

1952

Trade Commission of Utah, Utah Retail Grocers Association and George Ingalls v. James L. Bush : Appellant's Reply Brief

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

TRADE COMMISSION OF UTAH,
Plaintiff and Respondent,

JUN 6 1952

Clerk, Supreme Court, Utah

**UTAH RETAIL GROCERS ASSOCI-
ATION and GEORGE INGALLS,**
dba George's Market,
*Plaintiffs in Intervention
and Respondents,*

Civil No.
7783

VS.

**JAMES L. BUSH, dba Bush Super
Market,**
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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ATION and GEORGE INGALLS,
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Defendant and Appellant.

APPELLANT'S REPLY BRIEF

INTRODUCTORY STATEMENT

In our main brief we first considered the question at issue from the cost point of view because the Utah Unfair Practices Act is a *cost*, not a *price* statute. In Point I we argued that cash discount stamps are an element of cost, and, as such, are covered by the statutory markup.

We next considered the question from the price point of view because that was the way the Trade Commission looked at it. In Point II we argued that *cash* discounts, as contrasted with *trade* discounts, do not reduce prices, but relate only to the terms of sale.

After considering in Point III the element of intent, we then took up the constitutionality of the Act, and showed in Point IV (a) that the consequence of rejecting our argument in Point I was to render the statute unconstitutional if the question were viewed from the *cost* point of view, and in Point IV (b), that the consequence of rejecting our argument in Point II was to render the statute unconstitutional if the question were viewed from the *price* point of view. In either case, an unfair discrimination against the cash-and-carry merchant and in favor of the credit-and-delivery merchant resulted.

To find that our argument hung together, no matter whether the stamps were looked at from the point of view of the merchant's cost of acquisition or from the point of view of his selling price, gave us a feeling of complete assurance in the logic and validity of our client's position in this dispute. That assurance is now made doubly sure by the inability of the respondents to take a consistent stand in opposition.

To meet Point I of our main brief it was incumbent upon our opponents to argue that cash discount stamps are not an element of cost, and, therefore, are not covered by the statutory markup. Not only do they fail to make this argument, but, in Point IV of their brief, they adopt appellant's argument to the contrary.

To meet Point II of our main brief it was incumbent upon our opponents to argue that cash discounts cut prices. They did make this argument, but, again, offered no answer to the constitutional problem which it raised.

All of this we shall presently consider in more detail, but it seemed worthwhile to indicate at the outset that whereas our argument hung together no matter how you looked at it, our opponents' argument did not, and that respondents' position on the various points which we have raised is illogical and inconsistent.

As a further preliminary observation, we call the Court's attention to the fact that our opponents make no record reference to the testimony or to the exhibits, and, therefore, as we understand it, adopt our statement of the facts; and that, taken as a whole, their brief is entirely negative in its approach to the problem under consideration. Their principal argument seems to be that if any discount is allowed, even though it be storewide and uniform in its application, and even though it be no greater than what is customary for cash discounts, the Unfair Practices Act will be nullified. This, we submit, is nonsense.

Finally, we wish to observe that "the great price war" in the retail grocery business in Ogden, which was featured so prominently at the trial of this action, rates only a passing mention in respondents' brief.

POINTS RELIED ON BY APPELLANT

POINT I

RESPONDENTS HAVE DEFAULTED IN ANSWERING POINT I OF APPELLANT'S BRIEF.

POINT II

RESPONDENTS HAVE FAILED TO ANSWER
POINT II OF APPELLANT'S BRIEF.

POINT III

RESPONDENTS' POSITION ON THE QUES-
TION OF WRONGFUL INTENT IS BOTH UN-
CLEAR AND UNSOUND.

POINT IV

RESPONDENTS HAVE NOT MET THE CON-
STITUTIONAL QUESTIONS RAISED BY
POINT IV OF APPELLANT'S BRIEF.

POINT V

BRISTOL-MYERS v. *PICKER*, 302 N. Y. 61, 96
N. E. 2d 177, and *SCHUSTER & CO.* v. *STEFFES*,
237 Wis. 41, 295 N. W. 737 ARE NOT PERSUA-
SIVE.

