1968

Trade Commission of Utah, State of Utah v. Skaggs Drug Centers, Inc., Grand Central Stores, Inc., D/B/A Warshaw's Giant Food and Grand Central Drugs, Inc. : Petition For Rehearing

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vs.

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IN THE SUPREME COURT OF THE STATE OF UTAH

TRADE COMMISSION OF UTAH, STATE OF UTAH
Plaintiff-Appellant,
vs.
SKAGGS DRUG CENTERS, INC., GRAND CENTRAL STORES, INC., d/b/a WARSHAW'S GIANT FOOD and GRAND CENTRAL DRUGS, INC.,
Defendants-Respondents,
AND UTAH RETAIL GROCERS' ASSOCIATION,
Intervenor-Appellant.

Case No. 11034

Petition for Rehearing

The defendant, Skaggs Drug Centers, Inc., (hereinafter called, "Skaggs"), petitioner in the above entitled case No. 11034, in which a decision was filed by this court on November 1, 1968, reversing a judgment of the District Court of Salt Lake County, Utah, hereby respectfully petitions the court for a rehearing, and in support thereof represents:

1. The Supreme Court failed to consider or rule upon the third defense of Skaggs to Count II of plain-

tiff's complaint and failed to consider the findings of fact and conclusions of law of the trial court with respect thereto which found that Skaggs had offered the goods in question for sale in an endeavor to meet the price of its competitor and which concluded Section 13-5-12(d) of the Utah Unfair Practices Act to be unconstitutionally vague and ambiguous and unenforceable if construed as requiring a retailer to determine at his peril whether a competitor's price is "legal."

2. The Supreme Court failed to consider or rule upon the Second Defense of Skaggs' to Count III of plaintiff's complaint and the findings of fact and conclusions of law of the trial court with respect thereto which concluded that the giving away of an item of merchandise in connection with a sale, is not prohibited by the Utah Unfair Practices Act.

3. The Supreme Court failed to consider the findings of fact and conclusions of law of the trial court with respect to Count IV of plaintiff's complaint which found that the sale in question was not made by Skaggs with the intent and purpose of unfairly diverting trade from a competitor or otherwise injuring a competitor but was made with the sole purpose of inducing the purchase of other merchandise by its own customers and which concluded that a sale made with such intent cannot be constitutionally prohibited by the legislature.

4. The Supreme Court failed to consider or rule upon the defense of Skaggs that the Utah Unfair Practices Act is unconstitutional because of its unjustifiable discrimination between parties similarly situated.

5. The Supreme Court apparently overlooked the testimony at the trial establishing the fact that it is impossible to prove the actual cost of selling an item of merchandise and establishing that credits and rebates cannot be applied to an item of merchandise at the time a retailer sets the price of that merchandise for sale.

6. The Supreme Court overlooked controlling principles of constitutional law in holding that the unfair practices act is not unconstitutionally vague and ambiguous.

7. The Supreme Court apparently misread the presumption of illegal intent which is created by Section 13-5-9 (2) of the Utah Unfair Practices Act and apparently overlooked the testimony at the trial and controlling principles of constitutional law concerning such presumption in connection with Count VI of plaintiff's complaint.

8. The Supreme Court apparently overlooked its own prior decisions in holding that the Utah Unfair Practices Act does not violate Article XII, Section 20 of the Utah Constitution.

Brief in Support of Petition

ARGUMENT

In addition to the constitutionality of the Utah Unfair Practices Act, the defendant Skaggs raised other defenses to certain of the counts in plaintiff's complaint. These defenses required the trial court to make interpretation of various sections of the Act and all of the interpretations of the Act by the trial court were before the Supreme Court on appeal. Among the questions raised were: (a) Whether a retailer in meeting prices of his competitor comes within the exemption set forth in 13-5-12(d) of the Act where his competitor's price is below cost as defined by the Act, and what the retailer must do in order to come within that exemption; (b) Whether the giving away of an item of merchandise in connection with a sale is prohibited by the Act; (c) Whether a sale below cost as defined by the Act which is made with the sole purpose of inducing the purchase of other merchandise can be constitutionally prohibited by the Act; (d) The interpretation of the presumption of illegal intent created by Section 13-5-9(2) of the Act. The answers to these questions were not given by the Supreme Court although they were before it on appeal. Obtaining the answers to these questions is important since, if the Act is held constitutional, these questions involving the interpretation of the Act determine whether or not Skaggs has other valid defenses to the counts set forth in plaintiff's complaint. The determination of these questions is probably even more important to the Utah Retail Industry as a whole, since without the an-

swers to these questions a retailer will not know what he may or may not do in the fuure to avoid violating the Act.

