

1953

Trade Commission of Utah, Utah Retail Grocers Association and George Ingalls v. James L. Bush : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; H. R. Waldo, Jr.; Sherman P. Lloyd; Quention L. R. Alston; Richard J. Maughan;

Recommended Citation

Petition for Rehearing, *Trade Comm. Of Utah v. Bush*, No. 7783 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1671

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED
SEP 28 1953

LAW LIBRARY
U. of U.

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

TRADE COMMISSION OF UTAH,

Plaintiff and Respondent,

**UTAH RETAIL GROCERS ASSO-
CIATION and GEORGE INGALLS,
d/b/a George's Market,**

*Plaintiffs in Intervention
and Respondents,*

Case No. 7783

vs.

**JAMES L. BUSH, d/b/a Bush Super
Market,**

Defendant and Appellant.

**PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF**

E. R. CALLISTER,

Attorney General

H. R. WALDO, JR.

Assistant Attorney General

*Attorneys for Plaintiff
and Respondent.*

SHERMAN P. LLOYD,

QUENTIN L. R. ALSTON,

RICHARD J. MAUGHAN,

*Attorneys for Intervenor
and Respondents.*

FILED
AUG 25 1953

Clerk, Supreme

INDEX

	Page
PETITION FOR REHEARING	1
BRIEF IN SUPPORT OF REHEARING	2
STATEMENT OF FACTS	2
STATEMENT OF POINTS	3
POINT I. CASH DISCOUNTS ON SALES MARKED UP NO MORE THAN THE STATUTORY SIX PER CENT DO REDUCE THE SALE PRICE BELOW COST.	3
POINT II. THE COURT ERRONEOUSLY ASSUMED THAT THE BELOW COST PROVISIONS OF THE STATUTE DO NOT APPLY TO EACH ITEM SOLD.	13
POINT III. THE COURT ERRONEOUSLY ASSUMED THAT IN THIS PROCEEDING FOR AN INJUNC- TION, A CIVIL NOT A CRIMINAL REMEDY, PROOF BEYOND A REASONABLE DOUBT WAS REQUIRED.	17
POINT IV. THE COURT ERRONEOUSLY DETER- MINED THAT AN INTENT TO INJURE COMPETI- TION WAS NOT PROVED.	21
POINT V. THE COURT IGNORED AN ALTERNATIVE METHOD OF PROOF OF THE VIOLATION, PROOF THAT THE EFFECT WAS TO INJURE COMPETI- TION.	30
POINT VI. THE PURPOSES OF THE UNFAIR PRAC- TICES ACT ARE TO PROHIBIT UNFAIR AND DIS- CRIMINATORY PRACTICES BY WHICH FAIR AND HONEST COMPETITION IS DESTROYED OR PRE- VENTED AS WELL AS TO SAFEGUARD THE PUBLIC AGAINST THE CREATION OF PERPETU- ATION OF MONOPOLIES.	32
CONCLUSION	34

AUTHORITIES CITED

20 Am. Jur., Evidence, Sec. 232	24
50 Am. Jur., Statutes, Sec. 297	11
50 Am. Jur., Statutes, Sec. 423	18
Callman, Unfair Competition & Trade Marks, 2d Ed., Vol. 4, 389.2(b)	24, 25
2 C. C. H. Trade Reg. Reporter, No. 8328.30	15

	Page
2 C. C. H. Trade Reg. Reporter, No. 8428.30	15
2 C. C. H. Trade Reg. Reporter, No. 8648.11	15
26 C.J.S. 1333	9
Finney, Principles of Accounting, Vol. 1, p. 38	7-8
Hatfield, Accounting, p. 368-9	8
Opinions of Attorney General of Minnesota	15
William Morse Cole, Accounts, Their Construction & Interpretation, Revised and Enlarged Edition, p. 340.....	8

CASES CITED

Anderson v. Cleburne Building & Loan Association, 16 S.W. 298 (Tex.)	9
Balzer v. Caler, 11 Cal. 2d 724, 82 P. 2d 19	28
Board of Railroad Comm'rs. v. Sawyers' Stores, 114 Mont. 562, 138 P. 2d 964	29
Bristol-Meyers Co. v. Picker, et al, 302 N.Y. 61, 96 N.E. 2d 177	10
Building Association v. Seemiller, 35 Pa. 225	9
Carroll v. Drury, 170 Ill. 571, 49 N.E. 311.....	9
Dikeou et al v. Food Distributors' Ass'n. 107 Colo. 38, 108 P. 2d 529	28
Dodge Bros. v. U. S., CCA Md. 118 F. 2d 95	10
Ellis v. Dallas, 113 Cal. App. 2d 234, 248 P. 2d 63.....	28
Fainblatt v. Leo Sportswear Co. (1942) 178 Misc. 760, 36 N.Y.S. 2d 695	19
First National Bank v. Sherburne, 14 Ill. App. 566	9
Helmet Co. v. Wm. Wrigley, Jr. Co., 245 Fed. 831	29
Hi-Land Dairyman's Association v. Cloverleaf Dairy, 107 Utah 68, 151 P. 2d 710	29
Industrial Savings & Loan Company of Charleston v. Schultz, W. Va., 185 S.E. 3	10
In Re Julius Restaurant, Inc. v. Lombardi, 282 N.Y. 126, 25 N.E. 2d 874	20
May's Drug Stores v. State Tax Comm., 242 Iowa 319, 45 N.W. 2d 245	31
McElhone v. Geror, 207 Minn. 580, 292 N.W. 414.....	31
McIntire v. Borofsky, 95 N.H. 174, 59 A. 2d 47.....	31
Miller's Groceteria Co. v. Food Distributors Ass'n., 107 Colo. 113, 109 P. 2d 637	29

