." (Commerce Clearing House Reports, Vol. I, p. 1951, Industrial Control Act—New Matters 6-15-33.) That the National Industrial Recovery Act also contemplated to control prices is likewise borne out by the statement of Congressman Celler in the debate in the House on Senator Borah's amendment to the Wagner Bill, which amendment proposed a prohibition of "price fixing." "If prices cannot be fixed in order not to monopolize but to prevent cut-throat competition, the bill is valueless. In the way the amendment has been offered we will certainly, if we adopt it, have placed ourselves in the rather anomalous position of utterly destroying the purposes that the administration had in mind when it offered the National Industrial Recovery Act. It was offered to stabilize industry, to increase employment, to limit production, to maintain maximum hours of employment and minimum wage scales. All will fail if arrangements cannot be made as to prices." (1933) 77 CONG. REC., June 10, 1933, at 5736.

[31] For an accountant's objections to the "cost" systems established by the codes, with particular reference to the unworkability of such formulæ, see Andersen, *What Constitutes Selling Below Cost Under the National Industrial Recovery Act* (1933) 13 CERTIFIED PUBLIC ACCOUNTANT 605.

[32] Statement of Administrator, Code of Fair Competition, Cleaning and Dyeing Trade, approved November 8, 1933.

for the investor rather than protection for the worker. The purpose of the recovery program is undoubtedly to abet the real producers—both managers and employees—and the huge mass of the wage-earning population, which stands in need of a larger purchasing power. This class is to be contra-distinguished from the investing or "capitalistic" class, which subsists from charges and claims which they hold against industry. If price-fixing does no more than gain these latter claimants a dividend on their stock or interest on their bonds, it does not aid the recovery program. If price-fixing in certain industries protects the smaller income class and aids their purchasing power, it does promote rehabilitation. Price-fixing for small tradesmen saves their wages of management from sinking below the subsistence level. Price-fixing for barbers, cleaners, bootblacks, and so on, is entirely analogous to wage-setting for employees. Both classes are in the low-income brackets, and both must be protected from self-inflicted competition that spells penury. Hence price-fixing that establishes wages for small tradesmen must be distinguished from price-fixing that insures profits for absentee investors.

It is to be hoped that the state recovery administration will continue in its present policy of including in the codes provisions that are broader than those falling within the restricted categories of unfair trade practices as previously defined by the courts. It is also to be hoped the administration will recoguize the need for the establishment of minimum prices or "averaged" or fixed costs in those industries comprising the small tradesmen class.

III. SUGGESTED AMENDMENTS TO CALIFORNIA RECOVERY LEGISLATION

As has been pointed out above, one of the main purposes of the recovery legislation was to preserve, so far as possible, for local industry, a relatively higher standard of living in California than in the rest of the United States. A secondary purpose was to supplement the enforcement devices of the NRA with the state enforcing mechanism. The statutes still leave much to be desired for the accomplishment of both these purposes. Due to the provision that a national code supersedes a state code, higher standards in California must in many instances be sacrificed to lower eastern levels, and as the above text sets forth, the employment of the California licensing system to enforce national codes is obscured in doubtful terminology.

That California living standards and wages are higher than in the middle west and eastern sections of the United States, has generally been recognized for quite some time. Due to its separation from the east by many hundreds of miles of uninhabited waste land and desert, the

coast region is a practically independent economic unit. It has a different climate and a different economic pattern generally. No better indication of the discrepancies in wages between this region and the rest of the United States can be afforded than by a comparison of state with national codes. Thus the code for cosmetologists and hairdressers in California suggests a wage for employees of $22.50 per week compared to a wage of $12.00 to $15.00 in the national code. The wages for employees in the cleaning and dyeing industry as submitted in the California code range from $.33⅓ to $.50 per hour for various classes of occupations; the national code sets up a comparable wage of from $.27 to $.33. The national code for the laundry industry establishes a wage of from $.20 to $.27½ per hour for various classes of occupations as compared to a submitted wage in California of from $.35½ to $.45. These are typical instances. Undoubtedly other examples from different industries could be obtained.[33]

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[33] A comparison of the labor standards of the state as compared to the federal codes discloses the following:

WAGES

	California Code	*National Code*
Cosmetologists—wages per week	$22.50	$12–$15
Cleaning and Dyeing—Wages per hour—		
San Joaquin	.33⅓–.50	.27–.33
Southern California	.40	
Contra Costa	.35–.50	
Northern California	.50	
Crushed Stone, Sand, and Gravel—wages per hour		
South	.40	.40
North	.50	
Laundry—wages per hour—		
Alameda County, central coast counties, San Francisco	.35½–.45	.20–.27½
Soap and Glycerine—wages per hour	.40	.25–.40
Wiping Cloth—wages per hour	.14–.16	.17–.60
Paper Distributing—wages per hour	.14–.15	.14–.15
Saw Service—wages per hour	.40	.40
Printing Industry—wages per hour	.40–.80	.40

HOURS

	California Code	*National Code*
Cosmetologists	48	48
Cleaning and Dyeing—Consolidated Code	40	45
Seasonal		50
Crushed Stone, Sand and Gravel	36–40	36–40
Laundry	45	45
Soap and Glycerine	40	40
Wiping Cloth	40	44
Paper Distributing	48	40
Saw Service	40	40
Printing Industry	40	40

If, as has been said, the failure to maintain the higher wages in California will permeate into the entire economic life of the state, it is important that steps be taken to prevent this. Surely the recovery program was not aimed to reduce the standard of living of any of the states. Indeed, practically every code issued by the National Industrial Recovery Administration carries a clause which provides that the national code shall not be interpreted to reduce any more favorable wage or hour provisions required by state law. It would seem advisable to provide that higher wages or lower hours established in California codes should be preserved even after the approval of a national code. It would be comparatively simple to amend the California recovery legislation to provide that national codes would supersede all conflicting provisions in state codes, except where the state code contained conditions for labor more favorable than those in a national code.

It would also seem advisable to permit the state administration to include in the state codes provisions that would *not* conflict with national codes. If there were peculiar conditions in the state which could be corrected by a state code, there is no reason why the state administration should not supplement a national code with provisions governing them. The amendment of the state law to provide that national codes supersede state codes only as to conflicting provisions would make this possible.

It must be remembered also that the state codes would apply only to intrastate commerce. It should not be possible for the state to change the terms of codes regulating interstate commerce, but only to preserve for local intrastate industry the higher wage standards of California as well as to afford provisions supplemental to national codes which are necessary for local conditions.

Not only should the legislation be changed to provide for the higher standard of living in California, but also the provision in regard to licenses should be clarified to express clearly the legislative intent. If, as the writer believes, the California legislation affords an excellent medium for enforcement of national codes through a state licensing system, that should be specifically set out in the law. As has been above pointed out, the present provisions are ambiguous. It should be provided that a national code becomes a state code and is enforceable by the state administration through the state licensing system. This would facilitate the administration of national codes, and would place at the dispesal of the federal authorities a trained corps of state officials familiar with local conditions.

While the California recovery legislation has probably proved a great aid to California business in allowing codification of industry

during the interval from the date of its enactment to the time when federal codes were promulgated, it should not be discarded at that point. This legislation should, as was its original purpose, preserve for local California industry, wages higher and hours lower than those in other sections of the country. It should also be amended to provide clearly that federal codes can be enforced by a state licensing system, thereby aiding in the enforcement of the recovery program.

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