Obtaining the Supreme Court's answers to the foregoing questions is important of course, only if the court determines that the Act is constitutional. It is Skaggs opinion that the Act is unconstitutional and that the Supreme Court failed to consider constitutional questions raised on appeal and overlooked controlling principles of constitutional law and prior decisions of this court in holding the Act constitutional.

It is respectfully submitted that a rehearing should be granted so that the court can reexamine its holding that the Act is constitutional and so that if the court continues to hold the Act constitutional the vital questions involving the interpretation of the Act, which have not been passed upon by this court, can be resolved.

POINT I.

THE SUPREME COURT FAILED TO CONSIDER OR RULE UPON THE THIRD DEFENSE OF SKAGGS TO COUNT II OF PLAINTIFF'S COMPLAINT AND FAILED TO CONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT WITH RESPECT THERETO, WHICH FOUND THAT SKAGGS HAD OFFERED THE GOODS IN QUESTION FOR SALE IN AN ENDEAVOR TO MEET THE PRICE OF ITS COMPETITOR, AND WHICH CONCLUDED SECTION 13-5-12(d) OF THE UTAH UNFAIR PRACTICES ACT TO BE UNCONSTITUTIONALLY VAGUE, AMBIGUOUS AND UNENFORCEABLE IF CONSTRUED AS REQUIRING A RETAILER TO DETERMINE AT HIS PERIL WHETHER A COMPETITOR'S PRICE IS "LEGAL."

Count II of plainiff's complaint alleged that on June 23, 1966, Skaggs advertised and sold Style Hair Spray for 49¢, which was less than cost as defined by Section 13-5-7 of the Utah Unfair Practices Act. In answer to this count Skaggs alleged that on or about June 16, 1966, Shoppers Discount, a competitor of Skaggs, advertised and sold Aqua Net Hair Spray at 49¢ and that the advertisement by Skaggs of Style Hair Spray at 49¢ was made in an endeavor by Skaggs to meet the price of Shoppers Discount on Aqua Net Hair Spray and was accordingly exempt under the provision of Section 13-5-12(d) which provides:

> "13-5-12 Sales Exempt from Act. The Provisions of this Act shall not apply to any sale made: . . . .
>
> "(d) in an endeavor made in good faith to meet legal prices of a competitor as herein defined selling the same article, product or commodity in the same locality or trade area."

In connection with Count II of plaintiff's complaint, the trial ocurt found that on or about June 16, 1966, Shopper's Discount advertised and sold Aqua Net hair spray at 49¢ which was a sale below cost as defined by the Act. On June 23, 1966, Skaggs advertised Style hair spray at 49¢ which was a sale below cost as defined by the Act. Aqua Net hair spray and Style hair spray are comparable products with regard to weight, size, use, price and customer demand. Shopper's Discount and Skaggs are competitors in the same locality or trade area comprising Salt Lake City and Davis County. Skaggs' advertisement and sale of Style hair spray at 49¢ was made in an endeavor by Skaggs to meet the 49¢

price of Shopper's Discount on Aqua Net hair spray. Skaggs had no actual knowledge that the Shoppers' Discount price on Aqua Net hair spray was not a legal price under the provisions of Section 13-5-12 of the Act. Aqua Net hair spray is a product with wide wholesale price fluctuations which can be purchased by retailers, including Skaggs and Shopper's Discount in numerous ways and from many different suppliers. Skaggs had not made any inquiry of Shopper's Discount or of the suppliers of Aqua Net hair spray to determine the invoice cost of Aqua Net hair spray to Shopper's Discount. Shopper's Discount as a competitor of Skaggs would not voluntarily supply defendant's with information relative to its invoice cost, replacement cost or date of purchase of the item, and wide price fluctuation and numerous wholesale sources of supply and differing purchase methods made it infeasible and unrealistic for Skaggs to obtain reliable information of invoice costs, replacement costs, or date of purchase of Aqua Net hair spray by Shopper's Discount.

The trial court concluded that Skaggs was entitled to meet the price of Shopper's Discount and to assume that the advertised price of Shopper's Discount was a legal price in the absence of actual knowledge of an illegal sale by Shopper's Discount in violation of the act and that Section 13-5-12 (d) would be unconstitutional if construed as requiring a retailer to determine at his peril whether his competitor's price is "legal."