	Page
Napier v. John V. Farwell Co., 60 Colo. 319, 153 P. 694.....	9
National Bank v. Johnson, 104 U. S. 271, 26 L. Ed. 742	9
Neillsville Bank v. Tuthill, 30 N.W. 154, 4 Dak. 295.....	9
Overstreet v. Hancock, 177 S.W. 217 (Tex.)	9
People v. Gordon, 105 Cal. App. 2d 711, 234 P. 2d 287	28
People v. Payless Drugs, 143 P. 2d 762	27
People v. Payless Drugs, On Appeal, 25 Cal. 2d 108, 153 P. 2d 9 at 12	27
Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P. 2d 343.....	28
Rust v. Griggs, 172 Tenn. 565, 113 S.W. 2d 733.....	31
Salmon Falls Bank v. Leyser, 22 S.W. 504, 116 Mo. 51	9
Sandler v. Gordon, 94 Cal. App. 254, 210 P. 2d 314.....	28
State ex rel Anderson v. Commercial Candy Co., 166 Kan. 432, 201 P. 2d 1034	29
State ex rel Malone v. Fleming Co., 164 Kan. 723, 192 P. 2d 207	20, 29
State v. Langley, 53 Wyo. 332, 84 P. 2d 767 at 774.....	23
State v. Tankar Gas, 250 Wisc. 218, 26 N.W. 2d 647.....	15
State v. Twentieth Century Market, 236 Wisc. 215, 294 N.W. 875	29
Youngblood v. Birmingham Trust & Savings Co., 95 Ala. 521, 12 So. 579	9

STATUTES

Utah Code Annotated, 1953

Sec. 13-5-7	17, 30, 33
Sec. 13-5-9	14, 16
Sec. 13-5-12	21
Sec. 13-5-14	18
Sec. 13-5-17	32
Wisconsin Unfair Sales Act, Sec. 100-30, Laws of Wisc.....	34

IN THE SUPREME COURT
of the
STATE OF UTAH

TRADE COMMISSION OF UTAH,
Plaintiff and Respondent,

UTAH RETAIL GROCERS ASSO-
CIATION and GEORGE INGALLS,
d/b/a George's Market,

*Plaintiffs in Intervention
and Respondents,*

vs.

JAMES L. BUSH, d/b/a Bush Super
Market,

Defendant and Appellant.

Case no.
7783

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

TO THE HONORABLE MEMBERS OF THE
SUPREME COURT OF UTAH:

Come now the plaintiffs who are respondents in the above entitled cause and petition the Court to grant a rehearing of this matter for the following reasons, more particularly elaborated in the accompanying brief:

1. The Court erred by deciding in effect that the issuance by the defendant of S & H Green Stamps, representing a two per cent cash discount, in connection with the sale of items marked up six per cent did not violate

the “sales-below-cost” provisions of the Unfair Practices Act.

2. The Court erred by deciding in effect that the markup on goods required by the Unfair Practices Act is not separately computed for each item sold.

3. The Court erred by treating this case, a civil proceeding for injunctive relief, as a criminal case, thus imposing a greater burden of proof on plaintiffs than is required by law.

4. The Court erred by holding that an intent by the defendant to injure competition was not proved when uncontradicted evidence in the record showed that such an intent was proved.

5. The Court erred by ignoring an alternative method of proof allowed by the Unfair Practices Act, proof that the *effect* of defendant’s actions was to injure competition.

6. The Court erred by holding that the only purpose of the Unfair Practices Act is to curb monopolies whereas the plain language and intent of the Act shows that it is also designed to promote fair methods of competition.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

The facts are as stated in the briefs of both parties submitted for the original hearing of this case.

STATEMENT OF POINTS

POINT I

CASH DISCOUNTS ON SALES MARKED UP NO MORE THAN THE STATUTORY SIX PER CENT DO REDUCE THE SALE PRICE BELOW COST.

POINT II

THE COURT ERRONEOUSLY ASSUMED THAT THE BELOW COST PROVISIONS OF THE STATUTE DO NOT APPLY TO EACH ITEM SOLD.

POINT III

THE COURT ERRONEOUSLY ASSUMED THAT IN THIS PROCEEDING FOR AN INJUNCTION, A CIVIL NOT A CRIMINAL REMEDY, PROOF BEYOND A REASONABLE DOUBT WAS REQUIRED.

POINT IV

THE COURT ERRONEOUSLY DETERMINED THAT AN INTENT TO INJURE COMPETITION WAS NOT PROVED.

POINT V

THE COURT IGNORED AN ALTERNATIVE METHOD OF PROOF OF THE VIOLATION, PROOF THAT THE EFFECT WAS TO INJURE COMPETITION.

POINT VI

THE PURPOSES OF THE UNFAIR PRACTICES ACT ARE TO PROHIBIT UNFAIR AND DISCRIMINATORY PRACTICES BY WHICH FAIR AND HONEST COMPETITION IS DESTROYED OR PREVENTED AS WELL AS TO SAFEGUARD THE PUBLIC AGAINST THE CREATION OR PERPETRATION OF MONOPOLIES.

ARGUMENT

POINT I

CASH DISCOUNTS ON SALES MARKED UP NO MORE THAN THE STATUTORY SIX PER CENT DO REDUCE THE SALE PRICE BELOW COST.

With deference to the Court's opinion it is respectfully submitted that in prohibiting "sales below cost" the Legislature did not intend, as the Court implies, that such prohibited sales were to be determined solely by "which of two technical and debatable accounting philosophies maintains."

In the Unfair Practices Act with which we are dealing here the Legislature was not speculating with "debatable accounting philosophies" in prescribing what was or what was not a "sale below cost." It prohibited all sales "below cost" with the requisite intent or effect and did not exempt from its prohibitory language sales below the arbitrary six per cent markup as long as the amount below the arbitrary markup was no more than "usual and customary" whether by way of "cash discount" or otherwise. In plain unequivocal language the Legislature said that "in the absence of proof of a lesser cost" the markup on a sale "shall be six per cent." When the arbitrary markup rather than the actual cost of doing business is used in establishing selling price the markup must be six per cent and not something less than six per cent. The Legislature did not say, nor can it reasonably be inferred from anything it did say, that if it is usual and customary to grant "cash discounts" the markup on a sale need be only six per cent less whatever "cash discounts" are usual and customary. The merchant is given the option of marking up his merchandise on one of two basis, viz: the 6% statutory markup—or his actual cost of doing business but he may not use the arbitrary markup and then make a "deduction" from

that markup however small or large and regardless of whether the deduction is or is not "usual and customary."