POINT I

RESPONDENTS HAVE DEFAULTED IN AN-
SWERING POINT I OF APPELLANT'S BRIEF.

In Point I of our main brief we contended that the Commission had failed to make out a *prima facie* case because the Unfair Practices Act is a *cost* statute, not a *price* fixing statute, and the evidence did not show that Mr. Bush had sold any merchandise below either his actual or the statutory *cost*. We based this contention upon the fact that Mr. Bush's trading stamps, being an element of his cost of doing business, were covered by the statutory markup of

6%. We pointed out that cash discount stamps are an element of the cost of doing business on the cash-and-carry plan directly comparable to the extension of credit as an element of the cost of doing business on the credit-and-delivery plan and, in the same general connection, that trading stamps as an attraction may counterbalance the attraction of free parking or some other service. From this we argued that, if the statutory markup of 6% was intended to cover such of these costs as were peculiar to the credit-and-delivery merchant, the legislature must have intended it to cover such of them as were peculiar to the cash-and-carry merchant for, otherwise, it would unfairly discriminate between the two.

Our opponents' only response is a quotation from *Bristol-Myers v. Picker*, 302 N. Y. 61, 96 N. E. 2d 177, on the difference between cash register receipts and free parking as advertising media and a quotation from *Rast v. Van Deman*, 240 U. S. 342, which is always thrown at the trading stamp companies in litigation such as this because of the colorful phrase "lure to improvidence." Neither of these cases is in point, and in neither of them was the quoted portion anything but *obiter dictum*. Neither of these cases had anything to do with a sales-below-cost statute, and, consequently, in neither of them was the Court called upon to consider whether trading stamps, as an element of the merchant's cost, would be covered by the statutory markup designed for that purpose.

We shall presently refer at more length to *Bristol-Myers v. Picker*, *supra*, for it is upon that decision that

respondents rest their chief reliance. *Rast v. Van Deman*, supra, stands only for the proposition that a retail sale of merchandise is a local act which comes within the police power of the State where it occurs; and its invidious slur upon the trading stamp business has been repeatedly rejected by Courts from one end of the United States to the other and, among them, by this very Court in *State v. Holtgreve*, 58 Utah 563, which held that the trading stamp business, making possible the allowance of cash discounts on small purchases, was a legitimate enterprise.

In Point I of our main brief, we also called the Court's attention to the fact that if stamps be considered as concessions, Section 16A-4-9 of the Act specifically provides that "in all sales involving more than one item * * * the vendor's * * * selling price shall not be below the cost of *all* articles * * * and concessions included in such transactions" and that, therefore, even if we were to assume for the sake of the argument that the Act prohibits the granting of a cash discount on the sale of a single item marked up no more than 6%, it does not prohibit the granting of a cash discount on a transaction involving several items when the average markup is more than sufficient to offset the discount. In this connection, we showed, first, that the average markup is 13%, or more than enough to offset the discount in question (2.08%) and, second, that it is only in one sale out of a thousand, a fact which is neither denied nor challenged, that the transaction is limited to a single 6% item.

To meet this, our opponents argue that Section 16A-4-9 is ambiguous (p. 16) and that the section obviously means that each item in a multiple-item purchase must bear its own share of the cost of doing business (i.e. must carry the statutory markup) without regard to the markup on the other items; and that to construe the statute otherwise is to legalize "loss leader" merchandising.

Per contra, we suggest that not only is there no ambiguity in Section 16A-4-9 but that, if there were, it should not be resolved in such a way as to convict a man of a crime. We are dealing here with an Act which carries criminal sanctions.