The Utah Supreme Court did not consider the defense of Skaggs to Count II of plaintiff's complaint or

the findings of fact and conclusions of law with respect to this defense, although the matter was presented to the Supreme Court on appeal.

It is respectfully submitted that the decision of the trial court on this point should be affirmed. As stated by the Pennsylvania Supreme Court in the case of *Commonwealth vs. Zasloff,* 338 Pa. 457, 13 At.2d 67 (1940), "How could a merchant know whether a selling price which he proposed to fix was legal because it met the "legal price of a competitor for merchandise of the same grade, quantity and quality? How could such a legal price of a competitor be ascertained without examining the competitor's books in order to determine whether his price was legal?" The Pennsylvania Supreme Court went on to hold the Pennsylvania Unfair Practices Act unconstitutional on the grounds it was so vague, indefinite and incapable of practical application as to make its enforcement a violation of due process.

A provision of the New Jersey Unfair Practices Act identical to Section 13-5-12(d) of the Utah Act was held unconstitutional by the New Jersey Supreme Court in the case of *State vs. Packard-Bamberger and Co.,* 123 N. J. 180, 8 At.2d 291 (1939) wherein the court stated:

> "how a person is to determine the legality of the price of a competitor is not declared and the impracticality if not impossibility of determining the legality of a competitor's price is obvious."

POINT II.

THE SUPREME COURT FAILED TO CONSIDER OR TO RULE UPON THE SECOND DEFENSE OF SKAGGS TO COUNT III OF THE PLAINTIFF'S COMPLAINT AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT WITH RESPECT THERETO WHICH CONCLUDED THAT THE GIVING AWAY OF AN ITEM OF MERCHANDISE IN CONNECTION WITH A SALE IS IS NOT PROHIBITED BY THE UTAH UNFAIR PRACTICES ACT.

Count III of plaintiff's complaint alleged that on or about June 20, 1966, Skaggs advertised a carton of cigarettes for $2.73 and gave a cigarette lighter away free with each purchase of a carton, which lighter cost Skaggs .25 each. The carton of cigarettes alone was not a sale below cost as defined by the Act but the price of the combined articles, cigarettes and lighters, was a sale below cost as defined by the Act. In answer to this Count, Skaggs contended that the facts alleged did not constitute a violation of the Act since the giving away of an article of merchandise in connection with a sale is not prohibited by the Act. The trial court held that the facts alleged in Count III of plaintiff's complaint did not constitute a violation of the Act because the sale of the cigarettes alone was not a sale below cost as defined by the Act and the gift of the cigarette lighter was not prohibited by the Act. The Supreme Court did not consider this defense of Skaggs to Count III of the complaint although the matter was presented to the Supreme Court on appeal.

It is respectfully submitted that the decision of the trial court on this point should be affirmed.

Prior to the 1965 amendment of the Act, the first sentence of Section 13-5-9 of the Act read as follows:

> "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 vendors or distributors selling price shall not be below the cost of all articles, products, commodities, *and concession* included in such transactions."

The emphasized portions of the Act which precluded the giving away of items were deleted by the 1965 legislature and the Act as it now reads does not prohibit giveaways. In ach of thefollowing cases, the courts have held that Unfair Practices Acts do not prohibit the giving away of items in connection with sales unless the Act in question specifically prohibits such action: *State vs. Tanker Gas, Inc.,* 250 Wisconsin 218, 26 N.W. 2d (1947); *United Retail Grocers Association vs. Harrison & Sons, Inc.* 89 Pa. D&C 294 (1954); *State of Minnesota vs. Applebaum's Food Market, Inc.,* 259 Minnesota 209, 106 N.W. 2d 896 (1960).

As this court so forcefully pointed out in its opinion in this case, it is not the province of the court to pass upon the wisdom of legislation. The court should voluntarily restrain itself by holding strictly to an exercise and expression of its power to interpret and adjudicate. The court should state what the law is, not what it thinks it should be. Prior to 1965 the Utah Unfair Practices Act prohibited the giving away of items in connection with a sale. The legislature amended the Act in 1965

and eliminated this prohibition. Regardless of what the court thinks concerning the wisdom of this amendment, the court should not rewrite the statute and thereby follow the example of unrestrained judicial activism practiced by certain other courts.