When this Court says that, "Unassailed, also, is expert accounting testimony showing that a cash discount customarily is considered as a non-operating business expense, like advertising, accounting and similar expense, includable in the cost of doing business, and also that the amount represented by the stamps, roughly 2% is about the going rate of cash discounts.", does it mean to imply that for any or even all of those reasons "cash discounts" do not reduce the selling price? There is certainly no expert accounting testimony to support that proposition. In discussing the handling by the defendant in his books of account of S & H Green Trading Stamps, Mr. Kelly told how they were and how they should properly be handled from an accounting standpoint. Nowhere did he say that they did or did not reduce the selling price. The only inference which can be drawn from his testimony however, is that they do reduce the selling price because he stated that under ordinary circumstances "cash discounts" were considered as sales losses. His testimony at page 189 of the record is as follows:

- "Q. You may state whether or not they are charged as an expense or how they are charged in the record of the retail trade?
- A. There is different methods of handling cash discounts. I would say the general accepted practice is to handle cash discounts as a finance and management expense.
- Q. Would you say that is the way in Utah?

- A. Under ordinary circumstances, cash discounts might be considered as a sales loss.
- Q. Would you say that is the prevailing practice in the State of Utah?
- A. Well, I would say its generally accepted as accounting practices and as far as my experience is concerned, I would say its the prevailing practice, those that I've seen. I might add that the accounting authorities would support that theory, although there are some differences in accounting authorities on it."

Mr. Kelly also testified that regardless of how "cash discounts" were handled from an accounting standpoint it would make no difference on the net profit. Likewise he testified that this defendant handled "cash discounts" as an "operating expense" rather than as a "non-operating business expense" which the Court states was the custom. His testimony to that effect is found on page 204 of the record as follows:

"Q. Would you say that in essence that charge is treated as an operating expense?

MR. RAMPTON: I object to that as a leading question.

THE COURT: I'll hear the answer.

- A. Certainly it's treated in his books as an advertising expense from what the witness said here on the stand, which is an operating expense.
- Q. And is that in essence a proper way to treat it from the standpoint of sound accounting?
- A. Well, I would say that that would probably be an acceptable method from the under-

standing that the particular merchant has as to what it is under his circumstances. I might treat it a little differently from that. As I said this morning, I think it was more probably in the nature of advertising or service cost. As far as the effect on the operating statement is concerned and the net profit it wouldn't make a particle of difference. It would be exactly the same."

Mr. Kelly went on further to point out precisely the difference between advertising and insurance expenses and the expenses incurred by the giving of "cash discounts" by stating that in the one case the customer receives a direct benefit and in the other he does not. His testimony along that line is found at pages 210 and 211 of the record as follows:

"Q. Well, does the insurance of the merchant, regardless of what the amount is, in connection with the price that the customer has to pay, does that ever result in any benefit to the customer?

A. It never gets any payment to the customers. The customer never receives anything from it that is tangible.

Q. And he definitely receives a right to benefit when he receives a green stamp.

A. That's right, he does. Quite a case, Judge."

As Mr. Kelly pointed out accounting authorities do recognize different methods of handling "cash discounts" in the books of account and that they do represent a "price reduction." In Finney, Principles of Accounting, Vol. 1, page 38 is found the following:

“Three different opinions are held with respect to the proper classification of cash discounts on purchases and sales:

- (1) *Cash discounts are a deduction from the price; therefore, discounts on sales should be deducted from sales, and discounts on purchases should be deducted from purchases.*
- (2) Discounts are financial items like interest, and should be similarly treated.
- (3) If discounts are less than 2% they should be treated as financial items; if more than 2%, they should be treated as deductions from purchases and sales, because a rate of discount greater than 2% is so large as to be disproportionate to interest.”

See also Hatfield, *Accounting*, pages 368-9; William Morse Cole, *Accounts, Their Construction and Interpretation*, Revised and Enlarged Edition, page 340.

The different methods of handling “cash discounts” from an accounting standpoint are merely for the convenience of the particular merchant. The Unfair Practices Act is not concerned with that. It says merely that when the merchant employs the statutory six per cent markup as the markup on his merchandise, there must not be a deduction from that markup, large or small, customary or not and whether by way of cash discount or otherwise.

While accounting authorities differ as to the proper method of handling “cash discounts” in the preparation

of various financial statements, there is no authority which questions that a "discount" does not in fact effect a "reduction." In 26 C.J.S. 1333 the term "discount" is defined as follows:

"In a general sense, the term may be understood as a counting off, something taken off or deducted, a reduction. More specifically, in mercantile transactions, an allowance on an account, debt, demand, price asked, and the like, an allowance or deduction generally of so much per cent made for prepayment or for prompt payment of a bill or account."

When a "cash discount" is offered on a sale, its effect on the sale price, as distinguished from how it may or may not be shown in the accounting records, is to reduce the sales price—the customer actually paying less and the merchant actually receiving less on the sale. To the effect that a "discount" is an "abatement," a "deduction," a "reduction," or the "difference" between the face amount and the lower cash sales price see the following: *Napier v. John V. Farwell Co.*, 60 Colo. 319, 153 P. 694; *First Nat. Bank v. Sherburne*, 14 Ill. App. 566; *Overstreet v. Hancock*, 177 S. W. 217 (Tex); *Carroll v. Drury*, 170 Ill. 571, 49 N. E. 311; *Salmon Falls Bank v. Leyser*, 22 S. W. 504, 116 Mo. 51; *Anderson v. Cleburne Building & Loan Ass'n*, 16 S. W. 298 (Tex); *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742; *Youngblood v. Birmingham Trust & Savings Co.*, 95 Ala. 521, 12 So. 579 20 L. R. A. 58, 36 Am. St. Rep. 245; *Neillsville Bank v. Tuthill*, 30 N. W. 154, 4 Dak. 295; *Building Ass'n v. Seegmiller*, 35 Pa. 225; *Industrial Savings & Loan Co. of*

Charleston v. Schultz, W. V. A., 185 S. E. 3; and, *Dodge Bros. v. United States*, C. C. A. Md., 118 F. 2d 95.