We also remind the Court that "loss leader" merchandising is not charged here and is not here under consideration and that it will be time enough to study its impact when, if ever, the occasion arises. "Loss leader" merchandising consists of the granting of extraordinary markdowns on specific items, sometimes far below even wholesale prices, for the purpose of attracting customers into the store. The hope is that the customers will be misled into believing that everything in the place is a bargain and that, therefore, the consequent loss on the "leader" merchandise will be more than offset by the profit on other sales. No such situation obtained in the case at bar. Mr. Bush gave no special discounts, and offered no "loss leader" merchandise. He did not hold out to the customer an apparent saving on certain items in order to lure him into the store, as our opponents suggest, but offered a uniform cash discount on every item in his store. That is not "loss leader" merchandising. Talk

of "loss leader" merchandising is not germane to the present controversy and not helpful in its solution.

In Point I of our main brief we contended, finally, that if only one sale out of one thousand sales consisted of 6% merchandise alone, a fact which was not denied, the consequent violation of the Act, if any, would fall within the rule of *de minimis*. The law does not concern itself with such trifles.

In response, our opponents say, (pp. 14 and 15), that the rule of *de minimis* does not apply because a cash discount of 2.08% which has the effect of attracting customers to a grocery store cannot be considered trivial. But we did not make such an argument. Our contention, which we believe we stated in plain terms, was that if a discount of 2.08% *on that one sale out of a thousand which relates to a single 6% item* violates the statute, it is *de minimis*. No answer to this argument has been attempted.

For the foregoing reasons, it may be said that our opponents have defaulted in answering Point I of our brief.

POINT II

RESPONDENTS HAVE FAILED TO ANSWER POINT II OF APPELLANT'S BRIEF.

In Point II of our main brief we contended that the Commission had not made out a *prima facie* case even if the present controversy is considered on the basis of *price*,

rather than cost, for *cash* discounts, as contrasted with *trade* discounts, relate to the terms of sale, not the price, and, therefore, do not have the effect of cutting prices. As authority for this contention we cited *Rosenkampff and Wider*, "*Theory of Accounts*"; *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, 55 Cal. App. 2d 684; 131 P. 2d 856; and a very carefully reasoned opinion by the Attorney General of Oklahoma. We also pointed out that the Utah Unfair Practices Act itself quite properly differentiated between trade discounts, which do affect prices, and cash discounts, which do not, by requiring the retailer to deduct the former but not the latter in determining his cost.

Our opponents' response to this is to cite the *Picker* decision and *Schuster and Co. v. Steffes*, 237 Wis. 41, 295 N. W. 737, to the effect that cash discounts do cut prices, and then go on to say, on the authority of the *Picker* decision, that if a 2% cash discount does not violate the Act, a 6% discount will not violate it and the Act will therefore be nullified. The same could be said of almost any trade practice, no matter how free from illegality when legitimately used. Almost any practice can be abused, but that is no reason to condemn it when it is not. As Judge Fuld said in his dissenting opinion in the *Picker* case, in which the Chief Judge joined, "Courts are not powerless to deal with obvious subterfuges. * * * There is time to deal with such situations when they are presented * * *."

In the case at bar, we are not dealing with any subterfuge. If the discount had exceeded the usual amount allowed as an inducement for prompt payment, or if it had varied in amount, or if it had been selective in its applica-

tion, the case would be different, for a subterfuge would have been indicated, but such was not the fact. What we have here is a normal cash discount (R. 188), storewide and uniform in its application.

Aside from offering the argument that, if a cash discount were allowed, it might be abused, our opponents tried to explain away the California cases (*Food & Grocery Bureau v. Garfield*, 20 Cal. 2d 228, 125 P. 2d 3; and *Weco Products v. Mid-City Cut Rate Drug Stores*, 55 Cal. App. 2d 684, 131 P. 2d 856) and to derive some comfort from *Sunbeam Corporation v. Klein*, 79 A. 2d 603, and *Lambert Pharmacal Company v. Roberts Bros.*, 233 P. 2d 258, but here we submit they failed completely.