POINT III

THE SUPREME COURT FAILED TO CONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF TRIAL COURT WITH RESPECT TO COUNT IV OF PLAINTIFF'S COMPLAINT WHICH FOUND THAT THE SALE IN QUESTION WAS NOT MADE BY SKAGGS WITH THE INTENT AND PURPOSE OF UNFAIRLY DIVERTING TRADE FROM A COMPETITOR OR OTHERWISE INJURING A COMPETITOR BUT WAS MADE WITH THE SOLE PURPOSE OF INDUCING THE PURCHASE OF OTHER MERCHANDISE BY ITS OWN CUSTOMERS AND WHICH CONCLUDED THAT A SALE MADE WITH SUCH AN INTENT COULD NOT BE CONSTITUTIONALLY PROHIBITED BY THE LEGISLATURE.

With respect to Count IV of plaintiff's complaint, the trial court found that on June 16, 1966, Skaggs advertised in the Provo Daily Herald the sale of Vimanal Vitamins at 82¢ per hundred tablets, which was less than cost as defined by the Act. In the Provo, Utah trade area Vimanal Vitamins are offered for sale exclusively by Skaggs and Skaggs has no competitor with respect to this item. This sale of Vimanal Vitamins was made by Skaggs with the intent of inducing customers at its Provo, Utah store to purchase other merchandise, but was not done with the intent and purpose of unfairly diverting trade from a competitor or otherwise injuring a competitor. The trial court concluded that the Utah Unfair

Practices Act is unconstitutionally arbitrary and unreasonable in prohibiting a sale below cost as defined by the Act where the only intent of the retailer in pricing the item below cost is to induce customers of the retailer to purchase other merchandise. The Utah Supreme Court did not consider this defense of Skaggs to Count IV of plaintiff's complaint or the findings of fact and conclusions of law of the trial court with respect thereto, altough the matter was presented to the Supreme Court on appeal. It is respectfully submitted that the decision of the trial court on this point should be affirmed.

To begin with, Skaggs agrees entirely with the opinion of the court in this case that the legislature has the power to prohibit sales below cost, which are made with the intent, or which have the effect ,of overwhelming or destroying competition. That, however, is not the situation which exists with respect to Count IV of plaintiff's complaint. The statute purports to prohibit a merchant in setting the price for his merchandise and in advertising that price, even though the merchant had no intent to divert trade from a competitor or otherwise injure a competitor and even though neither of these results occurred. The Utah Supreme Court held in the case of *Pride Oil Co. vs. Salt Lake County,* 13 Utah 2d 183, 370 P.2d 355 (1962) that Article I Section 1 of the Utah Constitution prohibits invasions of a person's right to own and enjoy property and that this includes the right to sell it and to let others know of the desire to do so and the price. The court in that case properly recognized that this right is not absolute and that when it appears necessary for the protection of somemore important in-

terest of the public, which involves the safeguarding of its health, morals, safety, or welfare, this basic right may be limited to the extent necessary to protect the public interest.

> "But a pivotal consideration in the problem before us is that in order to justify encroachment on these rights, such a danger to the public must exist and the statute must be such that it will have some substantial and reasonable relationship to the elimination or correction of the evil."

Most courts which have considered the question have held that a balnket prohibition against sales below costs is unconstitutional. A statute to be constitutional must only prohibit sales below cost which are made with an evil intent or which accomplish an evil result. *Kansas vs. Fleming Co.,* 184 Kansas 674, 339 P.2d 12 (1959). *Englebrecht vs. Day,* 201 Oklahoma 585, 208 P.2d 538 (1949), *Commonwealth v. Zasloff,* supra. As stated by the Colorado Supreme Court in *Perkins vs. King Soopers, Inc.,* 122 Colorado 263, 221 P.2d 343, (1950):

> "Our study of the decided cases leads to the conclusion that a statute attempting to prohibit all sales below cost would be unconstitutional, and to avoid this result, only such sales may be prohibited which are intended to injure the public in a manner warranting the exercise of the police power."

The Trial court found that Skaggs in making the sales complained of in Count IV of the complaint had no intent to infairly divert trade from a competitor or otherwise injure a competitor and plaintiff at no time contended that either of these results were accomplished

by the sales. Plaintiff, in fact, never contended that Skaggs intended to unfairly divert trade from a competitor or otherwise injure a competitor in connection with the sales complained of in Count IV of plaintiff's complaint. Under these circumstances, the decision of the trial court insofar as Count IV of plaintiff's complaint is concerned should be affirmed.

