

1952

Trade Commission of Utah, Utah Retail Grocers Association and George Ingalls v. James L. Bush : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED

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Clerk, Supreme Court, Utah

TRADE COMMISSION OF UTAH,
Plaintiff and Respondent,

UTAH RETAIL GROCERS ASSOCIA-
TION and George Ingalls, d/b/a
George's Market,
Plaintiffs in Intervention and Respondents,

vs.

JAMES L. BUSH, d/b/a BUSH SUPER
MARKET,
Defendant and Appellant.

No. 7783

BRIEF OF RESPONDENT

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Plaintiffs in Intervention and Respondents,

vs.

JAMES L. BUSH, d/b/a BUSH SUPER
MARKET,
Defendant and Appellant.

No. 7783

BRIEF OF RESPONDENT

STATEMENT OF FACTS

An action was brought by the Trade Commission of Utah against James L. Bush, d/b/a Bush Super Market in Ogden, Utah for violating the Unfair Practices Act of the State of Utah. It was the contention of the plaintiffs that the defendant violated the Unfair Practices Act and more particularly Section 16A-4-7, as amended by Chapter 21, Laws of 1951, by

selling merchandise below cost, as that term is defined in the statute, by issuing S & H green stamps with the sale of merchandise marked up no more than the minimum prescribed by the statute. The facts in the case are not disputed. It is agreed that the defendant sold many items which will hereafter be referred to as 6% items on which the markup was the bare statutory minimum of 6%. The defendant does not deny doing the acts complained of but maintains that such acts do not constitute a violation of the statute.

The evidence was heard by the trial court and after oral argument and written memoranda had been considered by the court, judgment was rendered against the defendant for having violated the statute and an injunction was issued restraining the defendant from continuing the unlawful practices. Defendant thereafter prosecuted this appeal.

The particular facts of the case will be more thoroughly discussed in connection with the points.

STATEMENT OF POINTS

I. THE ISSUANCE OF CASH DISCOUNT STAMPS IS NOT COMPARABLE TO THE COST OF ADVERTISING, THE COST OF CARRYING CHARGE ACCOUNTS, THE COST OF MAKING DELIVERIES, ETC.

II. THE GIVING OF A TRADING STAMP IS IN EFFECT A CASH DISCOUNT WHICH REDUCES THE PURCHASE PRICE OF THE ARTICLE PURCHASED.

III. THE EVIDENCE ESTABLISHES A DEFINITE INTENT ON THE PART OF THE DEFENDANT TO INJURE COMPETITORS.

IV. THE UNFAIR PRACTICES ACT IS CONSTITUTIONAL.

ARGUMENT

POINT I

THE ISSUANCE OF CASH DISCOUNT STAMPS IS NOT COMPARABLE TO THE COST OF ADVERTISING, THE COST OF CARRYING CHARGE ACCOUNTS, THE COST OF MAKING DELIVERIES, ETC.

Appellant devotes pages 12 to 29 of his brief to the proposition that the issuance of cash discount stamps is comparable to the cost of advertising, the cost of carrying charge accounts, the cost of making deliveries, etc., and that the giving of such stamps constitutes a cash discount. With the later position respondents are in agreement.

The argument that the issuance of cash discount stamps is comparable to the cost of advertising, the cost of carrying credit and the cost of other functions performed by some retail grocers has been rejected by various courts which have considered the matter. The question was thoroughly considered by the Court of Appeals of the State of New York in the case of Bristol-Meyers Co. v. Picker, et al, 302 New York 61, 96 NE 2d 177. In that case the New York Court said:

Considered as a method of advertising, the challenged scheme must be differentiated from types of service such as free parking, self-service, care of infants, entertainment, free delivery and the like, with which we are not presently concerned. These other types of service have no direct relation to the article purchased or the price paid. They are completely separated and too remote from the pricing element to come within the statute's prohibition. *Here the benefit to the customer is directly, proportionately, inseparably and specifically related to the article purchased and its price.* (Emphasis added.)

The vast distinction between the giving of trading stamps and mere advertising was also considered by the Supreme Court of the United States in the case of *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S. Ct. 370, 60 L.Ed. 679, wherein the court said:

It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success.

The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value

greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence.

See also *Tanner v. Little*, 240 U.S. 369, 36 S. Ct. 379, 60 L Ed 691.

POINT II

THE GIVING OF A TRADING STAMP IS IN EFFECT A CASH DISCOUNT WHICH REDUCES THE PURCHASE PRICE OF THE ARTICLE PURCHASED.

Appellant concedes that the effect of giving a trading stamp is to grant a cash discount to the purchaser but then paradoxically maintains that such discount does not affect a reduction in the price of the article. The evidence in this case shows that with each article purchased appellant gave an S & H green stamp for each 10c represented in the purchase price which was redeemable either in merchandise or cash. If redeemed in merchandise it represented a discount on the article purchased of slightly more than 2%. If redeemed in cash it represented a discount of slightly less than 2%. The net effect was no different than if appellant had handed back in cash or reduced the selling price of the article by an amount equal to the redeemable value of the stamp. If a cash discount (effectuated by the giving of a trading stamp) does not result in a lowered price on the article purchased then a discount actually given in cash would not result in a lowered price. Under appellant's argument the cash discounts, which the evidence shows were offered by Simpson's Market, Safeway

and American Food Stores in the amount of 3%, would be perfectly legal. If appellant's position is correct it would follow that if another grocery store were to give a cash discount of 6%, that also would be legal. The provision of the Unfair Practices Act prohibiting sales below cost then would be completely nullified. A grocer could mark up an item enough to comply with the statute, then completely nullify it by lowering the price of the article again by means of a cash discount. It is a primary rule of statutory construction that courts will construe statutes to have some meaning. If the construction contended for by appellant were adopted by the Court, the prohibition against sales below cost would be absolutely meaningless. Merely by adopting the device of a cash discount any merchant that desired to do so could completely circumvent the entire effect of the statute. This contention was dealt with by the Court of Appeals of New York in the Picker case cited above. The Picker case was concerned not with an Unfair Trades Practices Act but with a Fair Trades Practices Act. While the Picker case was concerned with "fair trade prices" rather than "sales below cost," it is in point so far as the basic principles are concerned. In the Picker case, rather than to give coupons, various merchants in the town had teamed together in a pool and had given their customers the receipts from their cash registers. The customers would take the receipts and treat them just as S & H green stamps are treated. When a customer had secured a sufficient number of the receipts he could redeem them at a central office either for cash or for merchandise. The situation was analgous to the case here under consideration.

