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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. : Brief of Defendant-Respondent Grand Central Stores, Inc., D/B/A Warshaws Giant Foods and Grand Central Drugs, Inc.

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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 FOODS and
GRAND CENTRAL DRUGS, INC.,
Defendants-Respondents,

and

UTAH RETAIL GROCERS'
ASSOCIATION,
Intervenor-Appellant.

Case No. [illegible]

BRIEF OF DEFENDANT-RESPON[illegible] CENTRAL STORES, INC., d/b/a [illegible] GIANT FOODS and GRAND CENT[illegible]

Appeal From Judgment of the [illegible]
Salt Lake County
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IN THE SUPREME COURT OF THE STATE OF UTAH

TRADE COMMISSION OF UTAH,
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—vs.—

SKAGGS DRUG CENTERS, INC.,
GRAND CENTRAL STORES, INC.,
d/b/a WARSHAW'S GIANT
FOODS and GRAND CENTRAL
DRUGS, INC.,
Defendants-Respondents,

and

UTAH RETAIL GROCERS'
ASSOCIATION,
Intervenor-Appellant.

Case
No. 11034

BRIEF OF DEFENDANT-RESPONDENT GRAND CENTRAL STORES, INC., d/b/a WARSHAWS GIANT FOODS and GRAND CENTRAL DRUGS, INC.

NATURE OF THE CASE

This is an action commenced by the Trade Commission of Utah seeking an injunction against each of the defendant-respondents to enjoin them from selling merchandise in violation of the Utah Unfair Practices Act. In particular, defendants are charged with viola-

tions of §13-5-7 and §13-5-9, Utah Code Annotated (Supp. 1967) (the Unfair Practices Act). The Utah Retail Grocers' Association was allowed to intervene in the trial of the matter and has filed a brief.

DISPOSITION IN THE LOWER COURT

The case was tried to the court without a jury. Based upon the stipulations of the parties and the evidence brought out at trial, the court held the Unfair Practices Act in its entirety to be unconstitutional, void and unenforceable in violation of the Fourteenth Amendment of the United States Constitution, and in violation of the Utah Constitution.

The ruling of the lower court was based upon its findings of fact and conclusions of law filed and entered herein in the record at pages 35 through 48.

RELIEF SOUGHT ON APPEAL

Defendant-respondent Grand Central seeks an affirmance of the judgment in the lower court and a declaration by this court that the Utah Unfair Practices Act is invalid, unconstitutional and enenforceable.

STATEMENT OF FACTS

The statement of facts as contained in appellant's brief is substantially correct though incomplete. The statement of facts contained in the brief of appellant-intervenor in many respects is substantially incorrect and not based upon the record in the case.

Since neither appellant nor intervenor-appellant has set forth a complete and accurate statement of the facts found in this case, defendant-respondent proposes as its statement of facts the Findings of Fact entered by the court. Those findings as herein material were:

> 3. With respect to Count I of plaintiff's complaint, defendants offered no defense thereto except the defense of unconstitutionality of the Act. The allegations of Count I of the complaint must accordingly be taken as true and the court therefore finds that on June 23, 1966, defendants, and each of them, advertised Crest Family Toothpaste at 50¢ which is a sale below cost as defined in the Act, with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor and defendants will continue to sell such item below cost as defined in the Act unless they are enjoined from such activity.
>
> 4. As alleged in Count II of plaintiff's complaint and as stipulated to by the parties, on or about June 16, 1966, Shopper's Discount Food Store, Inc., herein referred to as "Shopper's Discount," advertised and sold Aqua Net Hair Spray at 49¢ which was a sale below cost as defined in the Act. On June 23, 1966 Grand Central advertised Aqua Net Hair Spray and Skaggs advertised Style Hair Spray for sale at 49¢, each of which was a sale below cost as defined in the Act. Aqua Net Hair Spray and Style Hair Spray are competitive and comparable products with regard to weight, size, use, price and customer demand. Shopper's Discount, Skaggs and Grand Central are all competitors in the same locality or trade area comprising Salt Lake City and Davis Counties. Grand Central's advertisement and sale of

Aqua Net Hair Spray at 49¢ and Skagg's advertisement and sale of Style Hair Spray at 49¢ was an endeavor by said defendants to meet the 49¢ price of Shopper's Discount on Aqua Net Hair Spray. Neither of said defendants at said time had any actual knowledge that the Shopper's Discount price on such item was a sale below cost as defined in the Act or was not a legal price for purpsoes of Section 13-5-12 of the Act. On or prior to June 23, 1966, plaintiff had not, to the knowledge of either of the defendants, taken any action against Shopper's Discount to enforce the provisions of the Act against Shopper's Discount with respect to its sale of Aqua Net Hair Spray for 49¢. Aqua Net Hair Spray is a product with wide wholesale price fluctuations which can be purchased by retailers, including defendants and Shopper's Discount, in numerous ways and from many different suppliers. Neither Skaggs nor Grand Central on or prior to June 23, 1966 made any inquiry of Shopper's Discount or the suppliers of Aqua Net Hair Spray to Shopper's Discount to determine the invoice cost of Aqua Net Hair Spray to Shopper's Discount or the replacement cost of such item or the date of purchase of such item by Shopper's Discount. Shopper's Discount as a competitor of defendants would not voluntarily supply defendants with information relative to its invoice cost, replacement cost or date of purchase of such item. The wide price fluctuation and numerous wholesale sources of supply and differing purchasing methods made it infeasible and unrealistic for defendants to obtain reliable information of the invoice cost, replacement cost or date of purchase of such item by Shopper's Discount.

. . .

7. With respect to Count V of plaintiff's complaint, on June 23, 1966 defendants, and each of

them, advertised Bayer Aspirin (100 cm) at 55¢ per hundred. Bayer Aspirin is supplied and delivered directly to the defendants' retail outlets by the supplier without cartage costs to the defendants. Bayer Aspirin is a product in constant demand by customers of defendants with a high turn-over and with little labor, waste, spoilage or advertising costs to defendants. The sale of Bayer Aspirin at 55¢ by Grand Central was not a sale below cost as defined in the Act, but the sale of the same item at the same price by Skaggs was a sale below cost as defined in the Act.