POINT IV

THE SUPREME COURT FAILED TO CONSIDER OR RULE UPON THE DEFENSE OF SKAGGS THAT THE UTAH UNFAIR PRACTICES ACT IS UNCONSTITUTIONAL BECAUSE OF ITS UNJUSTIFIABLE DISCRIMINAION BETWEEN PARTIES SIMILARLY SITUATED ALTHOUGH THE MATTER WAS PRESENTED TO THE SUPREME COURT ON APPEAL.

The trial court concluded that the Utah Unfair Practices act is unconstitutional in its unjustifiable discrimination between persons similarly situated. The Utah Supreme Court failed to consider or discuss this attack upon the constitutionality of the statute. It is respectfully submitted that the decision of the trial court on this point should be affirmed.

A statute is unconstitutional as being discriminatory and in violation of the equal protection and due process clauses of both the federal and state constitutions if it differentiates between classes of persons similarly situated without any reasonable basis bearing on the purpose sought to be accomplished by the statute. *State vs. Packard,* 122 Ut. 369, 250 P.2d 561 (1952); *Slater vs. Salt Lake City,* 115 Ut. 476, 206 P.2d 153 (1949); *Gronlund vs. Salt Lake City,* 113 Ut. 284, 194 P.2d 464 (1948).

Several cases from other jurisdictions have held unfair practices acts unconstitutional because of such discrimination. e.g. *Kansas vs. Consumers' Warehouse Market, Inc.,* 185 Kans. 363, 343 P.2d 234 (1959); *Wayne's Distributors, Inc., vs. Tilton,* 7 N.J. 349, 81 At.2d 786 (1951); *Serrer vs. Cigarette Service Co.,* 148 Ohio St. 519, 76 N.E.2d 91 (1947).

The Utah Unfair Practices Act unconstitutionally discriminates between the ordinary retailer and the large manufacturer-retailer. The ordinary retailer is prohibited from making a sale below costs as defined by the Act, except where he endeavors, "to meet the *legal prices* of a competitor." U.C.A. 13-5-12(d)

The sales of a large manufacturer-retailer are exempted from the provisions of the Act where they meet "prices established in interstate competition *regardless of cost.*" This broad exemption granted to the manufacturer-retailer which is not permitted the small, ordinary retail merchant, is in complete opposition to the avowed purpose of the Act which is set forth in 13-5-17 of the Act as follows:

> "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 unreasonable discrimination between the exemptions granted the manufacturer-retailer and the ordinary retailer is in direct conflict with the purpose

of the Act and makes the Act unconstitutional under the rules laid down by this court in *State vs. Packard,* supra.

The Act also discriminates without reason between retailers who receive cash discounts on their purchase of merchandises and those who receive trade discounts. In determining the minimum price at which a retailer may sell his goods, the statute permits a retailer who receives a trade discount to deduct the trade discount from the invoice price in determining the minimum price at which he can advertise his goods for sale. The retailer who receives a "customary cash discount" may not deduct this discount from his invoice price, however. This merchant will thus be required to sell his goods at a higher price than his competitor who received a trade discount in spite of the fact that the net costs of the items to the two retailers is identical. It is impossible to determine what reason there could possibly be for this distinction. As this court held in the case of *Sleater vs. Salt Lake City,* 115 Ut. 476, 206 P.2d 153 (1949), "If we are unable to find any reasonable basis for the classification, then we cannot sustain the enactment."

POINT V

THE SUPREME COURT APPARENTLY OVERLOOKED THE TESTIMONY AT THE TRIAL ESTABLISHING THE FACT THAT IT IS IMPOSSIBLE TO PROVE THE ACTUAL COST OF SELLING AN ITEM OF MERCHANDISE AND ESTABLISHING THAT CREDITS AND REBATES CANNOT BE APPLIED TO AN ITEM OF MERCHANDISE AT THE TIME A RETAILER SETS THE PRICE OF THAT MERCHANDISE FOR SALE.

It was the contention of Skaggs that the Utah Unfair Practices Act was unconstitutional because it created

an irrebutable presumption that a retailer's cost of doing business is 6% of the invoice price of the goods. While the language of the Act indicates that the presumption is not conclusive, the presumption is, in fact, conclusive as shown by the testimony at the trial. Attributing a "proportionate part of the cost of doing business" to an item of merchandise sold by a modern retail merchant handling hundreds of different items is impossible. The Supreme Court apparently overlooked the testimony at the trial concerning this matter and the findings of fact of the trial court with respect thereto.