In discussing the nature of the cash discount afforded by the receipt system, the New York Court stated:

"Assuming that there is no essential difference between the use of trading stamps and cash register receipts which are redeemable, and that either may be regarded as a form of cash discount, I nevertheless cannot agree with the opinion in the cases cited that such a discount does not cut the sale price of an article. No matter how one puts it, the consumer who is accorded a cash discount in reality pays that much less for the article which he purchases, and this is none the less true because the return is by way of merchandise rather than coin which may purchase merchandise. When defendants sold plaintiff's products at fair trade prices, and as a part of the same transaction gave their customers cash register receipts having a redemption value of $2\frac{1}{2}\%$ of such fair trade prices, they, in effect, sold plaintiff's products at $2\frac{1}{2}\%$ less than the prices fixed. I can see no distinction between returning to the customer a credit memorandum of $2\frac{1}{2}\%$ and giving him a cash register receipt. And whether the discount is small or large makes no difference—the statute forbids both."

This same matter was also considered by the Supreme Court of the State of Wisconsin in the case of *Ed Schuster & Co. v. Steffes*, 237 Wis. 41, 295 NW 737, 133 ALR 1071. There the Wisconsin Court stated:

"The contention that trading stamps are merely a species of cash discount has substance and perhaps is true. It does not follow, however, that so considered the issuance of stamps does not effect a reduction of the stipulated resale price, and the fact is that it does result in such a reduction. This is obvious in all cash transactions and only slightly less so than in those involving

credit. Hence, we conclude that the trial court erred in holding that to the extent of a two per cent discount trading stamps do not operate to reduce the resale price and are not within the prohibition of the subsection."

It is true that there are two cases decided under the Fair Trade Act which hold that the giving of a trading stamp or a cash discount coupon does not result in lowering the fixed price under the interpretation of the Fair Trade Act. Those cases as cited by appellant in his brief are Bristol-Meyers v. Lit Bros., Inc., 336 Pa. 81, 6 A.2d 843 and Weco Products v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P. 2d 856. However, those decisions were reached on the basis, as stated in the Picker case that, "the allowance of such discount has not injured the good will value of any article of plaintiff's merchandise." The difference in effect of giving a cash discount with articles protected by the Fair Trade Act and with articles protected by the Unfair Practices Act is clear. Generally, the purpose of the Fair Trade Act is to insure the manufacturers of brand name articles that the reputation of their products will not be jeopardized by being sold in some stores at lower prices than those established by the manufacturers and likewise to insure that the public will be able to buy a brand name article at a given price throughout the country. Both the California and Pennsylvania cases were brought by the manufacturers on the grounds that by giving the trading stamps with the purchase of the brand name article, the reputation of the particular brand was being jeopardized in the public mind and that the public would come to regard the brand name in question as a cheaper article or an article of inferior quality. The rationale of the courts is obvious. So

long as a certain stated posted price was maintained by the merchants on the particular articles being sold, this would be the price which the public would regard as the established price by the manufacturer and purchasers would clearly understand that any reduction that they got from that established price did not represent a concession made by the manufacturer but was purely an arrangement between them and their local merchant. As is pointed out in the Picker case, this reasoning is rather tenuous even in regard to the Fair Trade Act, and of course would have no bearing as applied to the Unfair Practices Act. While it may be argued as is done in the California and the Pennsylvania cases, that the giving of trading stamps does not effect a violation of the spirit and intent of the Fair Trades Act, it is quite clear that the giving of trading stamps as pointed out above completely nullifies the *Unfair Trade Practices Act*.

The use of trading stamps was challenged under the Unfair Practices Act in the California case of Food and Grocery Bureau, Inc. v. Garfield, 20 Cal. 2d 228, 125 P. 2d 3 supra. There plaintiff did not charge that there was any sale below cost but contended rather that the giving of the stamps was, in effect, the giving of a commodity in violation of a section of the Unfair Practices Act. The defendant has quoted this case in his brief to the effect that the trading stamp was not a commodity but was a cash discount. However, we direct the court's attention to language in the decision where the California court states that had the action been brought under the below cost section of the statute and had the evidence been proper, an injunction would have been granted. The California court said:

"Concededly, the Unfair Practices Act, *supra*, makes no reference to trading stamps. To support the respondent's position, therefore, it is necessary for him to show either that the plan conducted by the appellant amounts to the giving away of a product for the purpose of injuring competitors or destroying competition, *or that by its use he sells products below cost*. But the association does not assert that the appellant's issuance of trading stamps resulted in the sale of any commodities below cost, and the affidavits filed by it do not include any facts indicating that sales below cost were accomplished by the use of stamps." (Emphasis added.)

While the above language of the court is dicta it certainly indicates that the California Court felt that had the action been brought under the proper section of the act and had it appeared from the evidence that the giving of the stamps reduced the price below the required 6% markup, a violation of the statute would have been proved.