. . .

9. With respect to Count VII of plaintiff's complaint, on June 16, 1966 Grand Central advertised Lee men's pants at two pairs for $5.00, which was a sale below cost as defined in the Act. The sale by said defendant was not done with the intent to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or to otherwise injure a competitor but was done with the sole intent and purpose of reducing what Grand Central in good faith believed was an excessive inventory in their stores at that time of Lee men's pants.

10. With respect to Count VIII of plaintiff's complaint, on November 8, 1965 Grand Central purchased frozen tom turkeys at 33½¢ per pound. Thereafter, on December 17, 1965 (more than thirty days after the original purchase) additional frozen tom turkeys were purchased at an invoice cost of 37½¢ per pound. On December 17, 1965 and thereafter, Grand Central had in stock commingled frozen tom turkeys purchased on November 8, 1965 at 33½¢ per pound and tom turkeys purchased on December 17, 1965 at 37½¢ per pound. The commingled turkeys were subse-

quetly sold by Grand Central on and after December 17, 1965 for 37¢ per pound, which was a sale below cost as defined in the Act, in that the turkeys purchased November 8, 1965 were sold more than thirty days from the date of such purchase and the replacement cost of the same at that time was 37½¢ per pound and the turkeys purchased on December 17, 1965 were sold at 37¢ which is a sale below cost as defined in the Act. The sales by Grand Central on or prior to December 8, 1965 of the turkeys purchased on November 8, 1965 were not sales below cost as defined in the Act.

11. Defendants offer for sale a wide variety of merchandise in their retail stores, each item of which has individual cost factors such as (a) variance in consumer demand for the product, (b) rate of turn-over, (c) cost of advertising, (d) handling costs, including warehousing, marking, packaging, displaying, and purchasing costs, (e) varying depreciation in value sometimes depending on perishability or seasonal demand and sometimes depending on obsolescence factors (e.g., an improved product comes on the market), (f) labor, overhead and administrative costs, and (g) trade and cash discounts, some of which cannot be determined or are not known to defendants at the time the goods are priced for sale.

12. Defendants, each using separate types of accounting methods for the purpose of deterrmining proper profit and cost guidelines for their merchandising operations, are each using sound, accepted and practical accounting procedures with as much emphasis on detail as feasible. Neither defendant attempts to accurately determine their cost for each item they sell, as to do so would be too costly and, hence, impractical and not feasible. Defendants cannot reasonably be required to establish accounting procedures where-

by their actual cost per item sold could be determined at or prior to the sale or offering for sale of such item.

PRELIMINARY STATEMENT

Since this appeal involves a challenge to the constitutionality of a statute, the general maxims of statutory construction should be before the court. Defendant-respondent Grand Central substantially agrees with the authorities cited by appellant and intervenor-appellant [hereinafter referred to generally as appellants] as to the duties of this court with respect to declaring a statute unconstitutional. A summary of the preliminary statements of appellants on this point can be made as follows: In order to be unconstitutional, a statute must be clearly violative of a constitutional provision. Reasonable presumptions must be indulged in favor of the validity of the statute. If there is any reasonable basis for the finding of validity, a statute must be upheld. Defendant-respondent does not argue with these authorities. Moreover, it completely agrees that a statute should be declared unconstitutional only when there is no other alternative.

ARGUMENT

The Utah Unfair Practices Act, involved in this case, was enacted by the Utah Legislature in 1937. The Legislature was reacting to a popular fad of the time. Many of the states which have similar legislation adopted it at that time. These statutes were passed under pressure from competitors seeking to limit the play of

free-market prices, and in response to a prevalent marketing technique of the time, loss-leaders. *Sale Below Cost: Private Price Fixing Under State Law,* 57 Yale L.J. 391 (1948). At that time, retailing as it is known today did not exist. Integration of the retailing-wholesaling and jobber functions had not been accomplished to the degree and extent of today. Under marketing conditions then existing, when a retailer desired to purchase an item, he would generally purchase the item from a wholesaler. Wholesalers were bound under the Robinson-Patman Act to treat all retailers alike. However, under the present-day distribution system, many operations such as defendants in this case perform their own wholesaling and/or jobbing functions. In purchasing directly from the manufacturer, these retail operations can obtain and do obtain a much better price than can a competitor on a smaller operation who must purchase from a wholesaler.

POINT 1

THE STATUTORY PRESUMPTION THAT, IN THE ABSENCE OF PROOF OF A LESSER COST, COST AS DEFINED IN THE ACT MEANS 6% ABOVE INVOICE OR REPLACEMENT COST, LESS TRADE DISCOUNTS, EXCEPT CASH DISCOUNTS, PLUS FREIGHT CHARGES WHERE THE RETAILER PAYS FOR THE FREIGHT, CREATES AN ARBITRARY, UNREASONABLE AND UNCONSTITUTIONAL STANDARD.

In its presumption that the cost of doing business shall "in the absence of proof of a lessor cost . . . be 6%

of the cost to the retailer . . .", section 13-5-7(3) of the Utah Unfair Practices Act does not take into account the different possible types of retail operations nor the various types of merchandise within each type of operation. The fact that the statute does not make provision for different forms of operation is not surprising since at the time of its adoption there was only one general type of retailing opreation. A presumption that the cost of doing business of a large-scale, self-service operation such as defendants, with the integrated functions of retailer-wholesaler and jobber and that of a one-man corner grocery store who purchases his stock from a wholesaler is the same is totally outside of the common experience of man and is hence arbitrary and unreasonable. *See Serrer* v. *Cigarette Service Co.*, 76 N.E. 2d 91 (Ohio 1947).