The Supreme Court in this case held that the term "cost" was not unconstitutionally arbitrary, unreasonable, vague and ambiguous and that the 6% markup required by the statute did not create an unconstitutional, irrebutable presumption. The reasons given by the Supreme Court for this holding were that the trial court's conclusion that the 6% presumption provides no real alternative because it is impractical or impossible to prove actual cost was not supported by the evidence; the cost computation required by the Act need not be exact; all that the statute requires is that a cost figure be arrived at by reasonable accounting methods; a reasonably accurate allocation of rebates and free goods given to retailers could be made for the purposes of complying with the Act, and therefore, the Act is sufficiently clear to require compliance .

It appears that the Supreme Court overlooked the findings of the trial court with respect to these points, or the testimony at the trial which supported these find-

ings. The trial court found that Skaggs offers for sale a wide variety of merchandise, each item of which has individual cost factors, such as variance in consumer demand, rate of turnover, advertising cost, warehousing, marking, packaging, displaying, purchasing costs, depreciation, labor, overhead and administrative costs. In addition, Skaggs receives trade and cash discounts with respect to some items, some of which cannot be determined or are even known to Skaggs at the time the goods are priced for sale. Skaggs used sound, accepted and practical accounting procedures with as much emphasis on detail as feasible, but it cannot reasonably be required to establish accounting procedures whereby its actual cost per item sold can be determined at or prior to the offering of such item for sale. These findings are simply supported by the testimony at the trial in this case.

In determining the price at which an item of merchandise is to be sold Section 13-5-7(b)(3) provides that the retailer is to take his invoice cost, deduct from this all trade discounts except customary discounts for cash, and then add 6% of the resulting figure to cover the proportionate cost of doing business. In actual practice, the retailer may not even know the amount of the trade discounts which he is to deduct from the invoice until long after the goods have been sold. Mr. Edwin N. Austin testified at the trial that a retailer often receives free goods and rebates on his purchases after the end of a quota period, depending upon the volume of sales during the quota period. The amount of these discounts

or whether the retailer will even receive a discount, is unknown to the retailer until long after he has sold the merchandise. (R. 90-91). It is apparent that the Supreme Court misread this testimony in reaching its conclusion that these rebates and free goods could be computed by a retailer with reasonable accuracy for the purpose of pricing his merchandise.

Dean Randall of the University of Utah College of Business testified in detail as to the difficulty encountered in attempting to attribute a "proportionate part of the cost of doing business" to a particular item of merchandise. He concluded:

> "In my opinion, in a retail store handling thousands of items, it would be economically impossible to arrive at a realistic cost of selling each item." (R. 116)

It is not, as the Supreme Court concluded, a question of "inconvenience or difficulty in application of the cost standard" which is involved in this case. The application of the cost figure required by the statute is one that is "economically impossible" to comply with. The statutory presumption that a retailer's "cost of doing business" is 6% of his invoice price thus becomes conclusive. It is well established that a statutory conclusive presumption is unconstitutional. *Alder vs. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.ed. 517 (1952). As stated by the Colorado Supreme Court in the case of *Perkins vs. King Soopers, Inc.*, supra, in holding a conclusive presumption of the Colorado Unfair Practices Act unconstitutional:

"A legislative right to declare that proof of one fact shall be presumptive or prima facie evidence of another is no longer open to serious dispute in this jurisdictoion or elsewhere. [citing cases] It may also be said in the light of the foregoing authorities that the power vested in the legislature to create such presumptions is subject to the qualification that there must be some rational connection or reasonable relation between the fact proved and the ultimate fact to be established; *Also, such power is subject to the further limitation that the presumption cannot be made a conclusive one.* (Emphasis is that of the Colorado Supreme Court.)

POINT VI

THE UTAH SUPREME COURT OVERLOOKED CONTROLLING PRINCIPLES OF CONSTITUTIONAL LAW IN HOLDING THAT THE UTAH UNFAIR PRACTICES ACT IS NOT UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

The trial court concluded that the Act is unconstitutionally vague and ambiguous in defining the prohibited intent of a retailer as making a sale at less than cost as defined in the act with the intent and purpose of "unfairly diverting trade from a competitor or otherwise injuring a competitor." The Utah Supreme Court reversed this decision of the trial court in the following language:

"Likewise we disagree with the trial court decision that the terms "unfairly diverting trade from a competitor" and "injuring a competitor" are vague and ambiguous. The terms may present difficulties in application, but such difficulty is not sufficient to hold the act unconstitutional. In fact, the said terms have come to have definite

and certain meanings in the practice of wholesale and retail business."