Appellant takes the position that the holding of the California court in the Garfield case is altered by the holding in the Weco case cited above. However, as pointed out above, this is not so for the reason that the Weco case concerns itself with the Fair Trades Practices Act whereas the Garfield case concerns itself with the Unfair Practices Act just as does the case now before the Court and the two Acts have an entirely different purpose and view.

In the case of Sunbeam Corporation v. Klein, 79 A.2d 603, the Supreme Court of Delaware held that the defendant violated the Fair Trade Act by issuing trading stamps with the sale of fair trade items thus reducing the price of those items. The Court said:

"It is true that the giving of trading stamps and cash register receipts redeemable either in merchandise or cash by purchasers have been held to be price cutting within the meaning of the Fair Trade Acts and, as such, enjoinable. *Schuster & Co. v. Steffes*, 237 Wis. 41,, 295 NW 737, 133 A.L.R. 1071; *Bristol-Meyers Co. v. Picker*, 302 N.Y. 61, 96 N.E. 2d 177. But, other services furnished by a retailer to attract customers to his business such as the furnishing of parking facilities, baby sitting, delivery service and the extension of credit, are not held to be price cutting within the meaning of Fair Trade Acts. *Bristol-Meyers Co. v. Lit Bros., Inc.*, 336 Pa. 81, 6 A.2d 843 *Weco Products Co. v. Mid-City Cut-Rate Drug Stores*, 55 Cal. App. 2d 684, 131 P.2d 856."

In the Oregon case of *Lambert Pharmacal Company v. Roberts Bros.*, 233 P. 2d 258, the right of a merchant to give trading stamps with a *fair traded item* was challenged. After the case was originally argued, the Supreme Court of the United States in the case of *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L.Ed. 1035, decided that the Miller-Tydings Amendment to the Sherman Anti-Trust Act, which in general excepted state fair trade laws and unfair trade practice acts from the prohibitions of the Sherman Anti-Trust Act, was not sufficiently broad to extend this exemption to a non-signer of a fair trade agreement. In view of the fact that a non-signer was involved in the Oregon case, *the Supreme Court of Oregon asked that the problem be reargued* and after reargument held that in view of the fact that a non-signer was involved, the Schwegmann case prevented it from upholding the Fair Trade Act of Oregon as to a non-signer. However, the very fact that the Court asked for a reargument of the case intimates that had it not

been for the Schwegmann case the court would have held that the giving of the trading stamps effectuated a reduction of the price of the article. Otherwise there would have been no reason for asking for the reargument. As pointed out above, there is much greater reason for prohibiting the use of trading stamps to effectuate price cutting under the Unfair Practices Act than there is under the Fair Trade Act.

The argument of defendant that even if a reduction in price below the statutory minimum was effected by the giving of trading stamps, the reduction is so small that the rule of de minimus should apply is rather novel in view of the testimony of the defendant himself. While the cash discount effected by the giving of the trading stamps amounts to 2.08% so far as the customer is concerned, it should be remembered that the mark-up on these articles under which the complaint is made was only 6%. Therefore, the reduction of 2.08% means that the margin of the retailer, upon which he has to do business, was reduced more than one-third. Certainly such a reduction does not come under the de minimus rule. Furthermore, regardless of how small the value may be to the consumer of a single trading stamp or a group of trading stamps, it is evident that the trading stamps are effecting a definite injury to competitors. If they are not, and if they are not drawing additional business to the retailer that uses them then obviously the claims of the S & H Green Stamp Company that they stimulate business are not well founded. The defendant himself testified that since using the stamps he had drawn new business, not only from his immediate neighborhood, but from all over the city, that his business had increased substantially and that he felt that the existence of

the S & H Green Stamp Plan in his store contributed in a material way to this increased business, which of course, was drawn from his competitors. How then can it be argued that the rule of de minimus should apply? De minimus applies only when the matter under consideration is so small as to have no practical effect. Here, as we have seen, the matter under consideration represents more than 1/3 of the retailer's total mark-up and has effectuated a substantial increase in the business of the retailer using the trading stamps. As the Supreme Court of the State of New York in the Picker case above cited stated:

"I can see no distinction between returning to the customer a credit memorandum of 21½% and giving him a cash register receipt. And whether the discount is small or large makes no difference—the statute forbids both.

"Defendants here agree that if the customer purchased \$10.00 worth of plaintiff's products, he would immediately receive on request and for nothing, any fair traded article he desired and which was priced at 25c. If a retailer may allow 21½% under the statute, a competitor may follow the same plan but instead allow 5%, in biting retaliation with an even greater allowance. Where may it end? The same cut-throat competition sought to be avoided by the Fair Trade Law could thus be revised under the so-called cash discount system."

The appellants maintain that even if the giving of the stamps does result in a price reduction, they would not be guilty of a violation of the law under the facts complained of. They maintain that Section 16A-4-9, Utah Code Annotated, 1943 requires that where there is a combination purchase

of 6% items with other items having a much higher mark-up, the law is not violated unless the sales price of all the items taken collectively is below the collective cost of the items. Even if it be conceded that Section 16A-4-9 is ambiguous on its face, however, when read in light of the purpose of the entire Unfair Practices Act, its meaning becomes quite clear. Obviously no retailer is going to be able to sell all of his products below cost and still stay in business. If he sells some items below cost, whether it be by means of a trading stamp, an out and out cash discount or merely a loss-leader, if he is going to make a profit on his whole operation it is necessary that he mark some items up more than enough to represent a fair return on such items. This is the very practice at which the statute is aimed. The statute is designed to prevent retailers from giving the customer an apparent saving on certain items in order to lure him into the store where it is hoped that the customer will purchase other items on which the markup is out of line. The section mentioned obviously means that each item or every item in the purchase must bear its own share of the cost of doing business and not that the collective profit on all the items should be enough to cover the cost of doing business. The natural law of economics will take care of that matter and no statute would be required.