The California cases cannot be explained away: in the *Food & Grocery Bureau* case the Court said, flatly, that trading stamps constitute a "discount given the customer in consideration of his paying cash;" and in the *Weco Products* case a higher Court said that this "ruling of the Court must be regarded as conclusive of the status of the trading stamp in commercial retail business." "A cash discount," said the Court, "is a trade practice long established, and is authoritatively recognized as being not a deduction from the purchase price." (Citing: Montgomery's "Auditing Theory and Practice," pp. 499-500.) Respondents read into the *Food & Grocery Bureau* decision an indication that if the complaint had not been brought under the section of the California Act that forbade gifts but had been brought under the section which forbade sales below cost, the Court would have condemned the cash discount. This is not only purely speculative but it is illogical because, if trading stamps are the

equivalent of a cash discount, as the Court found, and not a gift, they do not constitute something for nothing and their effect is upon the terms of sale rather than the price. In this respect, our view of the matter is confirmed and our opponents' is rejected by the Court of Appeals of California in the *Weco Products* case which held that cash discounts do not cut prices.

Sunbeam Corporation v. Klein, *supra*, which our opponents cite for the proposition that the Supreme Court of Delaware held that it was a violation of the Delaware Fair Trade Act to issue trading stamps with the sale of fair trade items, did not in any way concern trading stamps, and was not decided by the Supreme Court of Delaware.

Similarly, *Lambert Pharmacal Company v. Roberts Bros.*, *supra*, which our opponents cite for the proposition that the Supreme Court of Oregon, but for the decision in *Schwegmann Brothers v. Calvert Distillers, Inc.*, 341 U. S. 384, would have held that the giving of trading stamps with fair trade items effectuated a reduction of the price in violation of the Oregon Fair Trade Act, stands for no such thing. In suggesting that it does, our opponents draw from the conduct of the Court, in asking for a reargument after the *Schwegmann* decision, an intimation which the Court itself took pains to foreclose by saying, "we intimate no opinion on the questions originally presented and argued." Even without such a statement, it should be obvious that no intimation, one way or the other, should be drawn, for Courts make a practice of refraining from rendering decisions on points which have become moot, and that, we

submit, is the reason why the Supreme Court of Oregon declined to go further with the case. The *Schwegmann* decision, by invalidating the Oregon Fair Trade Act as applied to non-signers, rendered the fair trade issues in the *Lambert* case moot.

There remains for comment only the concluding paragraph of Point II of respondents' brief in which our opponents profess not to understand the logic of the argument commencing at page 34 of our main brief. We had there suggested that, when the legislature directed the retailer to deduct "all trade discounts" but forbade him to deduct "customary [i.e. "true" or "normal"] discounts for cash" in arriving at his cost of acquiring merchandise at *wholesale*, it indicated an awareness that customary cash discounts do not affect price. From this we argued that cash discounts should not be considered to affect the cost at which the ultimate consumer acquires the goods at *retail* for there is no reason to make a distinction in this regard between purchases at wholesale and purchases at retail. Our opponents suggest, *per contra*, that the legislature intended to make a special exception in the case of the retailer and that its failure specifically to repeat this "exception" for the benefit of the ultimate consumer indicates that it intended the latter to be excluded from its benefit. This, we submit, is unsound, first because there is no conceivable reason why the legislature should have desired to make a special exception in favor of the retailer and our opponents do not offer any; and, second, because the legislature was not framing an exception but merely recognizing commonly accepted

accounting practice when it differentiated between trade discounts and customary cash discounts; and, third, there was no occasion to define cost to the ultimate consumer, for it was cost to the retailer which the legislature selected as the index to legality: nothing is said anywhere about the ultimate consumer in that part of the Act now under consideration.

To ignore the fundamental difference between trade discounts and customary cash discounts; to cry that if a normal cash discount is permitted, abnormal discounts which are subterfuges cannot be prohibited; to try to explain away the California cases (*Food & Grocery Bureau*, and *Weco Products*); and to draw unsupported inferences from the *Sunbeam* and *Lambert Pharmacal* cases is no answer, we submit, to Point II of appellant's brief.

POINT III

RESPONDENTS' POSITION ON THE QUESTION OF WRONGFUL INTENT IS BOTH UNCLEAR AND UNSOUND.

It is difficult to understand our opponents' position on the question of intent.

