

1953

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

Utah Supreme Court

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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TRADE COMMISSION OF UTAH,  
*Plaintiff and Respondent,*

UTAH RETAIL GROCERS ASSO-  
CIATION and GEORGE INGALLS,  
dba George's Market,

*Plaintiffs in Intervention  
and Respondents,*

— vs. —

JAMES L. BUSH, dba Bush Super  
Market,

*Defendant and Appellant.*

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**BRIEF OF APPELLANT JAMES L. BUSH**  
**d/b/a BUSH SUPER MARKET**

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Appeal From the District Court of the Second Judicial  
District in and for the County of Weber  
Honorable Parley E. Norseth, Judge.

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**FILED** **D**ATHOL RAWLINS,  
C. E. HENDERSON,  
of RAY, RAWLINS, JONES & HENDERSON,  
APR 2 1952 *Attorneys for Defendant-Appellant.*

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Clerk, Supreme Court, Utah **R. R. BULLIVANT,**  
*of the Oregon Bar,  
of Counsel.*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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TRADE COMMISSION OF UTAH, <i>Plaintiff and Respondent,</i>	}	Civil No. 7783
UTAH RETAIL GROCERS ASSO- CIATION and GEORGE INGALLS, dba George's Market, <i>Plaintiffs in Intervention and Respondents,</i>		
— vs. —		
JAMES L. BUSH, dba Bush Super Market, <i>Defendant and Appellant.</i>		

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BRIEF OF APPELLANT JAMES L. BUSH  
d/b/a BUSH SUPER MARKET

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INTRODUCTORY STATEMENT

The declared purpose of this action was to enjoin defendant from selling groceries below cost with the intent or effect of injuring competitors and destroying competition in violation of the Unfair Practices Act (R. 1). The undeclared but only basis for the complaint was that defendant issued S. & H. cash discount



stamps to customers who paid cash for certain staple items of groceries sold at the minimum markup required by the Act (R. 21 and 15).

Defendant denied that he sold any groceries below cost or that he issued the stamps with the intent to injure his competitors or destroy competition. He also challenged the constitutionality of the Unfair Practices Act (R. 11).

The trial took place on August 27 and 28, 1951, in the Second Judicial District Court, Weber County, before the Honorable Parley E. Norseth, who handed down a memorandum decision, dated October 29, 1951, to the effect that defendant had violated the Act, as charged, and that the Act, although lacking in definiteness, was not so indefinite as to be "wholly unconstitutional" (R. 15). In due course, findings of fact and conclusions of law were stated (R. 20), an appropriate decree was entered (R. 24), and this appeal was filed (R. 27).

## STATEMENT OF THE FACTS

For more than fifty years, The Sperry and Hutchinson Company has made available to retail merchants throughout the United States a system which enables them to allow the equivalent of a cash discount on small as well as large purchases (R. 173-174). There is no coin small enough to provide for discounts on purchases under 50¢. The equivalent can be accomplished, however, through the use of stamps which serve as tokens.

Under the S. & H. contract, retail merchants are licensed to make use of the S. & H. Co-operative Cash Discount System by issuing S. & H. Co-operative Discount Stamps to customers who pay in cash or, in any event, on or before the 15th proximo. The purpose stated in the contract is to make available to the merchant "a Co-operative Cash Discount System whereby there may be offered to retail customers a cash discount on all cash payments, irrespective of their amount, thereby inviting and rewarding cash or prompt payment for goods sold, decreasing the merchant's losses from slow or bad accounts and attracting and greatly increasing the volume of his cash trade" (Pltfs'. Ex. "A").

As the system operates, the licensee issues to the customer one stamp, as a token or symbol of a discount, for each ten cents paid in cash. These stamps are supplied by The Sperry and Hutchinson Company and are pasted in books provided for that purpose by The Sperry and Hutchinson Company. Both the stamps and the books remain the property of the Company (Deft's. Ex. 2). When the customer has accumulated 1200 of the stamps, or sooner at the customer's request, the Company redeems them either in merchandise or cash (R. 175-176).

To provide the stamps the retail merchant pays The Sperry and Hutchinson Company \$15 a pad (Pltfs'. Ex. "A"). They represent for the customer a discount of 2.08% if redeemed in merchandise, or 1.66% if redeemed in cash (R. 176).

This system has been popularized in thirty-nine states (R. 174); and has been licensed in Utah since 1914 (R. 179). At the time of the trial there were some 30,000 licensees in the United States, of which 197 were in Utah and 11,397 in the eight western states of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon and Washington (R. 180).

The advantages which a retail merchant derives from operating on a cash basis are obvious:

(a) He is spared the expense of extending credit to his customers: his capital is not tied up, neither does he have to pay interest on borrowed capital (R. 142-143; 187);

(b) He can save money on his own purchases by paying cash to his suppliers and enjoying the consequent discounts (R. 143);

(c) He avoids losses on bad debts (R. 143; 187);

(d) He minimizes his bookkeeping expense and thus reduces his overhead (R. 187; 190);

(e) He cuts his delivery cost because cash customers carry their own purchases (R. 190);

(f) Last but not least, of course, he attracts customers who are willing to trade on a cash and carry basis in order to realize the consequent savings.

It does not follow, however, that because there are advantages to the merchant in operating on a cash basis, he is getting something for nothing: the discount that he allows is the cost to him of the advantage which he enjoys. Similarly, it cannot be said that the customer who receives the discount gets something for nothing: the loss of the use of his money sooner than would otherwise be the case is the cost to him. In other words, a cash discount represents a *quid pro quo*; it is something for something, not something for nothing.

In January 1947, Mr. Bush opened a cash and carry super market at 26th Street and Quincy Avenue in Ogden, Utah, where, in November 1950, he installed the S. & H. Co-operative Cash Discount System (R. 42). Thereafter he issued to his customers one S. & H. cash discount stamp for every ten cents paid in cash for anything or everything in his store (R. 42; 48; 53). The cost of providing these stamps, Mr. Bush treated as a non-operating expense. The daily and monthly sales were recorded in his books at the prices actually paid by his customers (R. 143), and the stamps were included with other non-operating expenses which were subsequently deducted from gross sales in order to arrive at net profit (R. 197). This was a proper and appropriate method from an accounting point of view (R. 203). Pending their use, the stamps were carried in a deferred account, for control purposes, in the same fashion that prepaid insurance is customarily carried (R. 197; 200). This, too, was perfectly proper (R. 203).

Not only did Mr. Bush recognize the advantages of operating his business on a cash basis (R. 142-143) but he considered the stamps as an advertising medium (R. 51; 53; 159), a trade stimulant (R. 56; 140). His purpose in using them was to attract additional business, not from any particular competitor but, generally, from anywhere he could get it (R. 53; 224), and, in his opinion, they did attract business to his store (R. 55; 223).

In 1937, ten years before Mr. Bush went into the grocery business but many years after the S. & H. cash discount system had become established in Utah, the legislature of this state enacted an Unfair Practices Act (Title 16A, Chapter 4) to prohibit the sale of merchandise at less than "cost" (as defined in the statute) with the intent or effect of injuring competitors and destroying competition. In lieu of actual cost, however, the statute permitted the retail merchant, if he wished, to take his invoice and freight, add to it an arbitrary markup of 6% for overhead, and thus arrive at what we shall refer to as "statutory cost". At the time when Mr. Bush became a licensee of The Sperry & Hutchinson Company, in November 1950, the practice had become established in the retail grocery business in Ogden of selling certain staple items, such as soap, coffee, flour, canned milk and other volume items (R. 84), at the fixed minimum markup of 6% (R. 47). About thirty-five per cent of the so-called "dry line" of groceries were 6% items (R. 131-132). In Mr. Bush's case, which was probably typical, something like twenty-five per cent of

the volume of sales were 6% items (R. 47; 57; 84) and, since his cash discount was storewide, Mr. Bush issued S. & H. cash discount stamps with these items, just as he did with all the rest (R. 53). 95% of the 6% items originated outside of the State of Utah (R. 132).

Upon the theory that the effect of the stamps was to reduce the price of the 6% items below cost, the Trade Commission of Utah ordered Mr. Bush to cease and desist issuing stamps with such items (R. 1), and, when he refused, instituted the present action to compel him to desist.

For an understanding of the nature of the controversy, these, we believe, are all the facts that are required. There are others to which we shall presently refer in the belief that they may prove helpful in resolving the issues, and still others which, we think, merely color and becloud the issues.

## THE UNFAIR PRACTICES ACT

The Unfair Practices Act (Title 16A, Chapter 4, Utah Code Annotated 1943) was enacted in 1937 and provides, in part, as follows:

“16A-4-7. *Sales, less than cost.*—(a) It shall be unlawful for any person \* \* \* to sell \* \* \* any article \* \* \* at less than the cost thereof to such vendor \* \* \* for the purpose of injuring competitors and destroying competition \* \* \* or when the effect of selling \* \* \* at less than cost

\* \* \* may be substantially to lessen competition or tend to create a monopoly in any line of commerce; and he \* \* \* shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties [fine or imprisonment, or both] set out in section 15 of this act for any such act."

"*Cost defined:* \* \* \* 3. 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: (a) freight charges [if incurred] \* \* \*, and (b) cartage [if incurred] \* \* \*, and (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 of the cost to the retailer as herein set forth after adding thereto freight charges and cartage \* \* \*."

\* \* \* \*

"16A-4-9. *Transactions involving more than one item.*—For the purpose of preventing evasion of the provisions of this act in all sales involving more than one item or commodity and in all sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise) the vendor's or distributor's selling price shall not be below the cost of all articles, products, commodities and concessions included in such transactions."

\* \* \* \*

“16A-4-12. *Sales exempt from act.*—The provisions of this act shall not apply to any sales made:

- (a) In closing out \* \* \* stock \* \* \*;
- (b) When the goods are damaged \* \* \*;
- (c) By an officer \* \* \* of any court;
- (d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article, product or commodity in the same locality or trade area. \* \* \*.”

\* \* \* \*

“16A-4-17. *Policy of Act.*—The legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.”

## STATEMENT OF POINTS

POINT I—Plaintiffs failed to make out a *prima facie* case because they did not prove that defendant sold any merchandise *below* cost, whether actual or statutory, but only that defendant sold merchandise *at* statutory cost. We say this because the merchandise was marked up six per cent as required by the Act, and

- (a) The stamps, being an element of costs, would have to be included in any computation of a



markup to cover actual costs and should, for that reason, be covered by the statutory markup of six per cent which the statute permits in lieu of actual costs;

- (b) The cost of providing stamps should be treated in the case of the cash and carry merchant as the cost of providing credit is treated in the case of the credit and delivery merchant: if the statutory markup of six per cent covers the one, it should cover the other; the markup is not selective; and was not intended to be applied in a discriminatory manner;
- (c) The Act specifically provides (16A-4-9) that the retailer's cost shall be calculated on the basis of the total purchase, not on the basis of each item in the purchase;
- (d) The sale of six per cent items alone is such a rare event that if it should violate the statute to issue stamps on such an occasion, the law would not be concerned with such a trifle (*de minimis non curat lex*);

POINT II—Plaintiffs failed to make out a *prima facie* case because cash discounts, as distinguished from trade discounts, do not reduce prices.