Appellant takes the position that because Section 16A-4-7, subsection 2, provides that in figuring his costs the grocer is not allowed to deduct cash discounts, it follows as a matter of logic that cash discounts should not be construed as reducing the purchase price paid by the ultimate consumer to the grocer. We are unable to follow the logic of the appel-

lant's position in this regard. The Legislature has seen fit to make a specific exception in the case of cost to the wholesaler and cost to the retailer. If, as a matter of sound logic, cash discounts would not reduce the purchase price, why, then, would a specific statutory provision be required? The rule of *expressio unius, exclusio alterius* would seem to apply in this case. The Legislature has chosen to except from the ordinary logical meaning of the term "cash discount," its application to the purchase price of the wholesaler and the retailer. It has not seen fit to make such a specific exception as to the purchase price of the ultimate consumer. The only conclusion to be drawn from this, therefore, is that the Legislature intended that the ordinary commonly accepted rules of construction should apply. Furthermore, to provide that cash discounts shall not be construed as reducing the price of goods to the wholesaler and the retailer does not strike at the very foundation of the Act, whereas if a similar provision were made in regard to the price paid by the ultimate consumer, as has been pointed out above, the entire Act prohibiting sales below cost would be rendered inoperative.

POINT III

THE EVIDENCE ESTABLISHES A DEFINITE INTENT ON THE PART OF THE DEFENDANT TO INJURE COMPETITORS.

The Utah Unfair Practices Act provides that the acts, in order to be in violation, must be done with the intent or the effect of injuring competitors. Later in the discussion of the

constitutional issues, we will discuss more fully the question of the constitutionality of a statute so providing and also the question of whether a state may constitutionally prohibit acts which have the effect of injuring competitors where no intent is shown.

It appears quite clear, however, from the evidence in the case that the plaintiffs have established both the effect and the intent. Numerous grocer witnesses called by the plaintiffs testified that in their opinion the issuance of stamps by the defendant had taken business from other business establishments in the neighborhood. The witness Wangsguard testified as to how his business had fallen off since the stamps were issued and testified that in his opinion the direct cause of his business falling off was the issuance of the stamps by the defendant. The witness Van Waggonen testified that his business had fallen off so much that its very existence was threatened. He further testified that he had seen customers who had formerly traded at his store going to the Bush Market. He further testified that many of his customers had asked him to put in the trading stamp system and complained because he did not do so. He further testified that in his opinion the issuance of the stamps by the defendant was responsible for the reduction in his business.

Other witnesses representing the larger grocery stores throughout Ogden testified that the disastrous price war in the city of Ogden was traceable directly to the issuance of trading stamps at the Bush Markets. Bush himself, both in his deposition and during his examination on the stand, testified that his business had been materially increased since the

issuance of these trading stamps, and further that in his opinion the stamps were a material factor in his business increase. Therefore the effect of injury to competitors is well established. Obviously one type of injury to competitors which the Legislature intended to prohibit by the passage of the Unfair Practices Act, in addition to protecting the public was the taking of a competitor's business by unfair means. If business is taken away by a competitor by fair methods of competition, that is legal and, of course, in keeping with the American tradition of free enterprise. However, the Legislature determined that certain methods of taking a competitor's business were unfair and unhealthy to business as a whole and prohibited them. One of the unfair methods prohibited was the practice of price cutting as defined in the statute. The sole question of intent, therefore, is not whether the defendant intended to violate the law, but merely whether the method which he adopted, leaving aside for the moment the question of whether or not it is legal, was adopted by him with the intent of attracting customers from other stores.

Intent, of course, is something which must almost always be proved by circumstantial evidence. It is seldom if ever that a person will admit on the witness stand, or even admit before witnesses, that he intended to violate the law, that he intended to drive his competitors out of business or even that he intended to injure his competitors. In order to arrive at the intent of an individual the court must look at what the individual did, what the result was, and at the facts surrounding the situation in an effort to determine what, in the light of common knowledge, was probably the intent of the individual in doing the act complained of. Here the evidence is

clear that the defendant did reduce his prices by means of giving trading stamps and that the result of this reduction in prices was that he injured his competitors by taking their business away from them. It is a fundamental rule of law that individuals are presumed to intend the natural and probable consequence of acts performed by them. The question of intent to injure competitors by price cutting was carefully considered by the Supreme Court of California in the case of *People v. Pay Less Drug Stores, et al*, 143 P2d 762. California has a statute providing that evidence of the sale below cost is presumptive evidence of a violation of the law. The Supreme Court of California in the case above cited determined that this statutory presumption was invalid and unconstitutional because of the fact that there were certain classifications of sales exempted from the act and there was no logical assumption merely because the sales were made that they did not fall within one of the exemptions provided in the statute. However, after invalidating the statutory presumption, the court went on to hold that the fact that the defendant had intentionally cut prices which had resulted in injuring competitors was presumptive evidence that there was an intent to injure competitors even though there was no presumption that the sales were not within one of the exempted classes. In discussing this question the Supreme Court of California said:

“So far as the first question is concerned, the respondent produced as the first witness the secretary of the Retail Grocers Association of Alameda County. He testified that appellants attract customers of their competitors by selling at cost or below, and that the natural effect of selling below cost by one merchant

is to lessen the business of his competitors. Various grocery store operators then testified that they were competitors of appellants. Several of those operated stores reasonably close to that of appellants, one operated a store in Piedmont, and the others operated stores several miles distant. They all testified that during the early months of 1940 they noticed a material decline in their volume of business that was not purely seasonal. Several of them testified that during this period they noticed a particular decline in the volume of their coffee sales, that being one of the products appellants admittedly sold below cost during this period. Several testified that in self-defense they had to reduce their price to meet the challenge of appellants. Appellants argued that evidence of loss of volume is not necessarily evidence of "injury" to competitors because to constitute an injury there must be a loss of profits, and loss of volume does not necessarily show loss of profits. There is ample evidence in the record of the highly competitive nature of the retail grocery business, and of the small margin of profit that exists because of such competition. In view of that evidence, it is a reasonable, if not inevitable, inference that loss of volume of business shows loss of profits.