Also we again respectfully cite the Court's attention to the language of the court in *Bristol-Meyers Co. v. Picker, et al*, 302 N. Y. 61, 96 N. E. 2d 177, as follows:

“Assuming that there is no essential difference between the use of trading stamps and cash register receipts which are redeemable, and that either may be regarded as a form of cash discount, I nevertheless cannot agree with the opinion in the cases cited that such a discount does not cut the sales price of an article. No matter how one puts it, the consumer who is accorded a cash discount in reality pays that much less for the article which he purchases, and this is none the less true because the return is by way of merchandise rather than coin which may purchase merchandise. When defendants sold plaintiff's products at fair trade prices, and as a part of the same transaction gave their customers cash register receipts having a redemption value of 2½% of such fair trade prices, they, in effect, sold plaintiff's products at 2½% less than the prices fixed. I can see no distinction between returning to the customer a credit memorandum of 2½% and giving him a cash register receipt. And whether the discount is small or large makes no difference—the statute forbids both.”

The conclusion of the court that because a two per cent “cash discount” is recognized by industry as usual and customary, a reduction in the price of the article does not therefore result, is unsound and without foundation. Here we are not dealing with “industry” generally. The defendant in this case was an admitted “cash and

carry" retail grocer. The record is void of any evidence that it was usual and customary for any retail grocers, whether "cash and carry" or "credit and delivery" to grant cash discounts. The only evidence concerning "cash discounts" was that the defendant granted "cash discounts" by means of S & H Green Trading Stamps and testimony that "generally," "cash discounts" do not exceed two per cent. Neither Mr. Kelly nor anyone else testified that it was "usual and customary" for retail grocery merchants to grant cash discounts and it cannot reasonably be inferred from any evidence in the record that there was such a custom. It is to be noted in this connection that the Unfair Practices Act was enacted in 1937 and at least as far as the record in this case reveals, neither the defendant nor any other retail grocery merchant granted "cash discounts" until shortly before the Trade Commission attempted to enjoin the defendant herein from making sales below cost. Assuredly the Court does not wish to imply or infer that a custom coming into being after the enactment of a statute, even assuming *auguendo* that the defendant herein did initiate a custom in the retail grocery business of granting "cash discounts," amends or modifies an existing statute !!! It is a generally accepted rule that a usage or custom in conflict with an existing statutory provision is void. Moreover, no custom, however long and generally followed, can nullify the plain meaning and purpose of a statute. 50 Am. Jur., Statutes, Sec. 297.

Purportedly in justification of the assertion that a two percent "cash discount" does not amount to a reduc-

tion of the sales price the court states that there is support for the proposition that a \$1.00 price is constant "whether the cash and carry merchant returns 2¢ as a discount" or "whether the credit merchant, for extended credit, finally may receive \$1.02 for the item." We seriously doubt whether the cited authorities do in fact support such a proposition but in any event there is no evidence in this record, by inference or otherwise, to back up that statement. The evidence is that on such sales no merchant received any premium payment whether \$1.02 or something else and on the contrary the uncontradicted evidence shows that on such sales the defendant granted "cash discounts" of approximately two per cent thus in effect receiving only \$0.98.

The statements in both the majority opinion and the separate concurring opinion that a two per cent discount does not amount to a reduction in the price of the article but that a discount substantially in excess of two per cent may, because two per cent is the customary discount for cash, is unsound. In the first place, as pointed out above, there is no evidence of any "usual and customary" "cash discounts" in the retail grocery business. Furthermore a "cash discount" reducing the arbitrary markup prescribed by the statute by any amount however large or small would be in direct conflict with the plain meaning and purpose of the statute. The Court apparently assumes however that such a practice would be all right because, as the Court says, in addition to being "usual and customary" his stamp cost is "an element of the cost of doing business intended

by the Legislature to be one of the costs of doing business included in the 6% markup." Conceding as we do that "cash discounts" are one of the costs of doing business, does the Court mean that when such discounts are two per cent they are one of the costs of doing business but when more than two per cent they are not one of the costs of doing business?

POINT II

THE COURT ERRONEOUSLY ASSUMED THAT THE BELOW COST PROVISIONS OF THE STATUTE DO NOT APPLY TO EACH ITEM SOLD.

The record shows, and the Court notes in its opinion, that:

"About 25% of the items are so-called 6% items,—staples ordinarily sold by merchants at cost as defined in the Act, * * *."

The Court further states in its opinion:

"Only one out of 1000 sales possibly could be construed as a violation of the Act, * * *."

And again, the Court states:

"Incredible it seems that one would intend to violate a criminal statute by inducing,—or, if you please, 'luring to improvidence,'—a single housewife out of about 1000, with bait of 8.3¢ in cash or 10.4¢ in merchandise on an average \$5.00 purchase, occurring but once in a \$5,000 sales volume.
* * *"

It is clear from this that the Court is of the opinion that a sale below cost occurs only when a single item is sold at less than six percent or only when the average markup of a number of items sold together is less than six per cent. This is an erroneous interpretation of the Act.

In the first place, there is no evidence that only one in a thousand sales would be affected. The defendant Bush made such a statement but on cross-examination admitted that this was not a fact but merely an exaggeration, a loose figure of speech, an arbitrary figure not based on his personal knowledge, and was designed only to indicate that very few customers bought six per cent items exclusively in a single purchase (R. 221-222).

The Court's assumption is based on an interpretation of Section 13-5-9 which provides:

“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.”

By its terms, this section is designed specifically to prevent, not allow, evasions of the Act. The intent seems clear. It is intended to prevent evasions through so-called “combination sales,” “one-cent sales,” bonus sales, etc. It is common to sell two items for a single price or two items for a single price plus one cent, for example: two tubes of toothpaste sold as a unit for a single price or two tubes sold for the price of one plus one cent. Thus, in interpreting a similar provision in the Minnesota act, the Minnesota Attorney General has declared:

“To give away a tumbler with each bottle of gingerale purchased is not prohibited unless

the price paid is below the cost of both the gingerale and the tumbler." (Opinions, Attorney General of Minnesota, May 26, 1937, 2 C.C.H. Trade Reg. Reporter No. 8428.30).

Under the Louisiana act, the Attorney General of Louisiana states:

"A gift item of merchandise may be given away in connection with the sale of another item, but the cost of the item sold must be determined by adding together the cost of both items." (2 C.C.H. Trade Reg. Reporter No. 8328.30).