Early in the trial they said that "an essential element of proof that we must bear here is that these sales * * * were made with the intent to injure competitors" (R. 68). This statement of their legal burden conformed to the very great weight of authority and was adopted by the Trial Court in its Memorandum Decision (R. 16).

At the close of the trial, however, they indicated the belief that if a man sold any merchandise below cost, as, in their opinion, the Act defined cost, he was guilty of an unfair trade practice and for that reason could be considered to have had a wrongful intent (R. 225-226). Practically speaking, this read the question of intent right out of the case.

Now, in respondents' brief, they cite all the cases in support of the majority rule that a wrongful intent must be proved, and all the cases in support of the minority rule that it is enough to prove an injurious effect, regardless of intent (pp. 28-33), and, without commenting on the reason for the difference, which we explained in Point III of our brief, or indicating what their own opinion is, make the bald claim that they proved *both* a wrongful intent *and* an injurious effect (p. 18). At the same time, they seem to reverse the position that they took at the close of the trial, for there they indicated that it did not matter what the intent was if the act committed (sale below cost) was an act forbidden (R. 225-226), but now they say that, so far as intent is concerned, it does not matter whether the act committed was forbidden or not, or whether defendant intended to violate the law or not, but only whether he intended to attract customers from other stores (p. 19). Having taken this position, our opponents go on immediately to say that it is always difficult to prove intent because no one will ever admit "that he intended to violate the law." This, of course, brings right back into the case the question of subjective intent to violate the law which our opponents, apparently, had just dismissed from consideration. With all of this,

we confess that we do not know where they stand on the question of intent.

Respondents make no claim that they proved any actual intent on Mr. Bush's part, except, of course, that he intended to attract business to his store, an intent which has not heretofore been considered reprehensible. Instead they rely upon certain *obiter dictum* in *People v. Pay Less Drug Stores*, 143 P. 2d 762, to the effect that if a retailer sells merchandise below cost, as in that case defendant did repeatedly, admittedly and flagrantly, and engages in "loss leader" merchandising, which was also admitted, it may be inferred that his intent is to injure his competitors. At the same time, however, the Court, citing *Balzer v. Caler*, 74 P. 2d 839, aff'd 11 Cal. App. 2d 663, 82 P. 2d 19, said, "It is, of course, true that all sales below cost are not prohibited. Only those sales accompanied by the requisite intent are prohibited." The case, therefore, stands for the proposition that a wrongful intent must be proved as a question of fact and cannot be presumed merely because sales have been made below cost. This is made very clear by the Court's statement at page 767, not quoted by our opponents, that "There is no material and rational connection between the fact proved (sales below cost) and the fact presumed (unlawful intent)," and by the Court's invalidation, for this reason, of a statutory presumption of unlawful intent based on sales below cost. The decision, it seems, to us, refutes our opponents' position and sustains ours, viz: that a wrongful intent must be proved and cannot be presumed.

Such an intent was not proved in *Balzer v. Caler*, *supra*, by the sale of Cornflakes below cost, from time to time,

to meet competition and stimulate trade; it was proved in *People v. Pay Less Drug Stores, supra*, by "loss leader" merchandising and a large number of sales below invoice or replacement cost. It was not proved, we submit, in the case at bar by the issuance of trading stamps in an amount appropriate for an ordinary cash discount as a uniform, storewide practice, where the average markup was 13% (R. 158, 195), and where the sale of a 6% item alone would take place only once in a thousand sales (R. 141-142).

So far as concerns the *effect* of the trading stamps, respondents proved no more than that they attracted customers to Mr. Bush's store, which, of course, we admit, but it was not shown that it was the stamps issued with 6% items, rather than the stamps on the other 75% of his merchandise that constituted the attraction and it could hardly have been the stamps issued with that one sale out of a thousand sales which consisted of 6% items alone.

POINT IV

RESPONDENTS HAVE NOT MET THE CONSTITUTIONAL QUESTIONS RAISED BY POINT IV OF APPELLANT'S BRIEF.