On this evidence the trial court found that these sales below cost were with the intent to injure competitors or to destroy competition. It is, of course, true that all sales below cost are not prohibited. Only those sales accompanied by the requisite intent are prohibited. This was the express holding in *Wholesale T. Dealers v. National, etc., Co.*, 11 Cal. 2d 634, at page 658, 82 P2d at page 17, 118 A.L.R. 486. See also, *Balzar v. Coler*, 11 Cal. 2d 633, 82 P2d 19. Intent, however, is not something that can always be proved by concrete evidence. It is an intangible matter that may be proved by inferences based on reasonable probabilities. Without now considering the evidence

produced by appellants, and without regard to the presumption contained in paragraph 5 above quoted, we think that it is a reasonable inference from the above evidence that the sales here involved were with the requisite intent. The sales below cost are admitted. The evidence shows competitors were injured by such price cutting by appellants. In addition, the act permits sales below cost, but the respondent, proved that these sales did not fall within any of the permitted categories. This is a necessary part of the respondent's burden of proof. *Green v. Grimes-Stassforth S. Co.* 39 Cal. App. 2d 52, 102 P2d 452. It seems to us that when sales below cost are shown, when injury to competitors appears, and when the evidence shows the sales were not in any of the permitted classes, the trier of the fact may reasonably infer, as was done in this case, that such sales were of the prohibited class, that is, sales below cost for the purpose or with the intent to injure competitors or to destroy competition.

In the case now before the court, as in the case above cited, the fact of price cutting has been proved. The injury to competitors has been proved. It has been stipulated by the parties that the acts complained of did not fall within any of the statutory exemptions except possibly subsection (d) relating to the reduction of prices to meet competition. The defendant introduced no evidence to indicate that the price cutting was to meet competition and on this he had the burden of proof. Plaintiff, however, went ahead and assumed the burden of affirmatively proving that there was no price-cutting which might have caused defendant to reduce his prices to meet competition in the Ogden area in the period preceding the issuance of the trading stamps by the defendant. Therefore, with the statutory exemptions negated, the only

question left is the question of intent. As is stated in the quotation above by the California court this intent can be presumed. However, we need not rely on this presumption. During the cross-examination of the defendant on the stand, he admitted, somewhat reluctantly, that his purpose in giving S & H green stamps was to attract new business for his store; that it was immaterial where the business came from; that if it was business that formerly belonged to a competitor that was quite all right. As is pointed out above, while it was legitimate for him to attract new customers by fair methods of competition, the Unlawful Practices Act of Utah prohibits the attracting of such customers by means which have been declared unfair by the Legislature.

POINT IV

THE UNFAIR PRACTICES ACT IS CONSTITUTIONAL.

Appellant attacks the constitutionality of the Unfair Practices Act on the ground that it purportedly violates the "equal protection" and "due process" clauses of the Federal Constitution and the corresponding sections of the State Constitution.

It is alleged that the statute discriminates between the "credit and delivery" and the "cash and carry" merchant. The alleged discrimination, however, is based on appellant's erroneous assumption that the statutory markup is intended to cover all of the costs of the one but only some of the costs of the other. A complete and decisive answer to this attack

on the constitutionality of the statute is a reading of the statute itself where "cost" is defined as including, among other elements, a markup of six per cent to cover a proportionate part of the cost of doing business in the absence of proof of a lesser cost. There is nothing in the statute which either expressly or inferentially provides that the statutory markup is to be applied differently in the case of a "credit and delivery" or a "cash and carry" merchant. Section 16A-4-7 (b) 3, Utah Code Annotated, 1943, as amended by Chapter 21, Laws of 1951, provides in part as follows:

When used in this act, the term "cost to the retailer" shall mean the invoice cost of the merchandise to the retailer within thirty days prior to the date of sale, or the date of offering for sale, or the replacement cost of the merchandise to the retailer, whichever is lower less all trade discounts except customary discounts for cash; to which shall be added * * * (c) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be six per cent * * * * .

Appellant's erroneous assumption that the statute contemplates a different application of the statutory markup in the case of the two types of merchants interjects a discriminatory element into the case which does not in fact exist.

As a corollary to the foregoing, appellant asserts that the overhead of the "cash and carry" merchant is lower than the overhead of the "credit and delivery" merchant and that consequently the "cash and carry" merchant should be permitted to charge correspondingly lower prices. Assuming, arguendo, that appellant's assumption is correct, it would follow that

the "cash and carry" merchant could charge lower prices than the "credit and delivery" merchant providing that both merchants priced their merchandise at actual rather than statutory cost. It does not follow, however, that the "cash and carry" merchant or the "credit and delivery" merchant may price his merchandise on the basis of the statutory markup and then deduct therefrom a particular item of expense merely because he does not and the other type of merchant does incur that item of expense as a part of his cost of doing business. Under the statute, a merchant may sell his merchandise either at actual cost, which necessarily includes all costs of doing business, or at statutory cost, which, by its very definition, includes only a proportionate part of the cost of doing business. In other words either the "cash and carry" or the "credit and delivery" merchant may sell at actual or statutory cost but neither may price his merchandise at statutory cost and then deduct from the selling price an item of expense in the cost of doing business which he does not bear but which is borne by the other type of merchant.