The Attorney General of North Dakota has stated:

"The act does not prohibit the sale of several articles as a unit or a combined price where the articles are sold as an indivisible unit and the sale price of the unit exceeds or is equal to the combined cost." (2 C.C.H. Trade Reg. Reporter No. 8648.11).

In *State v. Tankar Gas*, 250 Wisc. 218, 26 N.W. 2d 647, the Wisconsin Supreme Court in construing a provision similar to Sec. 13-5-9 stated:

"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 purpose of unfairly attracting business. The typical loss-leader involved the sale of a single item at less than cost in order to attract patronage to the place of business of the advertiser. A possibility of evasion existed in the case of the sale of various items for a combined price or the offering of gifts in connection with the sale of other things. A suitable prohibition would dispose of these transactions but the legislature did not do this. It took care of the situation by

providing (1) that each item involved must be deemed offered for sale; (2) that each item must be considered separately in relation to the cost and price provisions and (3) that the total price for the sale at a combined price or the sale with a gift added must measure up to the aggregate cost of the goods. If on this basis the transaction falls below the standards bearing on the relation between cost and price there is a violation. If not, there is none."

We submit that Sec. 13-5-9, although not worded as precisely as the Wisconsin statute, is designed to accomplish exactly the same result, that is, requiring the cost of each item to be separately computed whether offered for a combination price, as a bonus for purchase of a certain item or for an additional one-cent (1¢) or some other nominal amount on condition that another item is purchased at the same time.

In making the sale of a bag full of groceries, the grocer does not take, for example, the fifteen articles purchased and compute the cost of the total. It is common and accepted knowledge that each article carries its own markup, each of which is computed at the check-out counter in arriving at the total purchase price. Bush himself testified that he followed such a practice (R. 153). In other words, with the exception of combination sales and similar devices covered by Section 13-5-9, U.C.A. 1953, the below cost provision of the statute is computed as to each item sold independently of other items which may be sold at the same time to the same purchaser. No other conclusion is possible in view of the terms of

Section 13-5-7 which states in part :

“It shall be unlawful for any person engaged in business within the State of Utah to sell, offer for sale, or advertise for sale, *any* article, product or commodity at less than the cost thereof to such vendor, * * *.”

We respectfully submit that unless the below cost provisions of the Unfair Practices Act are construed to apply to each item sold, the Act could be so easily evaded that it would become a nullity; and therefore we petition the Court for a modification and clarification of their present opinion in respect to this question.

POINT III

THE COURT ERRONEOUSLY ASSUMED THAT IN THIS PROCEEDING FOR AN INJUNCTION, A CIVIL NOT A CRIMINAL REMEDY, PROOF BEYOND A REASONABLE DOUBT WAS REQUIRED.

This case was decided upon the ground, as stated by this Court, “that no *prima facie* case was established showing that Bush intended to violate the Act—certainly not beyond a reasonable doubt.” The Court refers again to *criminal intent* as follows :

“Nor can a criminal intent be proved by adding to such loss the Commission’s suggestion that people normally do not admit violations of law.”

And further when it said :

“Incredible it seems that one would intend to violate a *criminal* statute by * * *” (Emphasis added).

This prompts petitioner to call the Court’s attention

to the fact that the statute in question is not in its entirety, a penal statute which would require the application of the criminal rule of evidence, viz., that the intent with which the violation of the act was accomplished must be shown by evidence which will convince the trier of the facts *beyond a reasonable doubt* that Bush had for his purpose the injuring of competitors and the destruction of competition. The statute is both penal *and* remedial in nature. Please note the provisions of 13-5-14 U.C.A., 1953, wherein injunctive relief and damages are made available to any *person* and the State of Utah and wherein any plaintiff may subpoena the books and records of any defendant, but that the information acquired from production in court of such books and records *may not* "be used against the defendant as a basis for a misdemeanor prosecution under the provisions of this act." We think it clear, from the remedial provisions of this Act, and from the mischief intended by the Legislature to be remedied, that the only time the criminal rule of evidence can be applied is when procedurally, resort is had to the penal provisions of the statute. The Unfair Practices Act unquestionably falls within that category dealt with in 50 Am. Jur., Statutes, Sec. 423, as follows:

"Some statutes are declared to be remedial as well as penal, and therefore to be entitled to a liberal construction to suppress the mischief and effect the object of the statute. On the other hand, it has been declared that penal provisions must be construed as such, although the general purpose or aim of the statute may be remedial. Simi-

larly, it has been asserted that a statute which is penal, as well as remedial in its nature, must be construed with at least a reasonable degree of strictness with respect to including anything beyond the immediate scope and object of the statute, even though within its spirit, so that nothing may be added to the act by inference or intent. Another rule which has received some support is that where a statute contains remedial and penal features, as respects the former it is entitled to a liberal construction, but as to the latter it must be strictly construed."

From the foregoing citation and the provisions of the statute itself we think it plainly apparent that when civil procedures are instituted under the provisions of the Act by any person or the State of Utah, it must follow that the statute cannot be construed as penal and thus require adherence to the strict rules of the criminal law.

The Legislature could have made it mandatory that a petitioner for injunctive relief establish its burden of proof beyond a reasonable doubt, but it did not.

A complete answer to this question is to be found in the case of *Fainblatt v. Leo Sportswear Co.* (1942), 178 Misc. 760, 36 N.Y.S. 2nd 695. Therein the court was called upon in an action under a "fair trade" law, to decide the very question upon which your petitioner takes issue with this Honorable Court, viz., when applying for injunctive relief under a statute which also provides criminal prosecution for the same acts sought to be enjoined, must the petitioner for injunctive relief be held to establish criminal intent on the part of the de-

fendant and prove defendant's intentional violation of the statute beyond a reasonable doubt? The New York Court said "No" and in part had this to say:

"It is true that this is a penal statute but it is also a hybrid of civil and criminal remedies, yet capable of definite severance, the one from the other. Thus that part of it which relates to and grants civil remedy must be read separate and distinct from that part of it which is penal in character and viewed as a separate and independent enactment and construed and interpreted accordingly."