POINT III—Plaintiffs failed to make out a *prima facie* case because they did not prove that defendant made any sales “for the purpose of injuring competitors and destroying competition.” We say this because,

- (a) Defendant's intent was only to attract cash business generally; to meet competition, not to injure his competitors and destroy competition;

- (b) Defendant cannot be held to have intended to incite price cuts or a price war, nor can he be held responsible for the acts of his competitors, legal or illegal; and
- (c) Plaintiffs failed to carry the burden of proving that defendant issued S. & H. cash discount stamps for the purpose of injuring his competitors and destroying competition.

POINT IV—The Unfair Practices Act is unconstitutional because it violates the equal protective and due process clauses of the Federal Constitution and the corresponding sections (Article I, secs. 1 & 7) of the State Constitution.

- (a) The Act, if construed to cover *all* of the costs of the credit and delivery merchant but only *some* of the costs of the cash and carry merchant, is unconstitutional.
- (b) If a cash discount is an element of price rather than cost, the Act is unconstitutional because it makes no allowance for the difference in the overhead of the cash and carry merchant as compared with the overhead of the credit and delivery merchant.
- (c) The Act, if construed only to prohibit the use of S. & H. cash discount stamps is unconstitutional because it discriminates against a legitimate business.
- (d) The Act, if construed to permit conviction upon proof, in the alternative, of a wrongful intent or a harmful effect, is unconstitutional.
- (e) The Act is unconstitutional in any event because it is so vague and indefinite that the retail mer-

chant is unable to ascertain when he is violating the law and, consequently, exposing himself to conviction of a misdemeanor and running the risk of a fine, imprisonment, and liability for civil damages.

POINT V—The Retail Grocers Association which is the real party-plaintiff in this action has been guilty of price fixing in violation of the Sherman Act and, accordingly, comes to Court with unclean hands, and for that reason should be denied injunctive relief, for the Unfair Practices Act does not, and could not, authorize price fixing.

## ARGUMENT

POINT I — PLAINTIFFS FAILED TO MAKE OUT A *PRIMA FACIE* CASE BECAUSE THEY DID NOT PROVE THAT DEFENDANT SOLD ANY MERCHANDISE *BELOW* COST, WHETHER ACTUAL OR STATUTORY, BUT ONLY THAT DEFENDANT SOLD MERCHANDISE *AT* STATUTORY COST.

Plaintiffs rest their case on the fact, to which defendant stipulated, that Mr. Bush issued S. & H. cash discount stamps with merchandise sold at statutory cost (invoice or replacement cost, plus freight, plus cartage, plus six per cent). There was no charge and no evidence that he allowed any special discounts on these or any other items, for the fact is that he allowed the same discount on everything in his store that was purchased for cash. Neither was there any charge that these items were “loss leaders”. No attempt was made to show that

Mr. Bush received less than it cost him to acquire and handle the articles in question.

The sole question for decision is whether it was legal for Mr. Bush to issue S. & H. cash discount stamps with merchandise marked up six per cent. The Trade Commission contended and the Lower Court found that it was not legal (R. 21); we respectfully submit that it was perfectly legal.

We shall consider this question first from the point of view of cost, for the emphasis in section 16A-4-7 with which we are concerned in this case is on *cost*, rather than price: the charge is that Mr. Bush sold below cost, not that he cut prices. Like the California Unfair Practices Act, upon which it is modeled, the Utah Unfair Practices Act is not a price fixing statute. *Food and Grocery Bureau v. United States*, 139 F. 2d 937 (C. C. A. 9th 1943). However, we shall also consider the question from the point of view of price, for that is the way the Commission seems to look at the case.

In all that follows, we ask the Court to bear in mind that the statute is not only restrictive in a field which had been traditionally free, but that it carries criminal sanctions in the event of violation. Accordingly, unless the statute clearly indicates that certain conduct is illegal, it is manifest that no Court should incline towards finding it so as a matter of statutory construction. See: *United States v. Capital Traction Co.*, 34 App. D.C. 592; 19 Ann. Cas. 68.

We also ask the Court to bear in mind that, “to give a discount for cash payments is a long established mercantile practice. The manufacturer allows such discount to the jobber and wholesaler, and the jobber and wholesaler, to the retailer. To pass this on to the customer of the retailer is but providing a benefit to him who, in the last analysis, pays all the bills.” (*The Sperry and Hutchinson Company v. Hudson*, 190 Ore. 458, 465, 226 P. 2d 501, 504 (1951)). Under the Lower Court’s interpretation, the retailer can receive but he cannot allow cash discounts on 6% items and thus the ultimate consumer “who, in the last analysis, pays all the bills” is deprived of a benefit which is available to everyone else in the chain of commerce. So far as we can see, this was never the intention of the Act and there is no legislative sanction for such an unfair and discriminatory result.

The average family lives on a fixed or fairly fixed income. The housewife knows within predictable limits the amount of money available to her to purchase the family necessities: such things as clothing, drugs, food, and the many other items of every day consumption. Through the use of S. & H. stamps, it is possible to provide a discount on all of these things for the benefit of the careful housewife who makes her purchases in cash. If such cash discount stamps are now to be outlawed, this avenue of thrift will be closed to her.

With these thoughts in mind, let us now consider whether the plaintiffs made out a *prima facie* case to

support their charge that defendant sold merchandise below cost in violation of the Act.

- (a) *The stamps, being an element of costs, would have to be included in any computation of a markup to cover actual costs and should, for that reason, be covered by the statutory markup of six per cent which the statute permits in lieu of actual costs.*

It is quite undeniable that the stamps were an element of Mr. Bush's cost of doing business. He considered them in the nature of advertising and his books showed that they were recorded as a financial expense (R. 143-144; 197). According to one of our most prominent certified public accountants, Mr. Lincoln G. Kelley, this was an appropriate and customary way to record them (R. 189).

Under the Act, Mr. Bush had a choice: he could sell his merchandise at actual cost or at statutory cost. His choice was free. It made no difference whether the actual cost was higher or lower than the statutory cost. He could take either one but he could not go below the lower of the two. The actual markup and the statutory markup were intended for the same purpose: to cover his cost of acquisition and "a proportional part of the cost of doing business".

Now, it is apparent that, if Mr. Bush had elected to proceed on the basis of actual cost, he would have been compelled to count the S. & H. stamps as part of

his cost of doing business because, in fact, The Sperry and Hutchinson Company did not let him have them for nothing. That being so, it is equally apparent that if, instead, he elected to avail himself of the statutory markup of 6%, the cost of supplying the S. & H. stamps would be covered by that markup, for that is exactly what the Act provides. It requires the merchant to add to his costs of acquisition "a markup to cover a proportionate part of the cost of doing business." Stamps were a part of defendant's cost of doing business, and were therefore covered by the markup. The markup "in the absence of proof of a lesser cost, shall be six percent". Mr. Bush marked up the items six percent and thereby satisfied the statutory requirements.

Just as Mr. Bush would have had no right to exclude the stamps in computing his *actual* costs, the Commission had no authority, no logical reason, to exclude them from his *statutory* costs.

To find that Mr. Bush did not meet the statutory requirements, one must read something into the Act which plainly is not there and was never intended to be there: viz., that the statutory markup is selective, that it covers everything but the stamps. Not only will one search the statute in vain for any inference or intimation which would justify such a course but it is apparent that such a course would do violence to the statute. The statutory scheme is to take either the actual cost of doing business or to pay no attention to actual cost and adopt an arbi-

trary six percent in its place. The six percent bears no particular relationship to the actual cost of operating a retail grocery business nor to the cost of selling any particular items in that business (R. 195), nor, for that matter, to the cost of operating any other kind of retail business. Gasoline and groceries, for example, cannot be handled for the same cost. The statutory markup is not intended to be and in the nature of things could not possibly be anything but arbitrary. It is a legislative standard minimum, a blanket for all costs over and above invoice, freight and cartage. It is like the standard exemption that the taxpayer can elect to use instead of listing his actual deductions in the computation of his federal income tax. The statutory six percent, like the standard exemption, willy-nilly, covers everything, for that is the function it is intended to fulfill. To read into the statute an exception which would require the retail merchant to add the cost of his stamps to the six percent would be like requiring the taxpayer who makes use of the standard exemption to add to his taxable income the amount that he contributes to the American Red Cross. It would combine with the arbitrary alternative, permitted by the act, one of the elements of the precise method of computing costs, and thus commingle and confuse the two systems which are supposed to be quite separate and distinct.

For the reason that the stamps would have to be included in any computation of actual costs, we respectfully submit that they were necessarily included in the



statutory costs and covered by the statutory markup on the items complained of. This, alone, we believe is a complete answer to the complaint.

- (b) *The cost of providing stamps should be treated in the case of the cash and carry merchant as the cost of providing credit is treated in the case of the credit and delivery merchant; if the statutory markup of six percent covers the one it should cover the other; the markup is not selective, and was not intended to be applied in a discriminatory manner.*

The thought to which we now turn follows so closely upon the thought which we have just expressed that the Court has no doubt anticipated it and there is no need to labor the matter. The only difficulty is to find a way to state it without repetition.

In an effort to attract business, not at the expense of any particular competitor but generally and with time honored indifference to the effect that it may have upon all of his competitors, a merchant may decide to extend credit and make deliveries. This, he has reason to believe, will attract the trade of people who are not so dollar conscious that they feel obliged to go to market early to avoid the crowd or to go at a more convenient hour and battle the crowd for the sake of a small savings. It will attract people who feel that they can afford the luxury of telephoning their orders and having the groceries delivered even though they have to pay a little more for them.

Now the fact is that it is not for the groceries that they pay more. Groceries are pretty standardized today both in price and in quality. It is for the extra service, the credit and the delivery, that the customer pays. That extra service costs the merchant money; he cannot give it for nothing. This is easily appreciated when one realizes that,

- (a) To extend credit, he must either pay interest on borrowed working capital, or, which is the same thing, lose the use of his own capital;
- (b) To extend credit, he must employ additional bookkeeping and clerical help, and incur postage and collection charges;
- (c) By extending credit, he inevitably sustains losses on uncollectable accounts.

All of these costs are covered by the statutory mark-up. On that subject there can be no doubt and there is no dispute.

On the other hand, a merchant like Mr. Bush, in an effort to attract business generally, may decide to allow a discount on all cash purchases. This, he believes, will attract the trade of people who are either willing or obliged to put up with some inconvenience to save a dollar. It will appeal, he thinks, to the thrifty as well as the needy. So confident is he that this is a good way to operate that he may decide to conduct all of his busi-

ness on a cash and carry basis and to allow a storewide discount on all cash purchases. That is what Mr. Bush did.