In point IV(a) of our main brief we argued that if trading stamps are an element of cost and if, as such, they are not covered by the statutory markup of 6%, the statute is unconstitutional because, so construed, the markup would cover *all* of the costs of the credit-and-delivery merchant but only *some* of the costs of his cash-and-carry competitor, and, hence, would unfairly discriminate in favor of the former and against the latter.

Instead of attempting to refute this argument, our opponents dismiss it with the statement that the basis for it does not exist because, in fact, the statute does not discriminate but covers *all* of the costs of *both* types of merchant; and they then go on to quote the statute to show the validity of their statement. This is astonishing to us, for it is exactly what we argued in Point 1 of our main brief, and we only suggested the contrary in Point IV (a) in order to demonstrate the constitutional consequence of rejecting it. Our opponents have thus not only underwritten Point I of our main brief, but they have not even attempted an answer to Point IV (a).

In Point IV (b) of our main brief we argued that if cash discount stamps are an element of price, as our opponents think, rather than an element of cost, as we think, the Act is unconstitutional because it makes no allowance for the consequent difference in the overhead of the cash-and-carry merchant as compared with the overhead of the credit-and-delivery merchant.

Our opponents have apparently interpreted this as a plea that appellant be permitted to apply the statutory formula and then deduct all the costs that he can think of that he does not have but that one or more of his competitors do have. We made no such foolish argument, and, therefore, decline to be drawn into a discussion of it. The position that we took was much simpler and more logical: namely, if there is a fundamental difference between the overhead of two types of merchant, one doing business on the cash and carry basis and the other on the credit and delivery basis, the statute should take that fact into account because it

would be unfairly discriminatory under such circumstances to fit the two into the same statutory straight jacket on prices. This is what the Courts were talking about in *Florida Dry Cleaning and Laundry Board v. Everglades Laundry*, 137 Fla. 290, 188 So. 380 (1939) ; *Serrer v. Cigarette Service Co.*, 148 Ohio 519, 76 N. E. 2d 91 (1947) ; and *Cohen v. Frey and Sons Inc.*, 80 A. 2d 267 (1951), when they held that it was unconstitutional not to take such a difference into account in fixing or formulating prices for services or commodities; and these cases cannot be distinguished as our opponents' endeavored to distinguish them, upon the ground that they dealt with wholesale rather than retail prices, for the same principal obviously applies in each case.

Either because they did not understand it, or because they could find no answer to it, our opponents have, to all intents, defaulted in answering Point IV(b) of our main brief.

We see no necessity to discuss the blocks of cases cited at pages 26-33 of respondents' brief for the proposition that other courts have sustained the constitutionality of Unfair Practices statutes. Although we do make the point (Point IV (e)) that the Act is indefinite where it should be quite definite, and although the Trial Court damned it with faint praise in finding that its "indefiniteness is not sufficient to hold the act wholly unconstitutional" (Memo. Decision), our principal point on the constitutional question is that it is not the way the Act is written but the way the Commission has interpreted it as applied to the facts disclosed by the present record that impairs its constitutionality. Little, if

any, light is thrown on that aspect of the discussion by respondents' cases.

POINT V

BRISTOL-MYERS v. PICKER, 302 N. Y. 61, 96 N. E. 2d 177, and *SCHUSTER & CO. v. STEFFES*, 237 Wis. 41, 295 N. W. 737 ARE NOT PERSUASIVE.

Respondents appear to place their principal reliance on *Bristol-Myers v. Picker* because of the statements contained in the majority opinion to the effect that the giving of cash register receipts to the extent of 2½% of purchases was the equivalent of a price cut and that, if prices can thus be cut 2½%, there is nothing to prevent merchants from cutting their prices as much as they please. We submit that the decision is not persuasive.

In the first place, the case does not deal with an Unfair Practices Act but with a Fair Trade Act and this is a significant difference for at least three reasons that come immediately to mind. First, violation of Fair Trade Acts do not depend in any way upon the ascertainment of costs or the application of any formulae for the allocation of overhead. Accordingly, the intent of the seller in cutting the price, if that is what he does, is quite immaterial. Second, violation of a Fair Trade Act does not ordinarily carry with it any criminal penalties. And, third, since the object of the Fair Trade Acts is to protect the good will of the manufacturers of brand-name merchandise, anything which has even the semblance of reducing prices may impair the effectiveness of price maintenance.