* * *

"In a formal civil action for injunctive relief the elements of criminal intent and reasonable doubt are irrelevant, immaterial and unnecessary and I am unable to see that these elements become relevant, by a summary proceeding incongruously allied with a penal law."

Accord: *In Re Julius Resturant, Inc. v. Lombardi*, 282 N.Y. 126, 25 N.E. 2d 874; *State ex rel Malone v. Fleming Co.*, 164 Kan. 723, 192 P. 2d 207.

Therefore, must we not conclude that the equitable remedies allowed by the statute should be secured under well established rules of evidence pertaining to such remedies? We think this conclusion inescapable, and in consequence, that petitioner establishes his burden of proof with evidence of merit and greater weight as in other cases of the same nature. It is submitted petitioner has so established his case.

We think the Court in error when it resolves the appeal of this case on the same ground it would had

defendant been charged with and convicted of a crime.

POINT IV

THE COURT ERRONEOUSLY DETERMINED THAT AN INTENT TO INJURE COMPETITION WAS NOT PROVED.

The statute declares that a sale below cost, made with the intent or the effect of injuring competition and not within one of the exemptions, is unlawful. It was stipulated that no exemption, except possibly subsection (d) of Section 13-5-12, U.C.A. 1953, was applicable (R. 58-59). No proof of subsection (d) was offered and, indeed, this exemption was expressly negated by evidence that the price situation was stable prior to the issuance of the green stamps by Bush (R. 62, 83, 97, 98).

We have discussed the issue of whether a sale below cost was made in Point I and will discuss the question of whether the effect of the issuance of green stamps injured competition in Point V. The present argument is limited solely to the question of intent to injure competition.

What does intent mean in this statute? As far as the mere act of selling goes, it is the same whether the sale is made above cost or below cost. It is only realistic to say that the intent in making both types of sales is also the same. Cutting the price of a twelve percent item by reducing the markup to six per cent, which is lawful, may be done with the same intent as cutting the price of a six per cent item by reducing the markup to three per cent, which is unlawful. In other words, malice is not necessary. It is unrealistic in fact and contrary to what

the Legislature must have known when the Act was passed to say that malice, i.e., ill-will or an evil design, is required. Any seller when cutting prices does not in fact differentiate in his mind between six per cent items and items above six per cent. His purpose is the same in both instances: to attract business by taking customers away from his competitors. Therefore, the only intent necessary is that the act of price cutting was knowingly done by the seller with knowledge of the ordinary consequences of such actions on his competitors.

The distinction which should not be overlooked is that the Legislature, in the proper exercise of its police powers, declared that one of these methods of attracting business, selling below cost, is unfair competition and unlawful. The Legislature recognized that cutting prices is a legitimate and ordinary business practice, a normal method of competition basic to our free enterprise system; but they also recognized one evil of unrestrained competition, cutting prices below cost, must be prohibited or the competitive system itself could be destroyed.

We have used the statement "intent to attract business" instead of "intent to injure competition." The Court places great reliance on this terminology in its opinion. The latter phrase has an unsavory connotation in that it seems unjust to accuse a seller of intending to injure competition when he is conducting what is apparently a normal and legitimate business practice of cutting prices to attract customers. Yet in the instant fact situation the terms are synonymous. They obviously mean different things where the price cutter does not in

fact have any competitors. But where a competitive situation exists, as is apparent from the facts here, it is ridiculous to say that intending to attract business without caring whether the customers come from a competitor (R. 52-53, 55, 223-227) and that some did come from his competitors to his knowledge (R. 55) is not the same as intending to injure competition. Where a competitive situation does exist, any method of attracting business such as improving the physical facilities of the store, conducting an accelerated advertising campaign, improving service, cutting prices and any number of other methods does in fact and in purpose injure competition. As stated in *State v. Langley*, 53 Wyo. 332, 84 P. 2d 767 at 774:

“A man * * * has the undoubted and inherent right, in order to make a living, to establish an ordinary business in a community. He will naturally and inevitably injure a competitor or competitors already there. The newcomer would not engage in his venture except with the thought that he would be able to get some of the business away from the others. He has in all such cases, in the very nature of things, the specific intent to injure the latter, and in most instances, if not all, to drive out competition as nearly as he is able to do so.”

Therefore, the fact that Bush stated his only intent was to attract business does not disprove the intent required by the Act. On the contrary, that statement, coupled with his statements that he intended to attract customers even if they came from his competitors, and that some customers did come from his competitors to

his knowledge, amounts to an admission that he did intend to injure competitors.

Furthermore the Court has ignored the well accepted rule of law, applicable to both civil and criminal cases, "that every sane man is presumed to intend the ordinary, natural, probable, or necessary consequences of his voluntary, intentional, and deliberate act." 20 Am. Jur., Evidence, sec. 232.

"Wrongful intent need not and ordinarily cannot, be established by direct evidence. 'In the nature of things this would be so, for persons about to engage in unlawful or questionable undertakings are not likely to proclaim their purposes on the housetops.' Such wrongful intent, however, may be inferred from the defendant's acts, sometimes even despite his 'sworn protestations.' Only the acts themselves evidence the defendant's intent, and the courts must be guided accordingly. * * * When a defendant is chargeable with knowledge of the inevitable consequence of his conduct, it is a proper inference that he intends them. For a person is ordinarily held to intend the consequences of his acts, when he understands his acts, and they are deliberate, especially'."

(Callman, Unfair Competition and Trade Marks, 2nd Ed. Vol. 4, 389.2(b))

Even if the denials of Bush as to his intent are given the full effect claimed for by appellants of negating the element of intent, his denials stand alone against the otherwise uncontradicted evidence that the issuance of stamps by Bush caused a decline in business and a ruinous price war to the injury of his competitors.

If the courts were to discount abundant and uncontradicted evidence of the deliberate acts of a defendant merely because the same defendant had testified he did not intend the consequences of his acts, intent could never be proved.