But this cash and carry merchant, too, has to pay something for the extra attraction. He has to pay the Sperry and Hutchinson Company to supply the stamps which enable him to make the discount available to his customers.

Still a third merchant may combine the two types of business, operating partly, or even predominantly, for cash, and partly on credit.

Now, each one of these merchants is in competition with the other and, when any one of them marks an item of staple merchandise down to the statutory minimum of six percent, they all follow suit (R. 223) without regard to whether their operations are conducted on a cash basis, a credit basis, or both. In this way it has come about that a substantial part (R. 84) of the retail grocer's volume is in six percent merchandise.

Can it be, we ask, that the statutory markup was intended to cover *all* of the costs of the credit and delivery merchant in this highly competitive segment of his business but only *some* of the costs of the cash and carry merchant? Can it be that the legislature intended to permit the credit and delivery merchant to sell staple items at 6% and require the cash and carry merchant to sell them at not less than 9%?

If it did intend any such arbitrary and discriminatory distinction, we doubt that any Court would hesitate to declare the statute unconstitutional. We prefer to think, however, that no such intention can be found in the Act; that the legislature intended the statutory markup to cover *all* the costs of a cash and carry merchant like Mr. Bush, just as it intended it to cover *all* the costs of the credit and delivery merchants who compete with him. The discrimination, we believe, lies in the attempted enforcement, not in the statute itself. Where a Florida Board, in the administration of an unfair practices act was guilty of such discrimination the Court said,

“There is a distinct difference between delivery and the cash and carry aspect of the laundry and dry cleaning business. The manner and cost of administration in each is materially different and those who prefer to patronize the cash and carry business are entitled to the advantage of this difference. In fixing a schedule of prices, it is the duty of the Board in the interest of the public to take into consideration these elements and establish a differential in charges between the two methods accordingly. If they fail in this, they may be required by the law as here quoted, to do so” (188 So. 380, 382).

(*Florida Dry Cleaning and Laundry Board v. Everglades Laundry*, 137 Fla. 290, 188 So. 380 [1939]).

See also: *Cohen v. Frey & Sons, Inc.*, 80 A. 2d 267 (Md. 1951).

The argument that we now make may also be applied to other items of overhead such as the cost of advertising or the cost of providing free parking or delivery service. If one merchant attracts his customers through advertisements or by providing free parking facilities and if the cost of these activities is covered by the statutory markup, why should not another merchant attract customers through the use of S. & H. cash discount stamps, and, if he does, why should not the cost of the stamps be covered by the statutory markup? The comparison is a little less apparent than the comparison of the cost of providing a cash discount on the one hand, and borrowing capital to extend credit, on the other, but it is still a valid comparison, and the statutory markup is just as applicable. There is nothing selective about the statutory markup. If the cost is real, and not feigned, the markup covers it.

This argument finds strong support in *Bristol Meyers Co. v. Lit Bros., Inc.*, 336 Pa. 81, 6 A. 2d 843 (1939), where the court, holding that trading stamps did not have the effect of cutting fair trade prices, said,

“ . . . If, for example, merchant A provides orchestral music for his customers at a certain hour of the day, or maintains in his store a salon where works of art are exhibited, or a nursery where children are fed and otherwise cared for while their mothers are shopping in the store, or if he provides his customers free bus service to and from his store, merchant B has no grounds for complaint which the law will heed. Yet all these

things confer benefits on the customer and some of these benefits are susceptible of pecuniary measurement. It follows, therefore, that for a merchant to confer pecuniary benefits upon his customers, which benefits some competing merchant does not confer, does not amount to such unfair competition as the Fair Trade Act forbids. Merchant A can extend his customers 30 or 60 days credit on the purchase of a commodity while merchant B refuses to extend any credit on the purchase of the same article. A is not thereby violating the Fair Trade Act. A may allow a discount of 1% on all bills paid within ten days after being rendered. B may allow no such discount. A is not thereby violating the Fair Trade Act'' (6 A. 2d 843, 847).

See also *Weco Products Co. v. Mid-City Cut Rate Drug Stores (Garfield)*, 55 Cal. App. 2d 684, 131 P. 2d 856 (1943).

Since the statutory markup unquestionably covers all of the costs of the credit and delivery merchant, we respectfully submit that it should cover all of the costs of the cash and carry merchant, including the cost of his cash discount stamps. This, we believe, furnishes a second, complete answer to the complaint.

- (c) *The Act specifically provides that the retailer's cost shall be calculated on the basis of the total purchase, not on the basis of each item in the purchase.*

Knowing just what was required as evidence to support the Trade Commission's complaint, assuming the

validity of its interpretation of the Act, Mr. Hale, the Executive Secretary of the Commission, went into Mr. Bush's store and bought nothing but 6% items. Such a purchase, in normal course, would be very rare (R. 221-222), perhaps no more frequent than one in a thousand (R. 141-142). It may therefore be appropriate to consider what the rule should be when the purchase follows the normal pattern and consists of mixed items: 6% and others marked up perhaps as high as 30% (R. 153), the average being at least 13% (R. 158; 195).

The Commission did not, we think, intend to conduct a meaningless test of the legality of Mr. Bush's sales policy, a test which would apply only to one purchase in a thousand. On the contrary, we believe that the Commission interpreted the Act to require Mr. Bush to refrain from issuing stamps with 6% merchandise even though the merchandise was commingled with other merchandise which brought the average markup above 6%, and intended to test that interpretation by this action. It intended to enforce a flat prohibition on the issuance of cash discount stamps with 6% items. It interpreted the Act to require a minimum markup of 9% on each item sold with stamps. Unless we are correct in this, the present litigation is much ado about nothing, for, as we have shown, it is a rare sale that relates to 6% items alone, and the average markup in the retail grocery business is at least 13% (R. 158; 195).

If we correctly comprehend the Commission's position, we beg leave, again, to differ with it. Even assum-

ing, *arguendo*, that the stamps must be offset by some reciprocal markup, we find nothing in the Act to require an allocation of that markup to each individual item, as distinguished from the average markup of the purchase as a whole. Quite to the contrary, section 16A-4-9, which relates to “*Transactions involving more than one item*,” clearly provides that, if stamps are considered to be some sort of concession, as the Commission contends, the average rather than the individual markup should control. In very express language, this section of the Act provides that,

“in all sales involving more than one item or commodity and in all sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise) the vendor’s or distributor’s selling price shall not be below the cost of *all* articles, products, commodities and concessions included in such transactions.” (Emphasis ours.)

We find difficulty in paraphrasing the statute to make it any more readily understood. If stamps are a concession, as the Commission contends, and if the average markup in the retail grocery business is at least 13%, there is more than enough leeway in the markup to cover the cost of the alleged concession: the statutory cost of the items being only 6%, there is 7% left over to meet the cost of the alleged concession.

In *State of Wisconsin v. Tanker Gas, Inc.*, 250 Wis. 218, 26 N.W. 2d 647, 649 (1947), the State of Wisconsin



brought proceedings against a gasoline dealer who advertised that two gallons of gasoline would be given away free (except for sales tax) with each seven gallons of gasoline purchased. There, as here, the statute forbade sales below cost and there, as we believe here, the State took the position that the cost of each item had to be separately considered. *Per contra*, the defendant claimed that the nine gallons should be treated as a whole for cost purposes, just as we contend that the full market basket should be treated as a whole. The Court sustained defendant's position, stating:

“The legislature sought by the Unfair Sales Act to prevent transactions in which, *considered as a whole*, there was a sale of goods at less than cost for the purposes of attracting business.” (Emphasis ours.)

We admit that the point we have just made goes beyond the record of the present case, for Mr. Hale restricted his purchases to 6% items and refrained from making the only kind of purchase (one of mixed items) that would have provided the basis for a really meaningful test of the law but we have not restricted our argument lest this whole proceeding boil down to nothing.

If, as we believe, it is the Commission's view that the “cost” of each item in a purchase must be separately computed when stamps are included, we respectfully submit that we have demonstrated the contrary. At the very least, if each item is marked up the statutory

minimum of six percent, and the average markup in the retail grocery business is 13%, Chapter 16A-4-9 indicates that it is no crime to include cash discount stamps having a redemption value in merchandise of 2.08%. This, of course, would validate all but one out of a thousand sales in Mr. Bush's store.

- (d) *The sale of 6% items alone is such a rare event that, if it should violate the statute to issue stamps on such an occasion, the law would not be concerned with such a trifle (de minimis non curat lex).*

If the "cost of *all* articles, products, commodities and concessions", as the Act clearly provides, is the criterion by which the legality of Mr. Bush's sales is to be judged, rather than the cost of each individual component, it will only be a very rare sale, perhaps one in a thousand, when the Act would be violated by the issuance of stamps even if the Court were to adopt the theory, which seems so completely untenable to us, that the statutory markup does not include the cost of providing stamps.

The law does not concern itself with such trifles (*de minimis non curat lex*), and rightly so, for, on the one hand, it is a practical impossibility from a management point of view to train checkers to control such a situation (R. 154), and, on the other hand, such a very occasional and minor infraction of a statute which is aimed at practices deemed to have a deleterious effect upon the economic welfare of the community cannot have been within the contemplation of the legislature.

The maxim of *de minimis non curat lex* was applied by the Supreme Court of Pennsylvania in *Bristol-Meyers v. Lit Bros.*, 336 Pa. 81, 6 A. 2d 843 (1939), when it held that the issuance of trading stamps worth 1.76% with each purchase did not cut prices in violation of the Pennsylvania Fair Trade Act. In this connection, the Court said,

“There is also a time-honored maxim of the law which applies to this case, to wit: ‘*De minimis non curat lex*’.

\* \* \* \*

“If, for example, a customer spent \$99 in Lit Brothers’ store for the purchase of 396 tubes of ‘Ipana Tooth Paste’ (a supply adequate for a long lifetime) and upon the presentation to the Stamp Company of the 990 trading stamps he received an article worth \$1.75, he would be obtaining in the form of *merchandise* a discount of 1.76%. Applying this to each 25 cent purchase of tooth paste, it would amount to four and 4/10ths mills on that purchase. When the further facts are considered that this ‘discount’ is not in cash and that fewer than 2/3rds of the purchasers of commodities at Lit Brothers’ store ask for or accept trading stamps, the infraction charged appears to be still more trifling than above indicated” (6 A. 2d 843, 848).

The infraction of which Mr. Bush might be guilty if, in one case out of a thousand, the issuance of cash discount stamps should violate the statute is, we submit still more trifling. Furthermore, society would not be

well served by convicting a merchant of a misdemeanor because, in one case out of a thousand, his checkers charged a fraction of a cent below cost on a pound of coffee or a quart of salad dressing.