If the terms did, in fact, have definite and certain meanings in the wholesale and retail business, the terms would not be vague and ambiguous and subject to constitutional attack. In fact ,however, the terms have no meaning whatsoever in the wholesale and retail business. There is not a shred of testimony in the record that they have a definite and certain meaning or that anyone has any idea as to what the terms mean.

The Supreme Court acknowledges that the terms may present "difficulties in application." It is this difficulty in application, arising out of the terms used, which causes the Act to be unconstitutional. The basic test of constitutionality which the Supreme Court apparently overlooked in this case and which it should have applied is that laid down by this court in the case of *State vs. Packard,* 122 Utah 369, 250 P.2d 561 (1952). There the court stated:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and *differ as to its application* violates the first essential of due process of law . . ." (Emphasis is that of Petitioner)

The difficulties of application of the statute which are recognized by the Utah Supreme Court make the statute too vague to inform a retailer what his conduct must be in order to avoid violating the Act; make the Act too indefinite to inform a retailer accused of violating its provisions what constitutes the offense with which

he is charged; and prevents uniform interpretation and application of the Act by those charged with enforcing it. It thus violates the basic test of constitutionality laid down by the Utah Supreme Court in the *State vs. Packard* case as follows:

> "Concerning the question of uncertainty or vagueness of statutes, the authorities seem to be in accord that the test a statute must meet to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with the responsibility of applying and enforcing it."

POINT VII

THE SUPREME COURT MISREAD THE PRESUMPTION OF ILLEGAL INTENT WHICH IS CREATED BY SECTION 13-5-9 (2) OF THE UTAH UNFAIR PRACTICES ACT AND APPARENTLY OVERLOOKED THE TESTIMONY AT THE TRIAL AND CONROLLING PRINCIPLES OF CONSTITUTIONAL LAW CONCERNING SUCH PRESUMPTION IN CONNECTION WITH COUNT VI OF PLAINTIFF'S COMPLAINT.

Section 13-5-9 (2) of the Utah Unfair Practices Act provides that proof of a limitation of quantity coupled with proof of a sale below cost as defined by the Act creates a presumption that the purpose or intent with which the sale was made was to "injure competitors or destroy competition." The section provides:

> "(2) Under this section, proof of limitation of the quantity of any article or product sold or

> offered for sale to any one customer of a quantity less than the entire supply thereof owned or possessed by the seller or which he is otherwise authorized to sell at the place of such sale or offering for sale, together with proof that the price at which the article or product is so sold or offered for sale is in fact below its cost, raises a presumption of the purpose or the intent of the sale being to injure competitors or destroy competition, and is unlawful. . . ."

The Supreme Court apparently misread the presumption which is created by this Section. In its opinion on this point, the court stated:

> "A sale by the respondents at the low cost with the limitation of quantity obviously disregards both profit and turnover which combined constitute the whole purpose of being in business. Even the most simple analysis would then lead all reasonable persons to conclude that the respondents had an intent by this activity to attract customers into the store upon the expectation that they would purchase other items not marked below cost."

The section does not create the presumption that the sale was made with the intent of including the purchase of other merchandise. The intent which is presumed by the statute is that the retailer intended to "injure competitors or destroy competition."

The constitutionality of a statutory presumption depends upon whether the fact presumed may be fairly inferred from the fact proven. *Tot vs. United States,* 319 U. S. 463, 63 S. Ct. 1241, 87 L.Ed. 519 (1943); *Alder vs. Board of Education,* 342 U.S. 485, 72 S. Ct. 380, 96 L.

Ed. 517 (1952). To paraphrase the Utah Supreme Court in the instant case, even the most simple analysis would lead all reasonable persons to conclude that the respondent had an intent by this activity entirely different from the intent which is presumed by the statute.

Even assuming hat the presumption of illegal intent created by Section 13-5-9 (2) was constitutional and could be fairly inferred from the facts proven, the court has overlooked the testimony of Skaggs at the trial that there was no illegal intent involved in connection with Count VI of plaintiff's complaint. Count VI of plaintiff's complaint alleged that on June 20, 1966, Skaggs advertised Polaroid Swinger Cameras at $13.49 each, which were at less than cost as defined by the Act, and that Skaggs limited the purchase of these cameras to one per customer. The uncontradicted testimony of Mr. Austin concerning this matter was that the cameras were offered for sale by Skaggs to introduce customers to a new store which was opened at 8th West in Salt Lake City. The advertisement was made to get people to come in and look at and become acquainted with the new store. The reason that the cameras were limited to one per customer was that Polaroid Cameras at that time were on allocation by the manufacturer and the supply was therefore limited. Skaggs felt they would have enough cameras to supply the demand if the cameras were limited to one per customer. Skaggs felt it was justified in limiting one camera per customer so that it would be able to supply all of its customers in that area. Mr. Austin also testified that it is often necessary when offering an item at a particularly attractive price