This unreasonable and arbitrary classification was not made by the Legislature. The classification has been made by a shift in legitimate business practice. At the time the Legislature adopted the statute, the classification *may* well have been reasonable. However, the facts introduced in this case and the findings of the court clearly show that the classification as applied to defendants becomes unreasonable and arbitrary because it does not take into account their type of operation.

In *Great Atlantic & Pacific Tea Co.* v. *Ervin*, 23 F. Supp. 70, 82 (D. Minn. 1938) the court set forth the proper test for a valid presumption when it stated:

> It is apparent from [cited decision of the U. S. Supreme Court] *that in determining the validity*

> *of a presumption created by a legislative body, two questions are ot be considered*: (1) *Whether the fact presumed may be fairly inferred from the fact proven;* (2) *whether the presumption created will be of aid to the state without subjecting the accused to unreasonable hardship or oppression.* (Emphasis added.)

The presumption under the Utah Act meets neither of the above tests. In its operation, the Utah statutory presumption of a cost of 6% is not a fair presumption and it places an unreasonable burden upon the retailer. *Cf. Mott's Super Markets, Inc.,* v. *Frassinelli,* 172 A. 2d 381 (Conn. 1961); *Wiley* v. *Sampson-Ripley Co.,* 120 A. 2d 289 (Me. 1956). This court should take into account the operational effect of the statute in question in order to see if the tests are met. Such consideration is in accord with Utah precedent. The case of *Broadbent* v. *Gibson,* 140 P.2d 939 (Utah 1943) was a case involving the constitutionality of the Utah Sunday Closing laws. Beginning at page 946, the court makes an extensive discussion of the Utah statute and its exceptions. The court reached the conclusion that the exceptions to the Act were so broad that they, in effect, changed the Act from a general Sunday Closing law to a special Sunday Closing law, and hence made it unconstitutional. The court goes on to state that:

> The exceptions in the Utah Sunday closing statutes are so broad that they in effect change the nature of this act from a general closing law, with exceptions, to a law aimed, without sufficient legal reason, at certain classes of businesses with a general exception to other classes which in effect is a grant of a special privilege to the excepted

class while without legal excuse denying them to others. *Broadbent* v. *Gibson, supra* at 946.

The court further points out that these Sunday Closing statutes were designed to apply in every locality and to every merchant throughout the state. As designed, the court holds, such uniform application does not take into account differences to be found in the various localities throughout the State and hence is unreasonably discriminatory. *Broadbent* v. *Gibson, supra,* at 946-47.

The Court goes on the state that in its opinion this statute *could be construed* in a manner which would make it constitutional, but the Court does not so construe it. Thus, the Court states:

> [I]t could reasonably be held that the intention of the Legislature in providing that confectionary stores could stay open for the sale of confections only and tobacco stores for the sale of tobacco only was designed to prohibit only the sale of such items as razor blades, stationery supplies, pipes, cigar and cigarette holders etc., rather than to prohibit the sale of candy in a tobacco store and vice versa. *But the statutes are awkwardly drawn and while the overall intent seems to be as outlined next above, the specific exemptions made and the language used in making them seem to defeat the manifest overall intent. And even if such an interpretation were given to the statutes, there would still be difficult problems of administration which possibly would creat unconstitutional discriminations in such administration. Broadbent* v. *Gibson, supra,* at 947. (Emphasis added.)

Based upon this reasoning, the Court held the statutes to be unconstitutional as being unreasonably discriminatory. The Utah Unfair Practices Act here challenged

suffers from these same defects and should also be construed to be unconstitutional in its application. *See Serrer* v. *Cigarette Service Co., supra.*

Intervenor-appellant attacks the court's conclusions that the Utah Act is discriminatory and arbitrary in its application to both large and small merchants. They cite in support the case of *People* v. *Gordon*, 234 P.2d 287 (Calif. 1951), and quote extensively therefrom. In analyzing the case of *People* v. *Gordon*, its factual basis should first be considered. This was a case which arose out of an injunction proceeding whereby defendants were first enjoined, without opportunity for hearing, from selling below cost. Defendants' motion to dissolve the order was denied and after further hearing an order was entered granting the injunction. It is significant to note the following statement of the court found on page 291:

> Moreover, "state laws will not be invalidated without the support of relevant, factual material which will 'afford a sure basis' for an informed judgment" [cases cited]. In this case, *no facts whatever have been adduced which afford any basis for judging the manner in which the act affects interstate shipments or burdens interstate commerce.* (Emphasis added.)

It should be noted that the main contention of defendants in the *Gordon* case was that the California Act was in violation of the commerce clause of the Federal Constitution.

Another factual matter which should be considered in the *Gordon* case is the fact that the store being enjoined was a small one-store operation. One of its argu-

ments was that the statute was unconstitutional in that large chain stores could buy at substantially lower prices and hence could sell at lower prices than the small store and come within the law. The defendant contended that small stores were prevented from competing with these larger concerns because the smaller stores could not sell below their own higher cost. It will be noted that the exact opposite is being argued in the case at bar. The large stores are merely arguing that they should be able to take advantage of their better buying position and sell at lower prices without having to put up with the arbitrary and unreasonable six percent presumption of the Utah Act.

At page 294 of the *Gordon* opinion, it appears that at the hearings there was some evidence introduced (*ex parte*) as to the affect of defendant's low-cost advertising. Competitors of defendant were called in to testify. However, the court admits that there was not much evidence. It was sufficient, however, to support the discretion of the trial court in granting the injunction.

In sum, it should be noted that the *Gordon* case did not present a set of facts upon which the court could decide the constitutionality of the Unfair Practices Act. It should also be noted that in that case the fact situation was exactly opposite that presented in the case at bar. There, a one-store operation was alleging that it should be allowed to sell below cost in order to meet the naturally lower costs (although legal) of the large discount operation. In the case at bar, all that defendant contends is that the large discount operation should be allowed to

sell at its cost plus operating expenses without the requirement of the six percent conclusive presumption. Intervenor-appellant seems to argue that defendant should have put on evidence showing that the six percent presumption was not a valid estimate as to cost of doing business. At page 28 of its brief, intervenor-appellant states:

> However, there is no evidence as to what a reasonable percentage mark-up is in regard to any item involved in this case.