**POINT II — PLAINTIFFS FAILED TO MAKE OUT A *PRIMA FACIE* CASE BECAUSE CASH DISCOUNTS, AS DISTINGUISHED FROM TRADE DISCOUNTS, DO NOT REDUCE PRICES.**

Cash discount stamps are either an element of cost or an element of price but not of both. No one suggests that stamps are, at one and the same time, elements of cost *and* price. Since our opponents cannot admit that stamps are an element of cost and, in the same breath, deny that they are covered by the statutory markup, they are driven to contend that stamps are not an element of cost at all but only of price. Baldly stated, they take the position that all that Mr. Bush did was to mark his merchandise up 6% and then mark it right down again, either 1.66% or 2.08%, depending upon whether the purchaser eventually redeemed his stamps in cash or merchandise.

The first answer to this facile argument is that the element of costs cannot be avoided by simply ignoring it, and neither can the fact that the statute made cost, rather than price, the index to legality. The argument not only fails to meet the real point at issue but it proceeds upon the wrong ground. We are not dealing here with a price fixing statute. *Food and Grocery Bureau v. United States*, 139 F. 2d 937 (C.C.A. 9th 1943).

The second answer is that Mr. Bush did not in fact, mark his merchandise down. He marked it up 6%, as required by the statute, and it stayed there. He collected the full markup in cash. The customer paid the same whether he took stamps or not (R. 215-216). The price remained unchanged.

But the Commission will argue that the stamps were the equivalent of a discount and that a discount is the equivalent of a price cut. This, it will be observed, raises two questions: first, whether the stamps are the equivalent of a discount, and, second, if they are, whether a discount is the equivalent of a price cut.

The first question need not be argued, for the litigants are in agreement that cash discount stamps are equivalent to a cash discount. The Sperry and Hutchinson Company contract makes this very plain (Pltf's Ex. "A"); the witnesses, Schirer and Kelley, so testified (R. 173-174; 187-188); the Lower Court so found (Finding of Fact No. 6; R. 21); and there is a long line of authority to sustain the finding. Thus, in *State v. Holtgreve*, 58 Utah 563, 571 200 Pac. 894, 897 (1921), a case involving S. & H. cash discount stamps, the Court said:

"\* \* \* Stamps were issued merely as a convenient means of allowing or granting a discount to the merchant's customers on small as well as on large purchases which were paid for in cash and to identify the purchasers entitled to such a discount."

So, also, in *Food and Grocery Bureau, Inc. v. Garfield*, 20 Cal. 2d 228, 232, 125 P. 2d 3, 6 (1942) the Court said,

“It is well settled by the decisions of this court, as well as those in other jurisdictions, that the practices of merchants in issuing trading stamps with the purchases of articles is merely a method of discounting bills in consideration for the immediate payment of cash.” (Citing cases from eight jurisdictions.)

*See also The Sperry and Hutchinson Company v. Hudson*, 190 Ore. 458, 465, 226 P. 2d 501, 504 (1951).

Many other authorities to the same effect could be cited but the point is not in dispute.

The second question, whether a discount is equivalent to a price cut, requires more time-consuming analysis, for some discounts do and others do not have the effect of cutting prices. The Lower Court found that the discount with which we are here concerned did have such an effect (Finding of Fact No. 6; R. 21). With great respect for the Lower Court, we beg to differ. It seems quite clear to us that a contrary finding should have been made, for we are dealing here with a cash discount rather than a trade discount.

Trade discounts are a convenient means for adjusting prices. The purpose of a trade discount is to accommodate list prices to actual selling prices which are determined by quantity, competitive factors and other

considerations subject to change from time to time, but without regard to terms of payment (R. 186). A quantity discount is one of the most common forms.

Cash discounts, on the other hand, regulate the terms of payment. Their purpose is to induce the customer to make payment promptly so as to relieve the seller of the necessity of borrowing working capital, to spare him the expense of keeping books, to obviate losses on bad debts, etc., as we have indicated on page 4, *supra*, and as the record shows (R. 187).

If an article is priced at \$1, less 2% for cash, the customer who pays cash pays 98¢ net, the customer who charges pays \$1, and the customer whose account becomes overdue may eventually pay \$1.02, but the price remains the same in each case, *viz.* one dollar. The only difference is that the customer who pays early is rewarded because of the savings that his promptness has effected for the seller, and the customer who pays late is made to bear the loss occasioned by his delay. One pays less, and one pays more; but the price remains in each case the same. The difference is required by capital considerations, not by any revision of the price. The price is fixed and determined by the seller at the outset but the amount of money paid is determined, within the limits of the discount, by the buyer. It would seem quite illogical, we think, to hold that price is a fluctuating thing that depends upon the time within which payment is made.

This distinction between trade discounts and cash discounts is succinctly stated by Rosenkampff and Wider in the "Theory of Accounts", 1942, at pages 478 and 488 as follows:

"Trade Discount on Sales. Many concerns allow trade discounts on shipments made to customers. The reason for this procedure is that prices in published catalogs are purposely established at high amounts in order that fluctuations in prices may be measured from the list or catalog prices by means of the trade discount, thereby obviating the necessity of publishing new catalogs. A trade discount is also used as a device to give certain customers preference over others" (p. 478).

"Cash Discount on Sales.—Strictly speaking, a cash discount is a financial inducement to the customer to pay bills on or before a date specified in the sales invoice. A 1% or 2% discount, if the bill is paid in 10 days, is a typical inducement. Consequently, it should be treated as a non-operating item, rather than as a deduction from the sales price" (p. 488).

The same distinction is recognized, for example, by the United States Office of Contract Settlement (Termination cost memorandum 15—Journal of Accountancy, V. 80, Sept. 1945, pp. 237-8) as follows:

"The term 'cash discount on purchases', as used herein, refers to a reduction in the amount paid to a vendor for the purchase of any items



included in a termination settlement, solely by reason of the payment therefor within a specified period. It should be differentiated from trade discounts, rebates, and other allowances, which are usually treated as a direct deduction from the purchase price of the items to which they relate.”

Finally, this distinction between trade discounts and cash discounts appears in the statute now under consideration, for, in defining “cost”, the legislature specifically excluded trade discounts and included cash discounts, as follows:

“*Cost defined:* \* \* \* 3. When used in this act, the term ‘cost to the retailer’ shall mean the invoice cost of the merchandise to the retailer \* \* \* less all trade discounts *except customary discounts for cash*; \* \* \*” (emphasis ours).

The legislative intent here is perfectly clear: In determining his basic or actual cost, *the statute requires the retailer to deduct trade discounts*, which represent a reduction from list or catalogue price and, consequently, are not true elements of cost, but *forbids him to deduct cash discounts*, which merely compensate him for making payment in cash, and, consequently, are true elements of cost. Translating this into terms of price, for that is the subject now under consideration, we believe that “invoice cost” can be read as “list price” and that the legislature intended to establish, as the first basic element, the actual price paid by the retailer for the merchandise. It recognized that trade discounts reduce price

but that cash discounts relate only to the terms of payment. Accordingly, in the computation of price it eliminated the former as an element but retained the latter; it adjusted the list price on the one hand and compensated for the cash discounts on the other so as to arrive at the actual price of the merchandise.

In doing this, we submit that the legislature not only indicated that it was well aware of the distinction between trade discounts and cash discounts but that it established, as a matter of legislative policy, that cash discounts were not to be considered to reduce prices. In the light of this legislative policy, it is difficult to see why a cash discount should be treated one way in the case of a purchase at wholesale and in quite the opposite way in the case of a purchase at retail.

Granted that "the life of the law has not been logic", how can it be said that cash discounts do not affect wholesale prices but do affect retail prices? The purpose of the discount is the same in each case. The result is the same in each case. Surely if the retailer is forbidden to deduct cash discounts in determining the price at which he buys his merchandise, he cannot be compelled to deduct cash discounts in determining the price at which he sells his merchandise. If he is obliged to consider his *purchase price* \$1.00, rather than 98¢, even though he has received a discount of 2% for cash, surely he should not be obliged to consider his *selling price* 98¢, rather than \$1.00, when he allows a discount

of 2% for cash. Yet, this is the way in which our opponents and the Lower Court have interpreted the statute.

If the stamps were nothing more than gifts, they would, of course, fall into the category of a trade discount and constitute a price cut, but, as we have repeatedly indicated, they are not gifts: they are not something for nothing. The law on this point has been settled by *Food and Grocery Bureau, Inc. v. Garfield*, 20 Cal. 2d 228; 125 P. 2d 3 (1942) and confirmed by *Weco Products Co. v. Mid-City Cut Rate Drug Stores (Garfield)*, 55 Cal. App. 2d 684; 131 P. 2d 856 (1943). Both of these cases attacked the practice of Mr. Garfield, a retail merchant, in issuing trading stamps to his cash customers at the rate of one stamp for each 10¢ purchase. These were his own stamps and he redeemed them himself either in cash or merchandise, but the system was the same, in substance, as The Sperry and Hutchinson Cooperative Cash Discount System which is the subject of the present suit. The redemption value in Mr. Garfield's case was 2% in cash or 2.5% in merchandise. In the first case, which was prosecuted under the California Unfair Practices Act, the plaintiff contended that Garfield's stamps were gifts. The Court rejected this contention, saying:

“It must be concluded, therefore, that the trading stamp plan adopted by the appellant does not constitute the making of a gift of \$1 in cash or \$1.25 in merchandise but is a discount given

the customer in consideration of his paying cash.”  
(125 P. 2d 3, 7.)

In the second case, which was prosecuted under the California Fair Trade Act, the plaintiff contended that Garfield's stamps had the effect of cutting prices on fair trade articles. The Court rejected this contention, also, saying:

“Are they [trading stamps] to be regarded as a discount for cash, as a means of advertising, a device to entice customers and to retain their trade, or do they simply represent a cut in the sale price of the articles with which they are given? If the latter, they accomplish a cut in the established price of merchandise; and where such merchandise is sold at minimum Fair Trade Act prices, the giving of trading stamps then amounts to a sale below such prices.

“If, however, the stamps are given by the merchant in the nature of an inducement to customers to attract them to his store, the practice is in the nature of an advertising device, and is no more to be condemned as violative of the Fair Trade Act than would be such commonly employed devices as free parking room, care of infants and other plans offered by some mercantile establishments in competition with their rivals. Free parking for automobiles of customers might be said to result in a lesser price paid by a customer for goods purchased, yet it could hardly be reasonably contended that thereby a violation of the Fair Trade Act had been worked.

“Neither can it be asserted that by giving discounts for cash the terms of the statute in question are contravened. A cash discount is a reward for prompt payment. It is a trade practice long established, and is authoritatively recognized as being not a deduction from the purchase price. *Montgomery Auditing Theory and Practice* (pp. 499-500).

“Consideration of such authorities as are available leads us to the conclusion that the giving of trading stamps as in the instance now before us does not effect a reduction in the price of the articles sold such as to constitute a violation of the Fair Trade Act \* \* \*.”