to limit the quantity to be sold to one per customer in order to prevent raids by competitors who attempt to come in and purchase the entire stock of that item. (R. 88-90). The Supreme Court apparently overlooked this undisputed testimony in connection with Count VI of plaintiff's complaint.

POINT VIII

THE SUPREME COURT APPARENTLY OVERLOOKED ITS OWN PRIOR DECISIONS IN HOLDING THAT THE UTAH UNFAIR PRACTICES ACT DOES NOT VIOLATE ARTICLE XII, SECTION 20 OF THE UTAH CONSTITUTION.

It was the contention of Skaggs and the decision of the trial court that the Utah Unfair Practices Act is an unconstitutional price fixing statute in violation of Article XII, Section 20 of the Utah Constitution. This decision of the trial court was reversed by the Utah Supreme Court on appeal. The reasons given by the Supreme Court were (1) That there was no evidence as to whether there was a real alternative of a lesser cost and (2) the Legislature has not been precluded by the Utah Constitution from price fixing.

As pointed out in Point V of this brief, there was ample testimony at the trial to support the finding of the trial court that there was no real alternative of proving a lesser cost. The testimony of Dean Randall which is quoted above, was that it was "economically impossible"

to arrive at a realistic cost of selling an item of merchandise. The retailer thus has no alternative but to fix the minimum price for his merchandise at the invoice cost plus 6% dictated by the statute.

The Supreme Court in holding that Article XII, Section 20 of the Utah Constitution does not apply to the Legislature, has apparently overlooked its own prior decisions which have relied on Article XII, Section 20 in holding acts of the Legislature to be unconstitutional.

In 1961 the Utah Legislature enacted Sections 41-11-45 and 46, which regulated and restricted service station advertising of gasoline prices. The ostensible purpose of the statute was to prevent false and misleading advertising. The constitutionality of these sections were attacked in the case of *Pride Oil Co. vs. Salt Lake County*, 13 U.2d 183, 370 P.2d 355 (1962). The Utah Supreme Court found that the real purpose of the statute was the control of gasoline prices and the elimination of gas wars. The Supreme Court held the act of the Legislature unconstitutional and the only constitutional provision cited by the Utah Supreme Court was Article XII, Section 20 of the Utah Constitution.

In the case of *General Electric Company vs. Thrifty Sales*, 5 U.2d 326, 301 P.2d 741 (1956), the Constitutionality of the Utah Fair Trade Act was attacked as being in violation of Article XII, Section 20 of the Utah Constitution. The contention was made in that case, "that

the constitutional provision, obviously aimed at private combinations from indulging in price fixing for monopolistic purposes, was not intended to prevent the legislature from enacting laws authorizing agreements for the wholesome purposes set forth above." This contention was rejected by the Utah Supreme Court. The court stated that it was clear that retailers could not voluntarily enter into contracts with each other to fix the price of merchandise. The Act, however, purportedly furnished them with a device whereby retailers were forced by statute to set minimum prices for the sale of their merchandise, which they could not have done by private agreement. The court held, not only that the contract in question was unconstitutional, but that "the act is invalid under Section 20, Article XII of our constitution."

In *Gammon vs. Federated Milk Producers Association, Inc.*, 11 U.2d 421, 360 P.2d 1018 (1961), the Utah Supreme Court stated that if the Utah Agricultural Cooperative Act were construed as authorizing the establishment of minimum prices for milk that the Act itself would be unconstitutional as being in violation of Article XII, Section 20 of the Utah Constitution.

The majority opinion of the Supreme Court in this case apparently overlooked its prior decisions which held legislative price fixing unconstitutional in violation of Article XII, Section 20, of the Utah Constitution. As ably pointed out in the dissenting opinion of Justice Ellett in this case, and by Chief Justice Crockett in the

General Electric Company case, supra, retailers could not by an agreement among themselves compell each other to charge a minimum price for their merchandise. It would clearly seem unconstitutional for the legislature to pass a law compelling retailers to do that which would be unconstitutional for them to do otherwise.

Respectively,

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