Of course, there is no evidence on this point. The whole purpose of this case is to show that defendants cannot determine what a reasonable percentage markup would be in advance of sales.

Intervenor-appellant objects to the finding of the lower court that no real alternative exists to the presumption since it is impossible or unreasonable for defendants to have to compute their costs on each item of groceries. Intervenor-appellant claims that this six percent presumution in fact aids the defendants and gives them "an option; a retailer may either undertake the detailed accounting which the act requires or merely presume a cost of doing business equal to six percent." Brief of intervenor-appellant at 25. Cases cited by intervenor-appellant make it quite clear that in any statute which grants a presumption, the presumption or the fact presumed must be reasonably related to the facts in existence. It is submitted that the six percent presumption indulged in by the Utah statute bears no reasonable relationship to any actual fact. The lower court so found. Intervenor-appellant makes much of the fact that de-

fendants are large retailers and have access to computers (Brief at 26) "which could easily make the allocation" required by the statute. It is common knowledge that computers cannot make an allocation which a man cannot make. The information must be fed into them in order to get an answer.

At page 26 of its brief, intervenor-appellant makes the argument that mere economic effect of the statute should not be considered when ruling upon the constitutionalities of the statute. Any number of cases can be cited which hold that economic effect may be the cause of holding a statute unconstitutional. This is the essence of due process and equal protection. If the economic effect of a statute is such as to unreasonably deprive one of his proper or subject him to unreasonable discrimination, it could certainly be the basis of holding a statute unconstitutional. *See Broadbent* v. *Gibson, supra.*

Intervenor-appellant makes much of its argument that the six percent pesumption was enacted to aid the retailer rather than restrict him. This is not the case. Such presumptions are enacted as an aid to the prosecutor. *McElhone* v. *Geror,* 292 N.W. 414 (Minn. 1940). When the statute provides that *in the absence of evidence to the contrary,* the cost of doing business shall be presumed to be six percent, a burden is placed upon the retailer to come up with evidence to the contrary. It is well known as shown by the findings and the conclusions of this case and the evidence adduced in this case that a retailer cannot reasonably show any cost prior to the actual sale of an item. Therefore, the six percent pre-

sumption becomes a conclusive presumption, and irrebuttable by the retailer. He must sell at the arbitrary markup of six percent or act at his peril.

At page 34 of its brief, intervenor-appellant cites *State* v. *Consumer's Warehouse Market,* 329 P.2d 638 (Kan. 1958) in support of the proposition that the Kansas statute which sets the markup of retailers at six percent in the absence of proof of lesser cost, was not arbitrary, unreasonable or discriminatory. The Kansas statute in question in that case, as quoted by the court, provides:

> "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this act, *where the result* of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce." *State* v. *Consumer's Warehouse Market, supra,* at 640-641. (Emphasis added.)

It should be noted that the italicized portion of this Act is different from the Utah Act, which speaks of "intent and purpose" and does not speak of result. The action in *Consumer's Warehouse Market* arose on a motion to quash the information on the grounds that the statute

was unconstitutional. Hence, there was no trial with introduction of evidence. On appeal, the case was based upon the information and the motion to quash filed by defendant. Defendant asserted that the statute was in violation of the Fourteenth Amendment in that it violated due process and equal protection. The court makes a lengthy argument going along the *Nebbia* v. *New York* line upholding the authority of legislatures to pass such acts. Defendant herein does not challenge the authority of the legislature to pass such an act. What defendant is challenging is the method and the reasonableness of the application of the Act. As to the unreasonableness and arbitrariness of the Act, it should be noted that in *Consumer's Warehouse Market* no evidence on these points was introduced. In the case at bar there is ample evidence as to the unreasonableness and arbitrariness of the application of the Act.

It should be further noted that the statute involved in *Consumer's Warehouse Market* contained a *prima facie* evidence provision, rather than a presumption such as is contained in the Utah Act. The distinction between a *prima facie* evidence provision and a presumption is adequately explained in IX Wigmore on Evidence §§2490-2494 (3d ed. 1940) and must be considered when reading these cases. With respect to the *prima facie* provisions of the Kansas Act, defendant challenged them as being unconstitutional and shifting the burden of proof. The court expressly did not set forth its views as to the constitutionality of this provision since it felt such question was not raised by a motion to quash.

In support of the proposition that "In California a provision which allows a presumption of intent from the mere sale below cost, without a limitation of supply, has been held valid," intervenor-appellant cites *People* v. *Payless Drug Stores,* 153 P.2d 9 (Calif. 1944), and *Mering* v. *Yolo Grocery & Meat Market,* 127 P.2d 985 (Calif. 1942). These cases do not support the statement for which they are cited. These cases do not hold that a mere sale below cost may result in a valid presumption. Repeatedly, on pages 12, 13 and 14 of the *Payless* opinion, the court makes statements like:

> Section 5 provides that in all actions brought under the provisions of the statute the proof of one or more acts of selling below cost, *together with proof of the injurious effect of such acts,* "shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition."
>
> *Proof of injurious effect* is permitted to be shown with the proof of sales below cost as a presumptive or prima facie evidence that the requisite intent existed.
>
> The Legislature merely enacted into law what is common in human experience, that when a person *causes injuries* by his acts he should be deemed to intend such consequences unless he can excuse or explain his conduct by facts showing that he had an innocent intent. (Emphasis added)

Similar statements are found in the *Mering* opinion at page 989.

From all of these quotations it will be noted that the California Act in addition to providing the presumption from the sale below cost, requires that *injury* be shown. The Utah Act makes no such requirement and, in

fact eliminates such a requirement. Utah Code Ann. §13-5-14 (Repl. vol. 1962). No evidence was presented in the case at bar that any injury had occurred. Hence, the Utah presumption is much stronger than the one in the California case cited by appellants.