\* \* \* \*

“It is true that the *Food and Grocery Bureau* case involved a different statute, the Unfair Practices Act rather than the Fair Trade Act, but the ruling of the Court must be regarded as conclusive of the status of the trading stamp in commercial retail business” (131 P. 2d 856, 858).

\* \* \* \*

“To denominate appellant’s trading stamp plan as a device for giving a cash discount on merchandise, rather than as a cut in price upon the article sold, gains force when we consider that the stamps are given uniformly and without regard to the type of goods sold or the purchaser of the same. The only condition is that cash be paid for the purchases” (131 P. 2d 856, 859).

Here, therefore, in companion cases we find the answers to both of the questions which control the present controversy, if it is viewed from the price point of view. In the first case the use of trading stamps was held to be equivalent to a cash discount; and in the second case it was held that such a cash discount did not have the effect of cutting prices.

Here, also, we find the origin of the present controversy and come right to the heart of the matter, for it was the Attorney General's reliance on the first of these two cases and his disregard of the second that precipitated the present dispute. Apparently asked, generally, whether trading stamps violated the Fair Trade Act or the Unfair Practices Act, he replied to Mr. Hale, Executive-Secretary of the Trade Commission, on May 21, 1951, that, in his opinion, they did, *if they had the effect of reducing the prices*, in the one case below the "minimum resale price" and in the other case below "cost" as defined by the Act. As authority for this, he cited the *Food and Grocery* case, saying that the only reasonable inference which could be drawn from the court's decision was that if the redeemable value of the trading stamps had reduced the price of the merchandise below cost, it would have constituted a violation of the Unfair Practices Act (*Opinion of the Attorney General, May 21, 1951*). Unfortunately, he overlooked the *Weco Products* case which held that cash discount stamps, despite their redeemable value, do *not* have the effect of reducing price.

The Attorney General did not say that stamps cut prices but that is what Mr. Hale understood him to say and that is the assumption upon which the Trade Commission based the prosecution of this enforcement proceeding. Taking its cue directly from the Attorney General's conclusion that "if the redeemable value of the trading stamps reduces the price . . . below cost", they violate the Unfair Practices Act, the Trade Commission issued a cease and desist order on May 28, 1951, (one week after the Attorney General's opinion), which recited that "S. & H. Green Stamps with their redeemable value did reduce the sale price of the commodities below cost", and called upon Mr. Bush to refrain from issuing them.

It is difficult to comprehend how the Attorney General could have misunderstood the *Food and Grocery* decision or how he could have overlooked the *Weco Products* decision, but it is easy to understand how Mr. Hale, misinformed of the significance of the first case and uninformed of the existence of the latter, proceeded upon a false assumption.

The Attorney General of Oklahoma under similar circumstances, after reviewing the *Food and Grocery* decision and the *Weco Products* decision said, in an opinion dated May 8, 1950, of which we shall be pleased to provide copies to the Court:

“\* \* \* The weight of law, logic and reason,  
as declared by decisions of the various courts,

holds clearly and distinctly to the view that the practice of giving trading stamps \* \* \* does not amount to nor will it sustain a charge of, price cutting.”

The Attorney General of Oklahoma also discussed at length *Bristol-Meyers Co. v. Lit Bros., supra*, wherein the Court said,

“It is clear to us that the practice indulged in by Lit Brothers, of issuing trading stamps with the sales of its merchandise falls within the sphere of legitimate competition and does not constitute a ‘selling [of] any commodity at less than the price stipulated’ and that it is not ‘unfair competition’ within the meaning of the act appellant invokes. To come within the prohibitions of the act, Lit Brothers would have to either (1) cut directly the price of the commodities within the act’s protection, or (2) accomplish the same result in respect to the commodities by a device which was a palpable subterfuge resorted to for the purpose of circumventing the law” (6 A. 2d 843, 847-8).

Upon reason, authority, and as a matter of statutory construction, we respectfully submit that the Lower Court was in error in finding that the stamps which Mr. Bush issued to his cash customers had the effect of cutting prices; that, on the contrary, they had no such effect; and, finally, that the authority upon which the Attorney General relied and upon which the Trade Commission acted stood for no such proposition.



POINT III — PLAINTIFFS FAILED TO MAKE OUT A  
*PRIMA FACIE* CASE BECAUSE THEY DID NOT  
 PROVE THAT DEFENDANT MADE ANY SALES  
 FOR THE PURPOSE OF INJURING COMPETI-  
 TORS AND DESTROYING COMPETITION.

We come now to the question of wrongful intent.

If an act, such as the sale of milk below a *definitely fixed price*, is prohibited by the State in the exercise of its police power, one can be convicted of a violation if, in fact, he sells below the fixed price, no matter how good his intentions may have been and no matter how innocent his purpose (*Nebbia v. New York*, 291 U. S., 502, 78 L. Ed. 940 [1934]). But, if an act, such as the sale of merchandise below *cost* is prohibited and the definition of “cost” is uncertain, one cannot be convicted of a violation just because he sells below cost but only if he does so with wrongful intent; that is to say, for the purpose of injuring his competitors and destroying competition.

The reason for this distinction between a statute prohibiting the sale of a certain commodity below a fixed price and a statute prohibiting the sale of merchandise in general below cost is that, in the one case, a man can easily tell when he is violating the law, for there is no uncertainty about it, but in the other case, it is difficult for him to know when he is and when he is not violating the law, for there is a great deal of uncertainty about it.

Accordingly, in the case of the anti-price discrimination and unfair practice acts the law has become well

settled that there must not only be an *act*, a sale at a discriminatory price or below cost, but there must also be a wrongful *intent*. The underlying reason for this, to repeat, is that, under broad regulatory statutes of this kind, it is so difficult for a merchant to know whether he is transgressing some regulation with which the legislature has seen fit to guide him, that it is unfair to convict him on the basis of an innocent or unwitting and unintended misinterpretation of the law. (*Daniel Loughran Co., Inc. v. Lord Baltimore etc. Co.*, 178 Md. 38, 12 A. 2d 201 [1941]). The present case perfectly illustrates the wisdom of the rule.

As the Court said in *Englebrecht v. Day*, 201 Okla. 585, 208 P. 2d 538 (1949), after referring to many earlier decisions from other states construing unfair practices acts,

“From all of the cases cited it appears that wherever the statute contained the words ‘with intent or effect’ or ‘with the intent, effect, or result,’ etc., and the constitutionality of the Act was challenged on that ground or on that ground with others, such Act is generally held to be unconstitutional” (208 P. 2d 538, 544).

For an interesting discussion of this point, see Thatcher: “*The Constitutionality of the Unfair-Practices Acts*”, 25 Oregon Law Review, 250-255. See also *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A. 2d 67 (1940); *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P.

2d 650 (1941); *State ex rel. English v. Ruback*, 135 Neb. 335, 181 N.W. 607 (1938).

In the case at bar the Act under consideration permitted, in the alternative, proof either of a wrongful intent or a harmful effect, for it made it unlawful to sell below cost “for the purpose of injuring competitors and destroying competition \* \* \* or when the effect of selling at less than cost \* \* \* may be substantially to lessen competition \* \* \*.” Similarly, in its complaint, the Trade Commission alleged, in the alternative, that the sales complained of were made either “for the purpose of injuring competitors or the effect thereof was and will be to substantially lessen competition”.

Recognizing, however, that it would not be enough under the Unfair Practices Act to prove, in the alternative, a wrongful intent or a harmful effect, counsel for the plaintiffs conceded at the trial 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 also was the position taken by the Trial Court which said,

“Under our statute the selling of merchandise below the legal price must be coupled with the intent to injure competition within the same trade area to constitute conduct on the part of the merchant which is unlawful and subjects said merchant to an injunction” (Memo Decision, R. 16).

Both on reason and authority therefore, it is plain that in addition to sales below cost, it was incumbent upon plaintiffs to show as part of their *prima facie* case that such sales were made by the defendant “for the purpose of injuring competitors and destroying competition.” The Trial Court found that the plaintiffs had sustained this burden (Finding of Fact No. 10, R. 22). We respectfully submit that there is no evidence to support such a finding.

(a) *Defendant's intent was only to attract business generally: to meet competition, not to injure his competitors and destroy competition.*

No claim is made in this case that there is anything reprehensible about the use of S. & H. cash discount stamps. As the Court said in *Ex parte Hutchinson*, 137 Fed. 949 (1904),

“The giving of trading stamps is merely one way of discounting bills in consideration of immediate payment of cash which is a common practice of merchants and is doubtless a popular method and advantageous to all concerned and it is not obnoxious to public policy” (p. 949).

Speaking of S. & H. stamps, the Court in *Winston v. Beeson*, 135 N. C. 271, 283, 47 S. E. 457, 461 (1904) said:

“The plan as outlined in the verdict seems to be one for advertising the merchant's business and his wares and enabling him to sell his goods for

cash instead of on time. This, it must be conceded is an advantage to him. It is also a benefit to the customer who practically receives a discount and who will buy more cautiously and judiciously if he pays cash and will spend only according to his means.”

Similarly, no claim is made in this case that it was reprehensible or illegal for Mr. Bush to install the S. & H. Co-operative Cash Discount System in his store so as to secure to himself and his customers the benefits available under that system.

In the conduct of his business, Mr. Bush had certain competitive handicaps: he did not extend credit, take telephone orders, make deliveries or provide free parking. To meet these competitive practices he simply installed a storewide cash discount. His intent was the same when he issued S. & H. stamps on merchandise marked up 16% as it was when he issued them on merchandise marked up only 6% (R. 53): namely, to allow a cash discount on everything for the purpose of stimulating his trade, advertising his business, and meeting his competition.

To charge that Mr. Bush had some sinister purpose in issuing cash discount stamps on 6% items, that he issued such stamps on such items, as contrasted with others at higher markups, “for the purpose of injuring competitors and destroying competition” is ludicrous. If there was any violation of the Act, which we deny, it

could only have been incidental, not purposeful. It simply makes no sense at all to contend that Mr. Bush intended to injure his competitors and destroy competition when he issued cash discount stamps with a quart of salad dressing marked up 6% but that he had no such intent when he issued them with a can of beans marked up 8.08%. The storewide application of the discount negates any supposed intention to sell particular items below statutory cost.