Appellant cites *Florida Dry Cleaning and Laundry Board v. Everglades Laundry*, 137 Fla. 290, 188 So. 380; *Serrer v. Cigarette Service Co.*, 148 Ohio 519, 76 NE 2d 91; and, *Cohen v. Frey & Sons, Inc.*, MD., 80 A2d 267 to support his assertion that the Utah statute is unconstitutional because it purportedly fails to recognize cost differentials between the "cost and carry" and the "credit and delivery" types of businesses. The cited cases are not in point here, however, because in each of those cases the courts were dealing with the definition of cost to the wholesaler rather than cost to the retailer. Furthermore, in *Florida Dry Cleaning and Laundry*

Board v. Everglades Laundry, *supra*, the court was dealing with a schedule of prices fixed by a board rather than a markup prescribed by statute. Moreover, while the Supreme Court of Ohio made no reference to the definition of cost to the retailer in its opinion in the *Serrer v. Cigarette Service Co.* case, *supra*, the Court of Common Pleas (74 NE 2d 841), affirmed by the Supreme Court of Ohio, did approve the definition of cost to the retailer contained in the Ohio statute when it said:

* * * * It may not be inappropriate to remark that unlike the definition of "cost to the wholesaler" the statutory presumptive markup does not cover a retailer's cost except in cases where the actual cost of doing business is undeterminable or equal to 6%. In all other cases a retailer's markup corresponds to the actual cost of doing business whether it be higher or less than the presumptive 6%.

A further distinguishing feature referred to by the court in striking down the statute in the *Cohen v. Frey & Sons, Inc.*, case, *supra*, was the statutory presumption of guilt which is not present in the Utah statute. On the other hand, numerous courts have upheld the constitutionality of such statutes where the definition of cost contained therein was remarkably similar to the definition of cost contained in the Utah statute. See *People v. Gordon et al.*, 105 Cal App 2d 711, 234 P2d 287; *People v. Pay Less Drug Stores, et al*, 25 Cal 2d 108, 153 P2d 9; *May's Drug Stores v. State Tax Commission*, Iowa, 45 NW2d 245; *Old Homestead Bread Co. et al v. Marx Baking Co.*, 108 Colo. 375, 117 P2d 1007; *State ex rel Anderson, County Attorney, v. Commercial Candy Co. Inc., et al.*, 166 Kan. 432, 201 P2d 1034; *Kentucky Utilities Co. v.*

Carlisle Ice Co., 279 Ky. 585, 131 SW 2d 499; Louisiana Wholesaler Distributors Ass'n. v. Rosenzweig, 214 La. 1, 36 So. 2d 403; McElhone v. Geror, 207 Minn. 580, 292 NW 414; Hill et al. v. Kusy, 150 Neb. 653, 35 NW2d 594; McIntire v. Borofsky, 95 N.H. 174, 59 A2d 471; Adwon v. Oklahoma Retail Grocers Ass'n. Inc., 204 Okla. 199, 228 P 2d 376; Rust v. Griggs, 172 Tenn. 565, 113 SW2d 733; State v. Sears, 4 Wash. 2d 200, 103 P2d 337; State v. Twentieth Century Markets, 236 Wis. 215, 294 NW 873; and State v. Langley, 53 Wyo. 332, 84 P2d 767.

Appellant's assertion that if the Utah statute is construed to prohibit only S & H cash discount stamps, it is unconstitutional because it discriminates against a legitimate business, is another specious attempt to mislead and confuse the court. The Utah statute *does not* prohibit the use of S & H cash discount stamps. The Utah statute only prohibits their use for an unlawful purpose. It prohibits their issuance with the sale of merchandise where the effect is to reduce the price of the merchandise below cost for the purpose of injuring competitors and destroying competition or where the effect thereof may be substantially to lessen competition or tend to create a monopoly. The prohibition of the statute is leveled not only at S & H cash discounts but cash discounts in any form when, and only when, the amount of the cash discount reduces the selling price of the merchandise below cost in violation of the statute. A merchant may issue cash discounts by means of S & H green stamps or any other means so long as the selling price of the merchandise is not thereby reduced below cost in violation of the statute. However, he may not do indirectly what the law prohibits him from doing directly.

Designating the issuance of S & H cash discounts or any other form of cash discounts something other than what they actually are does not clothe the practice with judicial protection if the practice contravenes the express provisions of a statute. As pointed out by the New York Court of Appeals in the case of *Bristol-Meyers Co. v. Picker, et al*, 302 New York 61, 96 NE2d 177:

* * * No matter how one puts it, the consumer who is accorded a cash discount in reality pays that much less for the article which he purchases, and this is none the less true because the return is by way of merchandise rather than coin which may purchase merchandise. * * *

Appellant also challenges the validity of the Utah statute if it is construed to permit conviction upon proof in the alternative of a wrongful intent or a harmful effect. The challenged section is Section 16A-4-7, Utah Code Annotated, 1943, as amended by Chapter 21, Laws of 1951, which provides in part as follows:

It shall be unlawful * * * to sell * * any article * * * at less than the cost thereof * * * for the purpose of injuring competitors and destroying competition, or of misleading the public, or when the effect of selling * * * at less than cost * * * may be substantially to lessen competition or tend to create a monopoly. * * *

It is true that many statutes prohibiting sales below cost do require a wrongful intent to injure competitors or destroy competition as an essential element of a violation. On the other hand, where the language of the statute does not expressly

require a wrongful intent as an essential element of the offense, courts have, by judicial construction, read that element into the statute. Thus in *Arizona v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P.2d 650, where the statute prohibited sales below cost "with the intent or effect" of injuring competitors or destroying competition the court said:

We consider then the objection that the chapter imposes both civil and penal liability upon one who violates its provisions without any criminal intent. Upon a careful examination of section 3, *supra*, which states what constitutes a violation of the chapter, we think that while it is not explicitly stated therein that the particular thing done must be done with a criminal intent, the only reasonable implication from the entire language of the chapter is that such intent is an essential ingredient of a violation thereof. A similar construction has been given to statutes which fail as does ours, explicitly to require the criminal intent. *People v. Kahn*, 19 Cal. App. Supp. 2d 758, 60 P.2d 596; *Omaechevarria v. Idaho*, 246 U.S. 343, 38 S. Ct. 323, 62 L.Ed. 763.