“Wrongful intent is an extremely narrow concept. It refers only to an unlawful act intentionally done with full knowledge of its unlawfulness. However, it should be recognized that a defendant, who knows all the facts but fails to appreciate the unlawfulness of his act, is still at fault, and his fault is tantamount to a wrongful intent. It is conceivable that a defendant may not understand the law, that he may be failing with respect to moral or ethical values, that he may lack the insight to appreciate the facts or the inevitable consequences of his act, or that he may be blinded by the intensity of the competitive struggle. He should, however, be answerable for his conduct notwithstanding. (Callman, *supra*, §389.2(a))

Bush admitted that by issuing stamps he wanted to attract business, to attract as many customers as possible whether they came from his competitors or not. (R. 52, 53, 223-227). Bush also testified as follows (R. 45):

“Q. Mr. Bush, is the contract that you have with Sperry and Hutchinson in the nature of an exclusive franchise, or could your competitors likewise get contracts for the issuance of Green Stamps?

A. You see, at the time I took on the stamps, the *one* thing I was *concerned* about in paying out this money I would have to pay out

for the stamps, that it certainly wouldn't be a good thing for me if every store were able to get the same thing, so I asked for exclusions in this, which they do give, and that is what I *insisted* on before I took the stamps on.

MR. RAMPTON: And what area do you have "exclusive"?

A. I have an area of fifteen blocks within each one of my stores, * * * " (Emphasis supplied)

Obviously, Bush had in mind his competitors and the actual effect on his competitors when he insisted on this monopoly provision in his contract.

The consequences of the issuance of the stamps by Bush are also clear. His competitors testified that their volume of business declined (R. 63-64, 76-77). Mr. Van Wagenen believed his decline would force him out of business (R. 77). Former customers of the competitors began trading with Bush (R. 76). Some customers of his competitors requested the competitors to install a stamp system of their own. (R. 78). The competitors attributed their decline in business to the issuance of the stamps by Bush (R. 64-65, 78). On the other hand, Bush had a substantial increase in his business after the stamps were issued (R. 55) and he attributed his increase to the stamps (R. 56). Also undisputed is testimony that a price war, one of the evils of the statute was designed to prevent, resulted from the issuance of the green stamps (R. 65-66, 72-74, 85-87, 97, 99).

The testimony of this cause and effect is unchal-

lenged. It is the testimony of grocers, men who speak from actual experience in the grocery business and not from abstractions. It is clear from this testimony that in the competitive retail grocery business, a discount from the price, even in cents or a fraction thereof, normally results and did result in a price war, trying to undersell the other fellow regardless of the actual or statutory cost of the item sold. Particularly is this so in the case of six per cent merchandise which Mr. Bush affirms on page 152 of the Record when he says he "stays" with the lowest priced advertised, "particularly on six per cent merchandise."

We believe the cases support our interpretation of the intent requirement. In *People v. Payless Drug*, 143 P.2d 762, quoted at length in respondent's first brief, it was held an intent to injure competition was proved by testimony of competitors that their business fell off as a result of defendant's price cutting, that a price war resulted, and, that the natural effect of selling below cost by one merchant was to lessen the business of his competitors. On appeal the Supreme Court of California, 25 Cal. 2d 108, 153 P.2d 9 at 12, affirmed relying on the statutory presumption of intent without mention of the specific evidence of intent. However, the court stated that by the presumption "The Legislature merely enacted into law *what is common in human experience*, that when a person causes injury by his act he should be deemed to intend such consequences unless he can excuse or explain his conduct by facts showing he had an innocent intent." (Emphasis added).

Similar evidence was held sufficient to support an injunction in *People v. Gordon*, 105 Cal. App. 2d 711, 234 P.2d 287. Contrary results were apparently reached in *Sandler v. Gordon*, 94 Cal. App. 2d 254, 210 P.2d 314, and *Ellis v. Dallas*, 113 Cal. App. 2d 234, 248 P. 2d 63. However in the former case the facts showed that apparently the alleged violator was in good faith attempting to meet the prices of his competitors and thus came within a statutory exemption and in the latter case the facts showed that when the price cutting took place there were no competitors to injure in the area of defendant's store and therefore could be no intent to injure competition. *Balzer v. Caler*, 11 Cal. 2d 724, 82 P.2d 19, also appears to reach a contrary result but it was dependent in part on the recognized judicial policy of supporting the trial court's decision on questions of fact and seems in conflict with the later case of *People v. Payless Drug*, supra.

In *Dikeou, et al. v. Food Distributors' Association*, 107 Colo. 38, 108 P.2d 529, intent was found from evidence of injury to competitors, advertising the specific reductions complained of to new customers, lack of cooperation in establishing cost surveys allowed under the Colorado act and other evidence not specifically enumerated in the Supreme Court opinion. The court stated, "It may be presumed in a civil action that the natural and probable consequences of the act were intended by the actor."

The later Colorado case of *Perkins v. King Soopers, Inc.*, 122 Colo. 263, 221 P.2d 343, does not change the

rules announced in the Dikeou case for in the Perkins case, unlike Dikeou and this case, no evidence was introduced to show the effect of the below cost sales. The plaintiff relied exclusively on the statutory presumption of intent and this was held to be insufficient in the Perkins case. *Board of Railroad Comm'rs v. Sawyers' Stores*, 114 Mont. 562, 138 P.2d 964, and *State v. Twentieth Century Market*, 236 Wisc. 215, 294 N.W. 875 are like the Perkins case and distinguishable from the present one in that no evidence was offered of the actual effect of the below cost sales of the defendant.

Also distinguishable are *State ex rel Anderson v. Commercial Candy Co.*, 166 Kan. 432, 201 P.2d 1034, where defendants proved they came within an exemption to the statute, *State ex rel Malone v. Fleming Co.*, 164 Kan. 723, 192 P.2d 207, where the complaint was held insufficient for indefiniteness, and *Miller's Groceries Co. v. Food Distributor's Association*, 107 Colo. 113, 109 P.2d 637, where a judgment on the pleadings was denied because the fact question of intent was in issue.

Finally, this Court has held that intent may be proved from the circumstances and consequences of actions of the defendant. In *Hi-Land Dairyman's Association v. Cloverleaf Dairy*, 107 Utah 68, 151 P.2d 710, this Court relied on a quotation from *Helmet Co. v. Wm. Wrigley, Jr. Co.*, 245 Fed. 831: "The defendant is therefore chargeable with knowledge of the inevitable consequences of such conduct, and so is open to the inference that it intends its products to be confused

with and mistaken for complainant's products." It is true that case involved a different aspect of unfair competition, trade-marks, but the same intent to injure a competitor was a necessary element of the claimed violation.