*Balzer v. Caler*, 74 P. 2d 839, *aff'd*, 11 Cal. App. 2d 663, 82 P. 2d 19 (1938), was a suit brought to enjoin a retail grocer from selling certain staple merchandise, such as Kellogg's Corn Flakes, slightly below cost in violation of the California Unfair Competition Act which prohibited such sales when made for the purpose of injuring competitors and destroying competition. There was no question about the sales having been made below cost, for defendant admitted it, but he denied that he made such sales for the purpose of injuring competitors and destroying competition. Upon a finding that the sales were made "with the sole purpose of advertising his business, improving his trade, and stimulating interest on the part of customers in those products and in his business, and not with the intention of injuring competitors or destroying competition", the Court denied the injunction and dismissed the action. Affirming the judgment on appeal, the Court said,

"Plaintiff failed to prove a cause of action against him. It was a necessary element of the

illegal selling of goods for less than cost, as the statute existed when this case was tried, that the act be performed with the purpose of injuring competitors and destroying competition. The burden was on the plaintiff to establish that unlawful purpose. The record in this case is devoid of any such evidence. The court specifically found that the respondent did not sell the goods below cost with that purpose in view. On the contrary, the court found that he sold the goods below cost for the sole purpose of advertising his grocery business and to stimulate trade'' (74 P. 2d 839, 843).

Notwithstanding that the Lower Court in the case at bar found that Mr. Bush did intend to injure competitors and destroy competition, the testimony showed that Mr. Bush's only intent was to advertise his grocery business and to stimulate trade. He so testified repeatedly, and neither the facts nor the circumstances contradicted him. See also *Sandler v. Gordon*, 94 Cal. App. 2d 254, 210 P. 2d 314 (1949); *State v. 20th Century Market*, 236 Wis. 215, 294 N.W. 873 (1940).

There was, we submit, no proof that Mr. Bush intended to injure his competitors or destroy competition but only that he employed a perfectly legitimate method, a cash discount, to meet the equally legitimate competitive practices of the credit and delivery type of merchant engaged in the same business.

- (b) *Defendant cannot be held to have intended to incite price cuts or a price war, nor can he be held responsible for the acts of his competitors, legal or illegal.*

In lieu of any proof of a wrongful intent on Mr. Bush's part, our opponents sought to prove some sort of *quasi* intent by making him responsible for a price war in the retail grocery business in Ogden. Their theory in this regard was that since a man must intend the ordinary consequences of his acts, and since a price war is the ordinary consequence of the use of S. & H. stamps, Mr. Bush must have intended to set off a price war in order to drive his weaker competitors out of business (R. 67-69).

The testimony offered in support of this line of attack was signally unsuccessful. All that it showed was that on July 21, 1951, eight months or more after Mr. Bush had inaugurated his cash discount, Stimpson's Market, which had already established a record for price cutting and had been ordered to desist (R. 62), cut its prices 2¢ on everything that the Bush Super Market had in its windows; Bush cut to meet Stimpson, and so the prices went progressively lower for three days, after which Bush gave up and Stimpson's, returning to the old prices, established a 3% cash discount on everything in its store. About a month later, other large stores in Ogden established prices at 3% below Stimpson's hand-bill or list prices (R. 72-73).

If this constituted proof that the ordinary consequence of the use of S. & H. cash discount stamps is to



cause a price war and that Mr. Bush must therefore be considered to have intended to incite such an event, it certainly took a long time to get started (8 months!), and Mr. Bush showed very little stomach for it (about 3 days!). What we really think the testimony showed, and no more, was that Stimpson's unnecessarily initiated a contest with Bush when all it needed to meet Bush's cash discount was a cash discount of its own which quickly restored its lost volume (R. 73).

If the ordinary consequence of the use of S. & H. cash discount stamps were to incite a price war, there would be over 30,000 such price wars raging at the moment throughout the United States, but no such phenomenon has come to our attention or was referred to at the trial, and no reference will be found to it in the cases.

We should also point out, again, that if Mr. Bush violated the law when he issued S. & H. cash discount stamps, which we deny, he only did so perhaps once in a thousand sales, when 6% items alone were sold, and that it is absurd to suggest that such occasional sales could have engulfed the local grocery trade in a price war or that Mr. Bush could be held to have intended any such consequence.

Furthermore, even assuming that there was a price war in the retail grocery business in Ogden and not just in the mind of counsel for the plaintiffs in intervention, no fault could be found with Mr. Bush if the "war" was inspired by his unquestionably legal use of S. & H. cash

discount stamps on the bulk of his merchandise, nor could any fault be found with him in so far as the "war" related to items selling *above* the 6% level. At the very most, fault could be found with Mr. Bush to the extent that the "war" was inspired by his use of S. & H. cash discount stamps in connection with the sale of 6% merchandise and only in so far as the "war" had the effect of cutting prices *below* the 6% level, where it would have run afoul of the Unfair Practices Act. On these matters the record is entirely silent and proof gives way to pure speculation.

Plaintiffs' argument, step by step, is that because the so-called price war followed defendant's use of cash discount stamps, it was caused by the stamps; and because it was caused by the stamps, it was the ordinary consequence of the use of the stamps; and because it was the ordinary consequence of the use of the stamps, defendant must have intended it to occur; and because a price war adversely affects the industry, it injures competitors and destroys competition; and because of this, defendant must be found to have made use of the stamps for the purpose of injuring his competitors and destroying competition. This is fantastic!

When one considers that we are dealing with a penal statute and that a man is presumed to have acted without wrongful intent until the contrary is proved, it is apparent that this whole phase of the evidence is weak, inconclusive, meaningless, and certainly inadequate and inappropriate to the task for which it was intended.

Even in its broadest construction, it proved nothing with respect to Mr. Bush's intent.

- (c) *Plaintiffs failed to carry the burden of proving that defendant issued S. & H. cash discount stamps for the purpose of injuring his competitors and destroying competition.*

As we have already shown, *supra*, at page 45, the plaintiffs were required to prove that defendant's actual *intent* in issuing S. & H. cash discount stamps was to injure his competitors and destroy competition; and that, in lieu of such proof, it would not be enough to prove merely the *effect* of his use of the stamps. In final analysis, all they had to rely upon was their theory that it was wrong for Mr. Bush to issue cash discount stamps with 6% items because the *effect* was to sell merchandise below cost. This, however, was not enough to prove a wrongful *intent*, even if such sales were below cost.

In *Board of Railroad Commissioners v. Sawyers Stores, Inc.*, 114 Mont. 562, 568, 138 P. 2d 964, 968 (1943), the Court said:

“The commission relied on its proof of the sales and the testimony of competitors as to the effect generally of price cutting as showing the unlawful intent. Proof of sales at less than cost, if that had been established by the evidence, would not in itself be proof of the unlawful purpose to injure competitors and destroy competition. No presumption of such purpose arises from the mere

fact of such a sale being made. It is necessary to go further and show other facts and circumstances that would furnish basis for a conclusion of the wrongful purpose.”

See: *State v. Commercial Candy Co.*, 166 Kan. 432, 201 P. 2d 1034 (1949); *Great A. & P. Tea Co. v. Ervin*, 23 F. Supp. 70 (1938); *Perkins v. King Soopers, Inc.*, 122 Colo. 263, 221 P. 2d 343 (1950).

In truth and in fact, plaintiffs defaulted on the issue of intent and their counsel virtually admitted as much at the close of the whole case when, in a colloquy with the Court, he revealed that his real theory was that, if the Act were interpreted to forbid the use of cash discount stamps with 6% items, he would consider defendant to have had a wrongful intent (to have acted unfairly), but if the Act were interpreted not to forbid such a practice, he would consider defendant to have had no wrongful intent, no matter what consequences flowed from his use of the stamps. If this is a correct view of the matter, no useful purpose will ever be served by attempting to prove or disprove intent in such a case as this.

The colloquy to which we refer and which shows that the Trial Court shared our opponent’s erroneous view of the question of intent, may be set forth as follows:

By the Court: “Of course, pursuing this line of thought a little bit further, it is obvious also if another competitor of Mr. Bush’s engages in a program of selling and adapts himself to certain

facilities which may be available to him, that by the same token Mr. Bush is hurt just as much by that method as the other merchant is by Mr. Bush's."

Mr. Rampton: "There is no question about that, your Honor, but the difference is this: Our legislature has set up certain things that they said are unfair.

By the Court: That's right.

Mr. Rampton: Now, things that are fair, that is legitimate competition.

By the Court: That's right.

Mr. Rampton: And you can't be blamed for hurting your competitor.

By the Court: Eventually, you are going to have to decide whether Mr. Bush's method is unfair, and as a result the State law will have to be interpreted in that regard" (R. 225-226).

This, we submit, is all there was to plaintiffs' *prima facie* case in so far as it related to intent. If cash discount stamps were not proscribed by the Act, the Court and counsel for the plaintiffs would consider Mr. Bush's intent unobjectionable; but if stamps were proscribed, they would then consider his intent to have been wrongful. Plaintiffs might as well have refrained from going into the question of intent at all. Their theory, we submit, was unsound; their proof, lacking.

POINT IV — THE UNFAIR PRACTICES ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FEDERAL CONSTITUTION AND THE CORRESPONDING SECTIONS (ARTICLE I, SECS. 1 AND 7) OF THE STATE CONSTITUTION.

In our first three points we endeavored to show that defendant, in fact, never violated the Unfair Practices Act.

We come now to our final point which has to do with the constitutionality of the Act.

- (a) *The Act, if construed to cover ALL of the costs of the credit and delivery merchant, but only SOME of the costs of the cash and carry merchant, is unconstitutional.*

In Point I we argued that the statutory markup was intended to cover *all* of the costs of the cash and carry merchant, just as it was intended to cover *all* of the costs of the credit and delivery merchant. We ask the Court now to consider the constitutional consequence of rejecting that argument.

If the statutory markup covers *all* of the costs of the credit and delivery merchant but only *some* of the costs of the cash and carry merchant, the statute clearly discriminates against the latter in favor of the former. It is fundamental that, where, as here, there is no reasonable basis for discriminating as between two classes of competing merchants, any statute which has such an effect is unconstitutional because it denies one of them

the equal protection of the law. (*State v. Holtgreve*, 58 Utah 563, 571, 200 Pac. 894 (1921); *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 80 L. Ed. 675 (1936).)

In our opinion, Point I provides a complete answer to this law suit and it is one on which we would prefer to stand because it does not entail the invalidation of the Act, but, if we are overruled on Point I, we submit that the present point will be unanswerable: the statute cannot be unfairly discriminatory and constitutional at the same time.

(b) *If a cash discount is an element of price rather than cost, the Act is unconstitutional because it makes no allowance for the difference in the overhead of the cash and carry merchant as compared with the overhead of the credit and delivery merchant.*

In Point II we argued that the function of a cash discount, as distinguished from a trade discount, is not to adjust price but to induce the purchaser to pay cash; that a cash discount affects the *terms* not the *price*. Here, again, we ask the Court to consider the constitutional consequence of rejecting our argument.

Cash discount stamps are either an element of cost, as we think, or an element of price, as our opponents suggest, but not of both. No one suggests that stamps are at one and the same time elements of cost *and* price.