See also *Hill et al v. Kusy*, 150 Neb. 653, 35 NW 2d 594; *Rust v. Griggs*, 172 Tenn. 565, 113 SW 2d 733; *Old Homestead Bread Co. v. Marx Baking Co.*, 108 Colo. 375, 117 P. 2d 1007; *Acme Dstb. Co. v. Thoni*, Tenn. 136 SW 2d 734.

In the case of *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A. 2d 67, 128 A.L.R. 1120, the court said:

* * * if the Act confined itself to prohibiting sales below cost when intended to destroy competition, it would undoubtedly be valid, as has been held in various

jurisdictions where such acts have been enacted with that qualification. *State v. Central Lumber Co.*, 24 SD 136, 123 NW 504, 42 LRA (NS) 804, affirmed 226 U.S. 157, 33 S Ct 66, 57 L.Ed 164; *People v. Kahn*, 19 Cal App Supp (2d) 758, 60 P (2d) 596; *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, 11 Cal (2d) 634, 82 P(2d) 3, 118 ALR 486; *State v. Langley*, 53 Wyo. 332, 84 P(2d) 767; *Associated Merchants v. Ormesher*, 107 Mont. 530, 86 P(2d) 1031; *Rust v. Griggs*, 172 Tenn. 565, 113 SW (2d) 733; *Hammond v. Bayless Markets, Inc.*, Arizona Superior Ct., Prentice-Hall Fed. Trade & Ind. Serv. (2d ed) 96. 632. * * *

The only case cited by appellant where a statute prohibiting sales below cost was invalidated because it contained the words "or effect" after the phrase "with intent" as does the Utah statute is *Englebrecht v. Day*, 201 Okla. 585, 208 P 2d 538. In that case, certain trade practices were declared by one section of the statute to be in contravention of the public policy of the state and made a crime by another section of the statute. The statute was invalidated because the court held that to strike out any part of the section which declared the public policy worked a change of that policy so as to defeat the basis for declaring the prohibited trade practices a crime. The reasoning of the court in invalidating the Oklahoma statute would not be applicable in determining the constitutionality of the Utah statute, however, because to strike out those words in the Utah statute would not work any change in the declared policy of the Utah statute.

It is to be noted moreover that the Supreme Court of the United States as well as the highest courts of various states has upheld the constitutionality of statutes prohibiting the sell-

ing of merchandise below a fixed price regardless of intent. In the case of *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940, 54 S. Ct. 505, 89 ALR 1469, the applicable statute provided in part as follows:

* * * it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk *at any price less or more than such price* * * * (the price fixed by the board). (Emphasis added.)

In upholding the validity of the statute the Supreme Court said:

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld.

* * * * *

* * * 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 sustaining the validity of a Minnesota statute which prohibited sales below cost "for the purpose of or with the effect of" injuring competitors and destroying competition as not objectionable on constitutional grounds, the Supreme Court of Minnesota, in the case of *McElhone v. Gregor*, 207 Minn. 580, 292 NW 414, said:

The present statute prohibits sales at less than cost for the purpose or with the effect of injuring competitors and destroying competition. *Intent to injure is not essential to violation. This is not fatal to the act. Sales below cost which have the effect of injuring competition may be prohibited regardless of intent.* (Emphasis added.)

* * * * *

The legislature is attempting to protect retailers and the public from unfair trade practices. It is not for us to deny its conclusions of fact that sales below cost are harmful and constitute a trade practice so unfair and injurious as to require legislative attention. The act declares and implements valid policy. We cannot say that the implementation bears no relation to the purpose. So, whatever its interference with plaintiff's freedom of contract, the statute transgresses no constitutional guaranty, unless in other respects it is arbitrary or unreasonable. The police power, which is about all the power that sovereign government has, aside from its power of eminent domain and taxation, is not limited to protection of public health, morals, and safety. It extends also to "economic needs." *Veix v. Sixth Ward Bldg. & Loan Ass'n.*, 60 S. Ct. 792, 84 L.Ed. (opinion filed April 22, 1940). Therefore, it may protect from economic harm.

The constitutionality of the Unfair Sales Act of the State of New Hampshire making it a misdemeanor to sell below cost "with intent or effect of injuring competitors" was also upheld by the Supreme Court of New Hampshire in *McIntire v. Borofsky*, 95 NH 174, 59 A2d 47. In that case the court said:

* * * Similar phraseology is found in several of the Unfair Sales Acts of the other states. 1 *Callmann, Unfair Competition & Trade Marks* (1945) Sec. 27,

2(a). *It is well settled in this jurisdiction that the Legislature may declare an act criminal without requiring that it be done with intent.* State v. Cornish, 66 N.H. 329, 21 A. 180, 11 L.R.A. 191; State v. Ryan, 70 N.H. 196, 46 A. 49, 85 Am. St. Rep. 629; State v. Goonan, 89 N.H. 528, 3 A2d 105; State v. Yosua, 91 N.H. 181, 16 A2d 370. In case of doubt the statute has frequently been construed to require intent (Coutremarsh v. Metcalf, 87 N.H. 127, 175 A. 173), but it is clear that the present statute by its express terms requires either the intent or the effect of injuring or destroying competition. The Legislature deemed it necessary to do more than condemn a state of mind and provided that sales below cost, except as provided in Sec. 3, are an economic evil whether they are intended or have the effect of injuring competition. Such a statute is valid. McElhone v. Geror, 207 Minn. 580, 292 N.W. 414; Rust v. Griggs, 172 Tenn. 565, 113 S.W. 2d 733. Cf Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S. Ct. 961, 89 L. Ed. 1320; State v. Tankar Gas, Inc., 250 Wis. 218, 26 N.W. 2d 647. (Emphasis added.)