In the second place, the distinction between trade discounts and cash discounts was not argued in the *Picker* case and we believe that it was for want of enlightenment on that score that the majority of the Court could not grasp the concept of a discount which affected only the terms of sale, rather than the price, and could not visualize any limit to the discounts that might be given if even a small one were permitted. All through the opinion and also in the opinion at Special Term (195 Misc. 151, 89 N. Y. Supp. 2d 215) runs the thought that the defendants were engaged in giving something for nothing. The merchandise which could be secured in exchange for the cash register receipts was referred to as "presents" and "gifts;" the retailers' organization which participated in the scheme was called a "Dividend Club;" there was no limit to the extent to which the merchants could go; and, finally, their object was not to reward prompt payment for cash but to protect themselves from the competition of large department stores in neighboring communities. In other words, the picture was one of trade discounts, which can be limitless, rather than cash discounts, which must bear a reasonable relation to the financial benefits which flow to the merchant from the prompt payment of his charges, the saving to him on capital expense, reduction of bookkeeping overhead, and avoidance of losses on bad debts. True cash discounts, "customary discounts for cash" have ascertainable limits.

In the third place, the *Picker* case did not involve trading stamps but cash register receipts and the Court did not hold that they were the same thing. As we have pointed

out above, there is a definite distinction between the two, for one is given to enable the retailer to operate his business on a cash basis and the amount must be related to the financial benefits flowing from prompt payment, while the other is given (or was in the *Picker* case) for quite another purpose and hence was "controlled" only by the exigencies of the particular competitive situation.

As we read the opinion, the Court was aware of the distinction between discounts and free parking when considered as advertising media, viz: that one is directly related to the price of the commodity sold, while the other bears no relation to it, but the Court appears to have been completely unaware of the very close analogy between the cost to the cash-and-carry merchant of affording a discount as an inducement for the prompt payment of cash, and the cost to the credit-and-delivery merchant of securing capital in order to extend credit.

We are therefore much more impressed with the thoroughness and breadth of the decisions of the California courts and the Pennsylvania Court in *Food & Grocery Bureau v. Garfield*, 125 P. 2d 3, *Weco Products v. Mid-City Cut Rate Drug Stores*, 131 P. 2d 856, and *Bristol-Myers v. Lit Bros.*, 6 A. 2d, 843, than we are by the *Picker* decision, for not only did one of these cases involve an Unfair Practices Act, rather than a Fair Trade Act, but they considered, separately and collectively, the financial as well as the advertising effects of cash discounts and showed an all around grasp of the problem which seems to us to be lacking in the *Picker* decision. We should also point out that the New York Court merely attempted to distinguish and not to reject these decisions. For the same

reasons we are impressed with the thoroughness of the opinion of the Attorney General of Oklahoma, which we have referred to at page 40 of our main brief and of which we shall ask leave to hand copies to this Court upon the argument of the present appeal.

In closing we should also refer to the case of *Ed. Schuster and Co. v. Steffes, supra*, cited by respondents along with the *Picker* case at page 9 of their brief, as authority for the proposition that cash discounts cut prices. The *Schuster* case, however, presented a special situation involving the Wisconsin Regulation of Trading Stamps Act (Wisconsin Statutes Chap. 100, Sec. 100.15) which provides (1) that trading stamps shall be redeemable only for cash in the amount stated on their face, and that (2) such stamps shall not be issued with fair traded items when the price obtained on the resale, less the redemption value of the stamps, is less than the stipulated fair trade price. The only issue, therefore, was whether the Act in question came within the police power of the State of Wisconsin and not whether trading stamps cut prices or merely affected the terms of sale.

CONCLUSION

The decision of the trial court should be reversed and the complaint dismissed.

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Respectfully submitted,

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