If cash discount stamps are an element of cost, as we think, the cost of supplying them occupies the same place

in the overhead of the cash and carry merchant that the cost of extending credit occupies in the overhead of the credit and delivery merchant. In other words, the cost of a cash discount and the cost of extending credit are related. This view, which we have held from the outset of the present controversy, is reflected in the following quotation from Rosenkamppff and Wider in the "Theory of Accounts", page 486:

"The presence of the financial and time elements, furthermore, makes the [cash] discount earned closely approximate interest. This similarity is even more pronounced in those cases where money is borrowed at the bank in order to take advantage of such purchase discounts. The interest paid on such borrowings is charged to interest expense and is treated as a *deduction from income* in the non-operating section of the income statement; hence, the cash discount on purchases should appear in the non-operating section as *other income*."

If stamps are not an element of cost, it means that there is no financial expense for the cash and carry merchant which corresponds to that element of the financial expense of the credit and delivery merchant which is attributable to the extension of credit. It means that the cash discount allowed by the former does not figure as a non-operating expense but is reflected, instead, by a reduction in sales. The consequence of this is that the overhead of the cash and carry merchant is lower than the overhead of the credit and delivery merchant by



reason of the absence of this particular item of non-operating expense, and, for this reason, the cash and carry merchant should be permitted to charge correspondingly lower prices for his merchandise. For its failure to compensate for this difference, the statute is arbitrary and discriminatory in its effect, and, hence, contravenes the equal protection clause of the Fourteenth Amendment.

In *Florida Dry Cleaning and Laundry Board v. Everglades Laundry*, 137 Fla. 290, 188 So. 380 (1939), the Court had before it the question of the reasonableness of laundry and dry cleaning prices fixed by a Florida Administrative Board. It held that, in determining prices the Board was under a duty to take into consideration the differences in cost between credit and delivery establishments, on the one hand, and cash and carry establishments, on the other.

In *Serrer v. Cigarette Service Co.*, 148 Ohio 519, 76 N. E. 2d 91 (1947), the Court invalidated an Ohio statute prohibiting sales of cigarettes below cost because it failed to provide for the difference in overhead between the wholesaler of cigarettes who did business on the credit and delivery plan and the wholesaler who did business on the cash and carry plan. As in the case at bar, the statute defined "cost" to the wholesaler as invoice or replacement cost less trade discounts, except customary discounts for cash, plus an arbitrary markup in the absence of proof of a lower

actual cost. In invalidating the statute the Trial Court said,

“The unreasonableness of the foregoing formula [2% markup] appears in bold relief when it is considered that although the specified markup is inadequate to cover actual cost, nevertheless it constitutes the maximum markup required by the statute. Regardless of how much higher the wholesaler’s actual cost may be, he is not required to increase his markup to correspond thereto. This maximum markup of 2% is disproportionately lower than actual maximum costs of Service Wholesalers and it bears no true relation to the average cost of all wholesalers. This is exemplified by the evidence and other data submitted to the court.

\* \* \* \*

“The differentials in cost of the two classes of wholesalers in question are ignored by the statute with the result that *instead of minimum prices fairly based upon different costs, the same minimum price is available to cash and carry and service wholesalers alike.*” (Emphasis ours.) (74 N. E. 2d 841, 849.)

More recently, in *Cohen v. Frey & Sons, Inc.*, 80 A. 2d 267 (1951), the Court of Appeals of Maryland invalidated for this same reason a Maryland statute prohibiting sales below cost. The Maryland Act was in all material respects similar to the Utah Act now under discussion, and required wholesalers to apply a markup of 2% to cover overhead in the absence of direct evidence of a lesser cost. For failure to make allowance

for the difference in overhead of the cash and carry wholesaler as compared with the credit and delivery wholesaler, the Court declared the Maryland statute unconstitutional, saying,

“We conclude that the Unfair Sales Act, particularly Section 112, as embodied in Section 113, is unreasonable, arbitrary and unjustly discriminatory, as between plaintiffs and defendant” (p. 278).

In our opinion, Point II provides a complete answer to this lawsuit, and it is one on which we would prefer to stand because it does not entail the invalidation of the Act, but, if we are overruled on Point II, we submit that the present point will be unanswerable. If cash discounts affect prices only, and do not figure as an element of cost, the overhead of the cash and carry merchant is thrown out of relation with the overhead of the credit and delivery merchant and there should be a compensating factor in the Act which would permit the cash and carry merchant to charge lower prices. For want of it, the Act is unconstitutional.

(c) *The Act, if construed only to prohibit the use of S. & H. cash discount stamps, is unconstitutional because it discriminates against a legitimate business.*

Counsel for the Utah Retail Grocers' Association, who carried nearly the whole burden of the trial for the plaintiffs, endeavored to make this enforcement proceed-

ing appear to be a public spirited effort to save the retail grocery business in Ogden from the disintegrating and demoralizing effect of a price war incited by the defendant's use of cash discount stamps (R. 67).

We believe that we have already demonstrated that this is nonsense, but let us add to what we have already said on the subject at pages 49 to 52, *supra*, that the alleged price war did not even get under way until long after this proceeding had been initiated.

The first step, apparently, was an effort on the part of the Retail Grocers Association to bring Mr. Bush into line, for that was the usual course (R. 91).

The second step, apparently, was a complaint by Mr. Boyle, President of the Association, to Mr. Hale, Executive Secretary of the Trade Commission (R. 91-92).

The third step, apparently, was a request by Mr. Hale to the Attorney General of Utah for an opinion with respect to whether the issuance of S. & H. green trading stamps in connection with sales was a violation of the Fair Trade Act or the Unfair Practices Act (R. 129). The date of this request does not appear, but the opinion was issued on May 21, 1951.

The fourth step, apparently, was an interview between Mr. Hale and the defendant's store manager, Mr. Winters (R. 129). This appears to have taken place on May 24, 1951, when Mr. Hale purchased certain 6% items (complaint, paragraph 3).

The fifth step, apparently, was the issuance of a cease and desist order by the Trade Commission. This took place on May 28.

It was not until nearly two months later, July 21, 1951, that Stimpson's first cut its prices in the opening round of the alleged price war (R. 72).

With this chronology of events in mind it will be obvious that the talk of an alleged price war was intended merely to obscure the real purpose of the proceeding. The real purpose was not to rescue the retail grocery business from a price war nor to prevent Mr. Bush from issuing S. & H. cash discount stamps with 6% items, but to compel him to give up the use of such stamps entirely. Here was the real animus: the Retail Grocers' Association wanted to drive S. & H. cash discount stamps out of the retail grocery business in Ogden.

Not only was the statute never intended for such a purpose but, if it had been it would clearly have been unconstitutional, for the business of The Sperry & Hutchinson Company in providing and redeeming its stamps, so that retail merchants and their customers may enjoy the benefits of a cooperative cash discount, is a legitimate business which serves a useful purpose and, hence, may not be made the subject of discriminatory legislation. As this Court said in *State v. Holtgreve*, 58 Utah, 563, 572; 200 Pac. 894, 897 (1921), in striking down a tax which sought to discriminate against S. & H. stamps,

“\* \* \* In our judgment the great weight of authority is against the validity of laws which either directly or indirectly prohibit or unduly interfere with the right to use trading stamps such as are in question here and which are supplied for the purposes stipulated \* \* \*.”

A host of other decisions upholding the use of cash discount stamps in the face of attack by special interests could be cited but the point is one which our opponents can hardly dispute and we shall therefore content ourselves with the following quotations from one of the leading California decisions (*Ex Parte Drexel*, 147 Cal. 763, 82 Pac. 429 [1905]).

“We see nothing in such a stamp or coupon which is outside of the constitutional rights of citizens to make contracts concerning property; nothing which wrongfully interferes with the lawful rights of other persons; and nothing which the police power can reach as touching the public safety, the public health, or the public morals. (82 Pac. 429, 431.)

\* \* \* \*

“Indeed, an ordinary trading-stamp or coupon is in substance a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract. It may be distasteful to certain competitors in business; but the latter should remember that if a statute suppressing it be upheld then other oppressive statutes might be enacted unlawfully interfering with and hampering busi-

ness and the right of contract to which these competitors would strenuously but vainly object.” (82 Pac. 429, 434.)

Not only are we quite certain that the Unfair Practices Act was not intended to outlaw cash discount stamps, but we are satisfied that, if it had attempted such a thing, it would have to be declared unconstitutional. Their use may be regulated, as, indeed, it is (Title 96, Utah Code Annotated 1943) but not prohibited.

(d) *The Act, if construed to permit conviction upon proof, in the alternative, of a wrongful intent or a harmful effect, is unconstitutional.*

Section 16-A-4-7 of the Act provides that it shall be unlawful for any person to sell any article at less than cost “for the purpose of injuring competitors and destroying competition \* \* \* or when the effect of selling \* \* \* at less than cost may be substantially to lessen competition.” Literally construed, it is evident that a retailer who made sales below cost *without* any purpose of injuring competitors or destroying competition could be convicted of a violation of the statute upon proof that the effect of his sales might be substantially to lessen competition. As we have indicated at pages 42-44, *supra*, the courts have repeatedly held that proof, in the alternative, of a wrongful purpose or a harmful effect is not enough: there must be proof of a wrongful purpose. Since our opponents, as we have indicated at page 44, *supra*, do not contest this point, we shall do no more here than to call the attention of the Court to *Englebrecht v.*

*Day*, 201 Okla. 585, 208 P. 2d 538 (1949), and *Adwon v. Oklahoma Retailers Association*, 204 Okla. 199, 228 P. 2d 376 (1951).

In the first of these cases, which contains a comprehensive review of the authorities, the Court invalidated the Unfair Sales Act of Oklahoma because it permitted conviction upon proof, in the alternative, of intent or effect.

In the second, the Court sustained the Unfair Sales Act of Oklahoma after it had been amended so as to remove the objectionable alternative which permitted conviction without proof of intent.

- (e) *The Act is unconstitutional in any event because it is so vague and indefinite that the retail merchant is unable to ascertain when he is violating the law and, consequently, exposing himself to conviction of a misdemeanor and running the risk of a fine, imprisonment and liability for civil damages.*

The Utah Unfair Practices Act, like many of its fellows in other jurisdictions, was modeled on the California Unfair Practices Act of 1935, as amended in 1937, and is subject to the same constitutional shortcomings. The time for challenging such acts upon the ground that they exceed the police power of the state, seems to have passed (*Wholesale Tobacco Dealers Bureau v. National Candy and Tobacco Co., Inc.*, 11 Cal. 2d 634, 82 P. 2d 3 [1938]), but the time for challenging them for the in-



definiteness and uncertainty of their regulatory provisions is still very much with us.