See also Mays Drug Stores v. State Tax Commission, Iowa, 45 NW 2d 245.

Appellant also attempt to establish invalidity of the Utah statute by comparing it with other statutes which were struck down because in defining "cost" they were held to be so vague and indefinite that the retail merchant was unable to ascertain when he was violating the law. A careful analysis of the statutes which were invalidated for that reason, however, shows that those statutes were entirely different from the Utah statute. State v. Packard Bamberger Co., 123 N.J.L. 202, 8 A2d 291; Commonwealth v. Zasloff, 338 Pa. 457, 13 A2d 67,

128 ALR 1120; *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P2d 650; and, *Daniel Loughran Co. v. Lord Baltimore Candy & T. Co.*, 178 Md. 38, 12 A2d 201, cited by appellant, are not in point because in each of those cases the definition of cost was linked to such phrases as "prevailing market conditions," "existing market conditions" or the "most favorable market prices available." None of those phrases are present in the applicable section of the Utah statute. In the case of *Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70, the court struck down a Minnesota statute because it required a merchant making purchases from a manufacturer who published a list price to use the list price as his cost regardless of whether or not it represented the merchant's actual cost. There is no such arbitrary requirement in the Utah statute. *Florida Dry Cleaning and Laundry Board v. Everglades Laundry*, 137 Fla. 290, 188 So. 380, is not in point because it dealt with cost to the wholesaler rather than cost to the retailer and also with a schedules of prices fixed by a board rather than a statutory markup prescribed by the Legislature. The case of *Cohen v. Frey & Sons, Inc.*, 80 A2d (Md. 1951), cited by appellant, cannot even be persuasive authority for invalidating the Utah statute because in the Maryland statute there was a presumption of guilt provision not present in the Utah statute and also because the trial court there rejected an attempt on the part of the defendant to establish a lesser cost. The Utah statute expressly authorizes a lesser cost where it can be established in lieu of the statutory markup.

Finally, appellant attempts to avoid the real issue involved in this dispute, which is whether he violated the Utah Unfair Practices Act, by making the assertion that the Retail Grocers'

Association was guilty of price fixing in violation of the Sherman Act.

The record shows conclusively that this was not an action commenced by the Retail Grocers' Association but an action commenced by the Trade Commission of Utah to enjoin the appellant herein from violating the provisions of the Utah Unfair Practices Act and *in which action the Retail Grocers' Association intervened upon stipulation of both parties.* (Emphasis added.) Enforcement of the provisions of the Utah Unfair Practices Act is a duty enjoined by law upon the Trade Commission of Utah. Section 16A-2-13, Utah Code Annotated, 1943, provides:

It shall be the duty of the commission, and it shall have full power, jurisdiction and authority:

(1) To prescribe rules and regulations not in conflict with the constitution and laws of this state for its own government and the transaction of its business.

(2) To have and exercise general supervision over the administration of chapters 20 and 21, Laws of Utah, 1937, as amended.

(3) To collect, collate, and publish statistical and other information relating to trade and business that is material to the enforcement of this act.

(4) To cooperate with and assist any trade or industry desiring to effectuate an agreement between its members for the purpose of stabilizing employment in the trade or industry and correcting unfair practices between competitors.

(5) To have and exercise general supervision over the administration and enforcement of Senate Bill No.

42, twenty-sixth legislature of the state of Utah, known as the barbers price and hour act.

The Unfair Practices Act of the State of Utah is Chapter 21, Laws of Utah, 1937, as amended, referred to in subsection (2) quoted above.

Appellant himself concedes that the Utah Unfair Practices Act is not a price fixing statute. At page 13 of his brief he states:

Like the California Unfair Practices Act, upon which it is modeled, the Utah Unfair Practices Act is not a price fixing statute.

Again at page 75 he states:

In the case at bar, we think it is not only plain that the Utah Act, like its California prototype, was not intended to sanction price fixing but we now have the benefit of *Schwegman Bros. v. Calvert Distillers*, 341 U.S. 384, 386, 71 S. Ct. 745, 95 L.Ed. 1035, (May 21, 1951), where the Supreme Court noted that the Sherman Act makes it unlawful for individuals to enter into any agreement, express or implied limiting or fixing prices, such price fixing being unlawful per se * * .

In citing the case of *Food and Grocery Bureau v. United States*, 139 F. 2d 973, (C.C.A. 9th 1943) appellant fails to point out that in that case the court was concerned with the activities of an associated group which actually did attempt to fix retail food and grocery prices, whereas in this case we are concerned solely with an enforcement action by the Trade Commission of Utah enjoining compliance with the Unfair Practices Act of the State of Utah. At no time has either the

Trade Commission of Utah or the Retail Grocers' Association attempted to fix prices and there is no evidence in the record to support appellant's bald assertion in this regard. The action of the Trade Commission of Utah in enjoining compliance with the provisions of a state statute does not in any way contravene the provisions of the Sherman Act.

CONCLUSION

It is respectfully submitted that the Unfair Practices Act of the State of Utah is a valid exercise of the police power of the State; that the evidence in the record supports the conclusion that appellant did violate its provision; and, that the cited authorities support the constitutionality of the statute so that the decree and injunction issued by the trial court should be upheld by this Honorable Court.

Respectfully submitted,

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