In their arguments, appellants seem to vascilate between an argument that the statute requires reasonableness and an argument that difficulty in application of a statute is no reason for its its invalidation. It is submitted that these are not distinct and different arguments. The standard of reasonableness as set forth in the many cases cited by appellants may well be based upon difficulty of application. See *Broadbent* v. *Gibson, supra.* What is the standard of reasonableness when defined in more explicit terms? This standard would seem to be that which the normal, average, reasonable businessman could be expected to do. If, in its application, a statute becomes so difficult that a normal, reasonable, average businessman could not be expected to comply, then the statute has failed the test of reasonability. There are numerous cases holding that unreasonable arbitrary statutes should not be upheld. Upon close reading of these cases, it will be observed that in many of them the reason for the court's holding that such statutes are unreasonable and arbitrary is that they are difficult or impossibie to apply. *E.g. Broadbent* v. *Gibson, supra.* Intervenor-appellant's citations to *W. F. Jensen Candy Company* v. *State Tax Commission,* 61 P.2d 629 (Utah 1936) and *Robert H. Hinckley, Inc.* v. *State Tax Commission,* 404 P.2d 662 (Utah 1965) are entirely inapposite. Both of these cases involved the collection and re-

mittance of sales tax. In neither of the cases was there any contention that the taxpayer could not determine the amount of sales tax due. The only contention in both of the cases was that due to the bracket system of collecting the tax, taxpayer could not collect the tax from his purchasers, yet he had to remit the tax to the state. All taxpayer had to do in either case to figure the tax due was to take his gross sales times the percentage of tax. This is no problem. There was no question of reasonability. Taxpayers knew the amount of the tax, and they knew the exact amount of their sales.

The cases cited by intervenor-appellant on page 23 in support of its proposition that sale below cost statutes have been upheld despite mere difficulty of application do not support this proposition. *People* v. *Kahn,* 60 P.2d 596 (Calif. 1936), was a criminal case in which defendant was convicted on a plea of guilty. Therefore, there was no evidence before the court at all as to difficulty of application of statutory standards.

On pages 24 and 25 of its brief, intervenor-appellant equates cost computation under the sale below cost statutes to cost computations for profit and loss statements. This is really not an equation. Cost computations for profit and loss purposes are made after the fact. No one will contest the fact that accurate cost computations can be made after sales. At the end of the year it is not difficult to arrive at a reasonable profit and loss statement for the transactions which occurred in the preceding year. However, it would be entirely unreasonable to arrive at a profit and loss statement at the

beginning of the year for the future year. This is what this statute, in fact, requires. It requires the merchant at his peril to price his goods prior to the time he sells them, prior to the time he even pays for them in many cases and prior to the time he receives many rebates, discounts and free goods. The trial court found this to be unreasonable.

POINT 2

THE STATUTORY PRESUMPTION OF PERCENTAGE MARKUP PRESENT IN THE ACT WITH ITS CRIMINAL SANCTIONS UNCONSTITUTIONALLY GIVES THE BURDEN OF PROOF TO DEFENDANTS.

Section 13-5-14 of the Utah Unfair Practices Act provides for injunctive relief, and damages. Section 13-5-15 provides a criminal penalty for violations of the Act. It will be noted from a reading of the Act that the provision for injunctive relief, the damages provisions and the criminal provisions are based upon the same statutory violation. The same operative facts constitute a case no matter whether brought as a criminal action, a civil case for damages, or a civil injunctive case. The same definitions of cost apply; the same 6% presumption applies; and the same definition of intent and purpose is applied. The same defenses are available, and the same definition of replacement cost applies. The presumption raised by Section 13-5-9(2) from proof of limitation applies whether the prosecution be civil or criminal. Under this statute, the only difference between a civil case and a criminal action is the form of the ac-

tion. There is absolutely no reason why the court should not consider the criminal provisions of this Act. It is obvious that the civil provisions of this Act cannot be held unconstitutional without perforce holding the criminal provisions unconstitutional also. *Accord, State ex. rel. Anderson* v. *Fleming Co.*, 339 P. 2d 12, 18 (Kan. 1959). *See Pride Oil Co.* v. *Salt Lake County*, 370 P.2d 355, 357 (Utah 1962). On this point, intervenor-appellant cites *State* v. *Barlow*, 153 P.2d 647 (Utah 1944), *appeal dismissed* 324 U.S. 829, *rehearing denied*, 324 U.S. 891 (1945). The *Barlow* case is the Utah polygamy case and contains many issues. In the lower court the defendants were convicted and were arguing that a portion of the Act under which they were convicted was unconstitutional. The court held that that portion under which they were convicted was severable and therefore could be enforced. In dictum the court stated:

> No other part of the statute was invoked in the trial of these cases, hence appellants have no standing to question their validity. *State* v. *Barlow, supra*, at 655.

This case is no authority for a holding that this court cannot consider the criminal penalties involved in the case now before the court. *See Henrie* v. *Rocky Mtn. Packing Corp.*, 202 P. 2d 727 (Utah 1949). Defendants have stipulated to a set of facts which clearly put them in violation of the criminal statute. The fact that no criminal action has yet been brought should not be determinative of whether or not the court considers these sanctions. In *State* v. *Fleming, supra,* the court holds:

> It is elemental that a criminal statute must be definite. [citation omitted]. Neither does the fact

> that this is a civil suit and not a criminal action help the statute enough to make it valid. *We would read this statute as a whole.* (Emphasis added.) *State ex rel. Anderson* v. *Fleming Co., supra* at 18.

The evidence presented in the trial of this case applies equally as well to the civil and criminal penalties. The trial court had adequate evidence on which to base its finding that the presumption unconstitutionally shifts the burden of proof to defendants. *Henrie* v. *Rocky Mtn. Packing Corp.,* 196 P.2d 487, (Utah 1948); *rehearing* 202 P.2d 727 (Utah 1949).