After reviewing the cases in which such challenges have been made, the author of "*The Constitutionality of the Unfair-Practices Acts*" in the Oregon Law Review to which we have already referred at page 41, *supra*, said: "\* \* \* in their present statutory forms, the enforcement of these acts, in the absence of a standard (either within or without the acts) for resolution of the myriad problems of apportionment of overhead expense which confront every merchant, is so highly conjectural that, it is submitted, the prohibitions of the acts are too vague, arbitrary, and uncertain to be supportable under due process" (p. 263), and then went on to say that, "Without exception, every case which has sustained the sales-below-cost provisions of an unfair-practices act has been based upon a record factually incomplete, the issue having arisen upon demurrer, motion, or certified question. Under those circumstances the courts' reluctance to pronounce a violation of the principles of due process is understandable, and in some instances may have been justifiable. Other courts, in contrast have not needed the elucidation of a factual record of the insuperable obstacles confronting a merchant who attempts to comply with these statutes" (p. 269).

Considered against the background of the constitutional struggle to which the foregoing attests, it is evident that the challenge leveled by the present defendant

at the present Act was a serious one; that it nearly succeeded below is equally evident from the following pregnant observation by the Trial Court:

“From the evidence in this record, the Court makes the observation that the Unfair Practices Act of the State of Utah is lacking in definiteness as to an exact formula in fixing what is or what is not below cost of a great many items of merchandise being bought and sold by merchants who operate merchandise stores such as the Bush Super Market; but that said indefiniteness is not sufficient to hold the act *wholly* unconstitutional” (Memo Decision). (Emphasis ours.)

In defining “cost to the retailer”, the Act states (Section 16-A-4-7, subdivisions 3 and 4, as amended in 1951):

“\* \* \* 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 \* \* \*.

“\* \* \* The term ‘replacement cost’ shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time *within thirty days prior to the date of sale* or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller’s last purchase of the said merchandise.” (Emphasis ours.)

We call the attention of the Court to this provision of the Act not only because it is an example of the indefiniteness of the statutory prohibitions but also because it is a prohibition which lacks any rational relationship to actual costs. Such a formula was held, in *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A. 2d 67 (1940), to render the Unfair Practices Act unconstitutional because of vagueness and the arbitrary disregard of actual cost. A very similar provision in the New Jersey Unfair Practices Act was held to be invalid in *State v. Packard-Bamberger & Co.*, 123 N. J. L. 180, 8 A. 2d 291 (1939); see also, *Great Atlantic and Pacific Tea Co. v. Ervin*, 23 F. Supp. 70 (1938).

The effect of this type of restriction is, first, that the retail grocer never knows whether he is violating the Act because he never knows what his "replacement cost" is unless he maintains a constant and accurate check on the market (*State v. Walgreen Drug Co.*, 57 Ariz. 308; 113 P. 2d 650 (1941); *Daniel Loughran Co. v. Lord Baltimore Candy & T. Co.*, 178 Md. 38; 12 A. 2d 201 (1940)), and, second, that he is prevented from making available to the consuming public the benefit of his legitimate foresight or good fortune in buying at low prices commodities which remain on his hands for more than thirty days. Thus in *Florida Dry Cleaning & Laundry Board v. Everglades Laundry*, 137 Fla. 290, 188 So. 380 (1939) the Court said:

"There is a distinct difference between delivery and the cash and carry aspect of the laundry and dry cleaning business. The manner and cost

of administration in each is materially different and those who prefer to patronize the cash and carry business are entitled to the advantage of this difference.”

To the same effect in *Cohen v. Frey & Sons, Inc.*, 80 A. 2d 267 (Md. 1951)

“To say that Self-Service was selling below cost because it did not charge itself with, but gave its customers the benefit of, non-existent expenses which it saved by selling for cash and making no deliveries, would be as arbitrary and unfair as to require one dealer to charge as much for short tons as others charge for long tons” (80A. 2d 267, 273).

While the statutes referred to in the foregoing cases are not identical to the Utah Act in its definition of cost, they each involved an attempt to impose a cost at variance with the actual cost and the courts invalidated them for that reason. The Utah Act, we submit, is invalid for the same reason.

In further defining “cost to the retailer”, the Act requires that the retailer add to his invoice (a) freight charges, if incurred, and (b) cartage, if incurred, and “(c) a markup to cover a proportionate part of the cost of doing business \* \* \*.” Here, again, is an element of uncertainty, for there is no way whatever for the merchant to compute that “proportionate part of the cost of doing business” which he is to contribute either to the various classes of his merchandise or to the in-

dividual items; and, in fact, there is no way that such a computation can be made (R. 192-193).

What "part of the cost of doing business" should a retail grocer attribute to his canned vegetables as compared to his fresh vegetables? And what "proportionate part" should he attribute to canned beets, for example, as compared to canned tuna fish? How should he allocate among the different items his rent, advertising expense, clerks' salaries, etc.? Should he allocate costs differently when the merchandise is on the counter instead of under the counter or on the shelves, or in the refrigerator? Should he make a different allocation to items that move slowly than to items which move rapidly? These questions illustrate the impossibility of making an apportionment as called for by the statute. Mr. Bush did not attempt such a thing (R. 150-151). Even to attempt such a thing would involve prohibitive bookkeeping expense.

Finally, after defining "cost to the retailer" and prohibiting the retailer from selling below "cost", the statute goes on to provide (Sec. 16A-2-12(d)) that, "The provisions of this act shall not apply to any sale made: \* \* \* (d) In an endeavor made in good faith to meet the *legal* prices of a competitor as *herein defined* selling the same article, product or commodity in the same locality or trade area." Here, we think, is a provision which makes the whole definition of "cost" completely meaningless, for, in fact, there is no way in which a

retailer can possibly ascertain "the legal prices" of a competitor (R. 153). To do such a thing he would have to be informed not only of the invoice or replacement cost within thirty days of the commodity being sold by his competitor but he would also have to be informed of the actual overhead of his competitor and the method by which his competitor allocated his overhead to the commodity in question. To this information, the retailer has no access.

For the foregoing reasons, we submit that the only way a retail merchant can be certain that he is not violating our Unfair Practices Act is to close the doors of his establishment and go out of business.

POINT V—THE RETAIL GROCERS ASSOCIATION WHICH IS THE REAL PARTY-PLAINTIFF IN THIS ACTION, HAS BEEN GUILTY OF PRICE FIXING IN VIOLATION OF THE SHERMAN ACT, AND, ACCORDINGLY, COMES TO COURT WITH UNCLEAN HANDS, AND FOR THAT REASON SHOULD BE DENIED INJUNCTIVE RELIEF, FOR THE UNFAIR PRACTICES ACT DOES NOT, AND COULD NOT, AUTHORIZE PRICE FIXING.

If, as we believe, the Retail Grocers' Association is attempting here to fix prices in the retail grocery business in general and, in that regard, to discipline Mr. Bush in particular, the Association is guilty of violating the Sherman Act, and, consequently, comes to Court with unclean hands. For that reason alone, it should be denied the injunctive relief which it seeks. There is no doubt,

of course, that we are dealing here with interstate commerce (R. 132).

As the United States Circuit Court pointed out in *Food and Grocery Bureau v. United States*, 139 F. 2d 973 (C. C. A. 9th 1943), it is one thing to take joint action to see that the members of a trade association do not violate an unfair practices act by selling below cost with the intent to injure competitors and destroy competition, but it is quite another thing to take such action for the purpose of fixing prices *without regard to intent*, for, in the first place, the Act does not forbid sales below cost, *per se*, but only sales below cost with a wrongful intent, and, in the second place, such conduct on the part of a trade association amounts to price fixing which clearly violates the Sherman Act when applied to goods moving in interstate commerce. As the Court said,

“The cases cited by the district judge in one of his rulings sustain his holding that agreements stabilizing such prices either at a maximum or a minimum or through a formula violate the Sherman Act.” (Citing many cases.) (p. 978.)

The activities of the Food and Grocery Bureau which were held to amount to price fixing are described in the Opinion as follows:

“The Bureau served some thousands of Southern California Retailers of food and groceries with frequent statements of minimum prices

at which particular items of the trade should be sold (p. 975).

\* \* \* \*

“The Bureau also was actively engaged in investigating the prices of retailers, both members and others, and in putting pressure on them not to sell below the cost of [or] price lists which it circulated. In this, appellants claim, they were doing no more than the policing of the California Act.

“There is abundant evidence that for a period from 1935 to 1941, the corporation [the Bureau] and its president and two executive secretaries conspired to compel the Bureau members and others to sell food and groceries at not less than minimum prices circulated by the Bureau regardless of whether such sales were with the intent to injure a competitor or divert trade from him” (p. 975).

Needless to say, the activities of the Utah Retail Grocers Association precisely follow those of the California grocers' association, as outlined above, and for the same reasons constituted price fixing. The closeness of the parallel is accentuated by the fact that one of the avowed purposes of the California association was “to bring to an end the disastrous price war now raging here.” In other words, it offered the same excuse for its price fixing activities.

Notwithstanding his protestation that his Association did not attempt to fix any prices in any way and



that it had no enforcement ability at all (R. 73), it was apparent that the witness Boyle, President of the Ogden Retail Grocers Association, considered that it was part of his duty as President of the Association, to "keep the grocers in line on violations" (R. 82), and, particularly to police the price of 6% items (R. 90-91); and there was not one word of testimony to indicate that the question of intent was ever considered. The only difference between the present case and the *Food and Grocery Bureau* case seems to be that, in the present case the Association conducted its price fixing activities with the active cooperation of our Trade Commission.

In practice, it appeared that the Association policed prices on a cooperative basis and only went to the Trade Commission when a merchant, like Mr. Bush, refused to take his orders from the Association. In such a case, as the present litigation illustrates, the Commission would then issue a cease and desist order and, upon non-compliance, institute an enforcement proceeding. At that point, the Association would actively intervene and its counsel would, to all intents, conduct the prosecution.

If there was any difference in substance between the activities of the Food and Grocery Bureau of Southern California and the activities of the Utah Retail Grocers Association, we fail to perceive it.

The only question left unanswered by the *Food and Grocery Bureau* case was whether price fixing in interstate commerce could be sanctioned under state law. The

United States Circuit Court, in the *Food and Grocery* case, avoided that question by pointing out that the California Unfair Practices Act was not a price fixing act and, therefore, no one could claim that it was intended to sanction such a thing. 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 *Schwegmann 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*; and then commented that,

“The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme absent approval by Congress.”

Accordingly, we respectfully submit that injunctive relief should have been denied in the case at bar because the plaintiffs, being in violation of the Sherman Act, came to court with unclean hands. The Unfair Practices Act not only did not and could not authorize price fixing, but was never intended to do so.

## CONCLUSION

Defendant made no sales below “cost”, as defined by the Act.

Defendant's allowance of cash discounts, through the use of cash discount stamps, did not have the effect of reducing prices.

Defendant made no sales "for the purpose of injuring competitors and destroying competition."

If the Act is construed to prohibit the issuance of cash discount stamps with 6% merchandise, it is unconstitutional; and so it is, in any event, because it violates the due process and equal protection clauses of our State and Federal constitutions.

Plaintiffs in intervention come to Court with unclean hands.

April 5, 1952.

Respectfully submitted,

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