We respectfully submit that if we have not proved the requisite intent in this case, there is no case in which it can be proved, absent a stipulation by the defendant. In any case, the defendant can testify that his only intent was to attract business, and, under the present opinion of the Court, that alone would be enough to exempt him from the operation of the statute regardless of the actual circumstances of the case. We might say of this result: The construction was successful, the statute died. Therefore, we request the Court to reconsider their discussion of intent, to reverse the present opinion as being in error, but in any event, to modify the language used so that in the future the Act can be enforced.

POINT V

THE COURT IGNORED AN ALTERNATIVE METHOD OF PROOF OF THE VIOLATION, PROOF THAT THE EFFECT WAS TO INJURE COMPETITION.

Section 13-5-7, U.C.A. 1953, after spelling out the prohibited practice of selling below cost, continues:

“ * * * for the purpose of injuring competitors and destroying competition, or of misleading the public, *or when the effect* of selling, offering for sale, or advertising for sale such article, product or commodity at less than cost thereof to such vendor * * * may be substantially to

lessen competition or tend to create a monopoly in any line of commerce.”

Thus, the Act provides that a violation may be proved (1) by proof of intent to injure competition plus proof of a below cost sale, offer or advertisement for sale, and also (2) by proof of a below cost sale, offer or advertisement for sale plus proof that the effect of such practice was to lessen competition or tend to create a monopoly. In our discussion of Point IV, we have shown that the issuance of the green stamps by Bush (the below cost sale) had the effect of reducing the business of his competitors and causing an injurious price war.

The Minnesota Unfair Practices Act is very similar to the Utah Act and provides that a sale below cost is unlawful if done “for the purpose or with the effect of injuring competitors * * *.” The Supreme Court of Minnesota held in *McElhone v. Geror*, 207 Minn. 580, 292 NW 414:

“Sales below cost which have the effect of injuring competition are prohibited regardless of intent.”

The same result was reached in *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 NW 2d 245, *Rust v. Griggs*, 172 Tenn. 565, 113 SW 2d 733; and *McIntire v. Borofsky*, 95 N.H. 174, 59 A.2d 47.

We submit that from the record of this case both an intent to injure competition and that the effect of defendant's actions was substantially to lessen competition has been proved. Proof of either is sufficient

under the Act to constitute a violation. By completely ignoring this aspect of the case, the Court has committed error.

POINT VI

THE PURPOSES OF THE UNFAIR PRACTICES ACT ARE TO PROHIBIT UNFAIR AND DISCRIMINATORY PRACTICES BY WHICH FAIR AND HONEST COMPETITION IS DESTROYED OR PREVENTED AS WELL AS TO SAFEGUARD THE PUBLIC AGAINST THE CREATION OR PERPETRATION OF MONOPOLIES.

This Court has said in the instant case ‘the declared purpose of the Act [is] to safeguard the *public* against *monopolies* by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed.”

It is the contention of petitioner that this interpretation is an unjustified restriction upon the plain and unequivocal terms of the statute, which we herewith set forth:

“13-5-17. The legislature declared that the purpose of this act is to safeguard the public against the creation or perpetration 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.”

Plainly, the Legislature declared at least two distinct purposes to be accomplished by the statute. One is directed against the “creation or perpetration of monopolies” and the other “to foster and encourage competition, by prohibiting unfair and discriminatory practices

by which fair and honest competition is destroyed or prevented”.

Even the prohibitory language of the Unfair Practices Act does not restrict the purposes of the statute as this Court has done. Section 13-5-7, U.C.A. 1953 declares a sale below cost to be illegal when the purpose of such a sale is to (1) injure competitors and destroy competition; (2) mislead the public; or (3) when the effect of such a sale may be substantially to lessen competition; or (4) when the effect of such a sale may be to tend to create a monopoly. Furthermore the policy section quoted above provides that the Act ‘shall be liberally construed that its beneficial *purposes* may be subserved. Certainly it does not subserve the purposes of the statute to limit its application to the prevention of monopolies.

To compress the language setting forth the purposes of the Act into a single concept is to deny substance and meaning to those words specifically referring to the fostering and encouraging of competition by prohibiting unfair and discriminatory practices irrespective of the creation or perpetration of monopolies. Such a construction strips the statute of one of the powers the Legislature designed it to have, viz., the prevention of trade practices which are injurious to retail merchandising, therefore injurious to the economy, even though they may not be shown to create or perpetrate a monopoly. Statutes prohibiting sales below cost are not merely anti-monopoly acts as this Court infers but are manifold in their purposes. As set forth

in Wisconsin Unfair Sales Act, Sec. 100-30, Laws of Wisconsin, as amended:

“The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences including economic depression.”

CONCLUSION

Petitioners respectfully submit

- (1) that a two per cent cash discount given with an item marked up the statutory six per cent does reduce the price of the item below the minimum allowed by statute whether such a discount is customary or not and regardless of the manner in which it is treated for accounting purposes;
- (2) that the below-cost provisions of the Unfair Practices Act apply to each item sold and therefore the cost of each item must be computed separately;
- (3) that it is erroneous and not according to law to require the same burden of proof in this

case, a civil action for injunctive relief, as in a criminal case;

- (4) that the record conclusively shows the intent of the defendant to injure competition;
- (5) that the record conclusively shows that the effect of defendant's actions was to injure competition;
- (6) that the purpose of the Unfair Practices Act is to promote fair methods of competition by the prevention of unfair methods and is not limited to the prevention of practices tending to promote monopolies.

For the foregoing reasons, we petition the Court for a rehearing of this matter so that the record may be reconsidered and, upon further hearing, the errors herein specified may be corrected and the decree of the trial court affirmed.

Respectfully submitted,

E. R. CALLISTER
Attorney General

H. R. WALDO, JR.
Assistant Attorney General
Attorneys for Plaintiff
and Respondent.

SHERMAN P. LLOYD
QUENTIN L. R. ALSTON
RICHARD J. MAUGHAN
Attorneys for Intervenors
and Respondents.