The 6% presumption found in the statute was placed there as an aid to the prosecutor or to the plaintiff. These presumptions are generally put in statutes where the evidence to prove a fact is much more available to the defendant than to the prosecutor. Requiring a defendant to go forward and rebut the presumption, hence, is not deemed to be too great a burden in many cases. In *Morrison* v. *California,* 291 U.S. 82, 88-89 (1934), the United States Supreme Court announced the test for a permissible presumption where it stated that:

> [T]he state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge *the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.* (Emphasis added.)

Accord, Great Atlantic & Pacific Tea Co. v. *Ervin,* 23 F. Supp. 70, 82 (D. Minn. 1938).

This is the test that should be applied in this case.

Whether or not the presumption places too great a hardship or oppression upon the accused is dependent upon the nature of the presumption. The presumption in the instant case, that cost in the absence of proof of a lesser cost shall be 6%, in fact is an irrebuttable presumption. The court found, and the evidence amply sustains the finding, that defendants in many cases cannot compute an exact cost for any item. Since defendants cannot compute a "lesser cost," or even a greater cost, the presumption provided by the statute would prevail. The following possible sequence of events will illustrate:

1. Defendant is charged with a violation of a sale below cost statute based on a sale of aspirin at 55¢.

2. At the time of pricing this aspirin for sale, defendant did not know its actual cost due to discounts not yet received and various non-allocable costs involved in merchandising.

3. Defendant cannot prove a lesser cost and, as a matter of fact, cannot prove a cost at all for the particular item. Even if it could, this would be an after-the-fact determination and would not help it set the original price for which it has already sold the aspirin.

4. In the absence of proof of a lesser cost, the cost is deemed to be 6% above invoice cost.

5. Defendant is convicted of selling under invoice cost plus 6% based upon the strength of the presumption alone.

Generally speaking, presumptions shift only the burden of going forward with the evidence and do not shift the burden of proof. However, if a presumption is to shift only the burden of going forward with the evidence, there must be some possibility of going forward with the evidence. Since in this case the court found that it was in many cases impossible for defendants to "go forward with the evidence," the presumption becomes conclusive. Similar statutory provisions have been held unconstitutional as shifting to the defendant the burden of proving his innocence. *Mott's Super Markets, Inc.* v. *Frassinelli,* 172 A. 2d 381 (Conn. 1961); *Wiley* v. *Sampson-Ripley Co.,* 120 A. 2d 289 (Me. 1956); *Great Atlantic & Pacific Tea Co.* v. *Ervin,* 23 F. Supp. 70 (D. Minn. 1938). See also discussion of the affect of this presumption under Point 1, *supra.*

Considering the lower court holding that the 6% presumption shifts the burden of proof to the defendant and is hence unconstitutional, it should be noted in answer to appellant's argument at pages 30 and 31 of its brief, that defendants admit that a rebuttable presumption does not shift the burden of proof but merely shifts the burden of going forward with the evidence. However, as stated previously, the 6% presumption, to which the court found there was no alternative, is not a rebuttable presumption but is a conclusive presumption. Since the presumption becomes conclusive, it not only shifts the burden of going forward but shifts the burden of proof.

At pages 31-32 of its brief, intervenor-appellant states

that, "the state has the burden of proving a violation [of the 6% statute] before the defendant is required to make any explanation." This statement is not borne out by the record. Mr. Gordon Browning, Executive Secretary of the Trade Commission, when asked about the Trade Commission enforcement procedure and how he would find a sale below cost, stated:

> Basically it is to find out exactly as to the complaint, and then to find a price, a low price, which I would either contact one of the big wholesalers or someone who buys in great quantities, and too low to sell people at, they are at the wholesale level, and I would get their price, plus the 6¾ of their lead in cost, then I would have to use that as a barometer to establish a low price. (R. 122-123)

When further questioned as to how he determined the element of intent, Mr. Browning stated

> Well, the fact that there *is* a legal price would indicate to me that it could be intended, if it is below the legal price, and a person knows it is below the legal price. I would have to think that this, in my mind, would be intention. (R. 124) (Emphasis added.)

From the above it appears that in its enforcement procedure, the Trade Commission is making a presumption of intent which is not allowed by the statute and which, in fact, places the burden of proof initially upon the defendant by reason of the presumption. The presumption being conclusive in its application does shift the burden of proof rather than the burden of coming forward to defendants, since defendants, in fact, cannot come forward.

In support of the proposition that a preseumption as to cost, in the absence of a showing of lesser cost, has been held to not unconstitutionally shift the burden of proof to the defendant, intervenor-appellant cites *Mc-Elhone v. Geror,* 292 N.W. 414, (Minn. 1940). The factual background of this case should be brought out. This was an appeal from an order overruling defendant's demurrer to the complaint. The trial court certified the question as important and doubtful and from this certification defendant was allowed to appeal. There was no trial of the facts. The Minnesota statute involved in this case prohibited all sales "at less than the cost thereof . . . for the *purpose of and with the effect of injuring* competitors and destroying competition." It should be noted that at page 418 the court, in defining cost, states:

> Two elements comprise cost — actual outlay for goods and the expense of doing business. The latter is defined in Mason's Minn. St. 1940 Supp § 3976-42, as "all current costs of doing business . . ." "The cost for the 12 *month period immediately preceding* or a shorter time if the business is less than a year old, is made *prima facie* evidence of current costs." (Emphasis added.)

This statement is very interesting in that it shows how this statute was set up to an after-the-fact method of accounting in order to project future costs. As to the efficacy of this case for the purpose cited, the following quote is essential, at page 419:

> All this section adds is the declaration that 10% of list price is *prima facie* evidence of cost of doing business. In order to say that the infer-

> ence permitted is unwarranted, we must say that there is no rational connection between the current cost of doing business and 10% of the invoice price. *We do not have the facts and cannot so hold.* (Emphasis added.)

Hence, the court is saying that it did not have before it in this case the facts to make a determination as to whether this presumption as to the cost was in fact unconstitutional. Without such evidence, the court has no choice but to uphold the constitutionality of the statute.

At page 37 of its brief, intervenor-appellant cites *State* v. *Eau Claire Oil Co.*, 151 N.W. 2d 634 (Wisc. 1967) as being in accord with *People* v. *Payless Drug Stores,* 153 P.2d 9 (Calif. 1944). The gist of the proposition for which this case is cited as support is that after proof of a sale below cost and *an injury* resulting from such sale, it is not an undue hardship to place upon the defendant the responsibility to come forward with the evidence of its true intent as against the *prima facie* showing. To begin with, it should be noted that both of the above-cited cases require a sale below cost and *an injury resulting* therefrom. The Utah statute requires no such evidence of injury and in the case at bar no proof or evidence was offered by the State as to any injury resulting from a sale below cost. As in the previous cases, it should be noted that there was no trial upon the facts, no stipulation, and there was no evidence taken in the *Eau Claire* case. The definition of cost as set forth by the court at page 637 appears to be exactly the same as that in the Utah Act. The rest of the Act appears to be substantially the same as the Utah Act, except for the fact that

this statute contains a *prima facie* evidence provision with respect to intent in addition to the presumption as to cost. This court held that there is a rational connection between the *prima facie* provision in the statute, e.g.:

> . . ."evidence of any advertisement, offer to sell, the sale of any merchandise by any retailer or wholesaler at less than cost as defined in this section shall be *prima facie* evidence of intent to induce the purchaser of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor."

and the intent requirement of the Act. The court was *not* commenting upon the presumption contained in the staute in addition to the *prima facie* evidence provision. It was construing the *prima facie* evidence provision. In effect, the court holds that it is rational to assume from evidence of sale below cost and a resulting injury that there is an intent to injure competitors. The court does not hold that it is rational to presume a cost of doing business of "X" amount. The court expressly found in the case at bar that there is not a rational connection between the fact presumed and the facts upon which the presumption is based.

POINT 3

THE STATUTORY PRESUMPTION OF PERCENTAGE MARKUP AMOUNTS TO AN UNCONSTITUTIONAL PRICE FIXING BY THE LEGISLATURE IN THAT THE ALTERNATIVE TO THE PRESUMPTION, THAT OF PROVING A LESSER ACTUAL COST, IS NOT A REAL ALTERNATIVE BECAUSE IT IS IN ALL CASES IMPRACTICAL AND IN

MANY CASES IMPOSSIBLE TO PROVE THE ACTUAL COST OF A PARTICULAR ITEM OF MERCHANDISE SOLD IN THE TYPE OF RETAIL OPERATIONS CUSTOMARILY CONDUCTED BY RETAIL MERCHANTS SUCH AS DEFENDANTS.

The finding of the trial court that in many cases proof of actual cost is impossible is amply supported by the evidence. There was testimony by the comptroller of defendant Grand Central that it does not refine its costs to a per-item basis. There was expert testimony that such refinement would not be feasible. Since cost cannot be feasibly refined to a per-item basis, it becomes impossible to come up with a "lesser cost" than the invoice cost plus 6% provided by the statute. *Standard Stores* v. *Safeway Stores, Inc.*, 1955 Trade Cases ¶ 68, 153 (D. Colo. 1955). Because it is impossible to come up with a lesser cost (or any other cost) a retailer must arbitrarily add to his invoice or replacement cost the statutory 6%. By requiring all retailers to arbitrarily add to their invoice or replacement costs the statutory 6%, the statute, in fact, fixes prices at invoice cost plus the statutory 6%. Generally speaking, for stores in the same size category, the invoice price will be the same. Even the smaller stores, as was testified by Mr. Sorenson of Associated Grocers, may partake of this lesser cost by joining an association and buying in volume through the association. (R. 147-148) The statute, through its presumption of 6%, which cannot be rebutted, unconstitutionally allows price fixing in contravention of Article XII, Section 20 of the Utah Constitution.

As ably stated by this court in the case of *Pride Oil Co. v. Salt Lake County*, 370 P.2d 355, 357 (Utah 1962):

> One of the basic tenets of our system is that free and open competition is a wholesome, stimulating force in our economy. Our founding fathers recognized this and so indicated in our constitution; [citing Section 20, Article XII, Utah Constitution] which is also implemented in our statutes. [citing Section 50-1-1 Utah Code Ann. 1953.]

In the above-cited case the court held the provisions of the Motor Vehicle Code requiring posting of gasoline prices to be unconstitutional. It is significant to note that in the *Pride* case this court took notice of whether or not the activity which the statute intended to control so seriously affeced the public interest as to justify the measures proposed for correction. The court stated at page 356:

> The second and more important one is that we see no real likelihood that the restrictions they place on the size and location of signs would materially aid in policing and preventing deception of the public.

The court then goes into the purposes of the statute and states that the argument that these statutes are necessary to prevent deceptive advertising is "something less than candid." Such abuses, the court stated, have been proscribed for many years by

> Our statute which denounces false and deceptive advertising [citations omitted]. From the record of the hearing before the trial court, it is evident that this was not the only motivation behind the statutes in question. *Their passage by the legislature was sponsored by the intervenors, the Utah Association of Petroleum Dealers.* From the testi-

mony of their witnesses, *it is plainly evident that a very important consideration prompting support of this legislation was to control gas price wars. Pride Oil Co.* v. *Salt Lake County, supra* at 357. (Emphasis added.)

Quoting further from the court:

> Despite averments and innuendos to the effect that the latter [gas wars] are in the long run inimical to the public interest, *we are not convinced that they pose any such danger to the public as should warrant invasion of the constitutional rights of the complaining dealers. Pride Oil Co.* v. *Salt Lake County, supra.* (Emphasis added.)

Based upon the reasoning of the court in the *Pride Oil* case, it is not improper for the court in this case to look into the purposes of the statute and its effect *in fact*, rather than just going along with the stated purposes of the statute.

Like the statute in the *Pride Oil* case, the statute involved in the present case is also in fact a price-fixing statute and, as such, is violative of Article XII, Section 20 of the Utah Constitution. In the case of *Gammon* v. *Federated Milk Producers Assn., Inc.*, 360 P.2d 1018 (Utah 1961), this court held that Section 19-A of the Uniform Agricultural Cooperative Association Act did not permit associations to control prices in violation of the Constitution. In so holding, this court stated that an agreement between members of a cooperative association to fix minimum prices for which milk was to be sold was violative of Article XII, Section 20 of the Constitution. The significant part of this case is its uphold-

ing and quoting from the prior case of *General Electric Co. v. Thrifty Sales, Inc.,* 301 P.2d 741, 748 (Utah 1956).

In the General Electric case, this court held the Utah Fair Trade Act to be an invalid price fixing in violation of Article XII, Section 20 of the Constitution. The court stated:

> The federal anti-trust laws were only acts of Congress, which may readily be modified by subsequent enactments; whereas our anti-price-fixing provision is in our Constitution, which must prevail over any statutory enactment inconsistent therewith, *however laudable or desirable, or however wise or even necessary for the public welfare such legislation may seem. General Electric Co. v. Thrifty Sales, Inc., supra.* (Emphasis added.)

Further considering the Fair Trade Act, the court went into an extensive discussion of the intent and purpose of the Fair Trade Act and then a discussion as to whether the Fair Trade Act accomplished the purpose claimed for it. Discussing the arguments existing on both sides, the court, at page 749, states that:

> It is also plausably argued that *instead of being a boon to small retailers as plaintiff argues,* the Fair Trade Act is actually detrimental to them in that it prevents them from getting ahead by efficient operation. That is, by assuring price and profit, it encourages additional retailers to enter the field, spreading the income thinner among dealers. *It is reasoned that the public should not have to bear the additional cost of supporting more retailers, but if business gravitates to more efficient ones who can sell at lower prices, the public should have the benefits of this efficiency.* (Emphasis added.)

Further, the court states

> *The difficulty with the type of "price fixing" here in question, even if it were for the salutary purposes contended by the plaintiff, whether it be a little or a lot, is that it is a violation of our Constitution.* It is like sin, a little sin, if properly so classified, is just as definitely sin as a great quantity of it, and hardly to be approved under the pretext that it is so small an amount that it can really be regarded as virtue.
>
> Although we are aware of the fact that all doubt should be resolved in favor of constitutionality [citations omitted], it nevertheless appears from the interdiction against any "combination . . . having for its object or effect the controlling of the price . . . of any article of manufacture . . . " that the framers simply did not want price fixing by any combination. *We see no reason which would impel us to ignore nor to vary from the plain import of the words of the Constitution* [citation omitted], even though events may have occurred which probably were not foreseen at the time the provision was adopted. [citations omitted.] *We do not regard the situation here presented as involving the regulation of prices where the public health, morals or welfare may be affected and the question of legislative police power under such circumstances is not here dealt with.* *General Electric Co.* v. *Thrifty Sales, Inc.*, *supra*, at 751-752. (Emphasis added.)

From the above-cited cases and the quotations therefrom, it will be seen that this court has, in fact, considered cases under Article XII, Section 20 of the Constitution. In so considering these cases, the court has not been hesitant to look at the real purpose of the statute, aside from the legislatively-stated purpose. Upon this

authority, the court is not precluded from looking into the real purpose and effect of the sale-below-cost statute. It is submitted that the lower court's finding that this statute is a price-fixing statute and violative of the Constitution is based upon the evidence adduced at the trial of the matter and is clearly supported by such evidence. It should also be noted that the federal government has considered this question and concluded that persons joining together, such as intervenor-appellants' members in the case at bar, to seek enforcement of sale below cost acts are in violation of Sherman Act price maintenance provisions. *U. S.* v. *Connecticut Food Council, Inc.*, 1940-1943 Trade Cases. ¶56,167 (D. Conn. 1941); *U. S.* v. *Massachusetts Food Council*, 1940-1943 Trade Cases ¶56,165 (D. Mass. 1941); *U. S.* v. *Rhode Island Food Council, Inc.*, 1940-1943 Trade Cases ¶56,175 (D. R. I. 1941).

At page 32 of its brief, intervenor-appellant commences its argument that the Utah Constitution, Article XII, Section 20, does not prohibit the sale below cost act as price fixing. In support of this proposition, intervenor-appellant cites *Riggins* v. *District Court*, 51 P.2d 645 (Utah 1935). A close reading of this case will disclose that it has nothing to do with price fixing. This case was a test of the state liquor control laws. The court held that the state can be in the liquor business and not be in violation of this statute. It should be noted that there was no factual development in an adversary-type hearing.

At page 33 of its brief, intervenor-appellant, in support of the proposition that the Unfair Practices Act is not a price-fixing measure, cites *Burt* v. *Woolsulate, Inc.*, 146 P.2d 203 (Utah 1944). In that case, plaintiff was suing defendant for breach of contract and defendant was basing its defense upon the Fair Trade Act and the Unfair Practices Act. Defendant was in essence saying that since it was selling its product at $37.50 per ton to everyone else, a contract to sell at $32.50 per ton to plaintiff was void under the Act. It should be noted that the portion of the Act involved there was the Anti-discrimination Section or the Little-Robinson-Patman Act. The court held that such a defense could not be made upon the basis of the Act. Hence, any language purporting to discuss the Act is purely dictum. It should also be noted that the court in *Burt* made much of the fact that the case had not been adequately briefed and argued and that many points had not been raised in the brief which should have been raised. The case was remanded for trial on the facts with relation to the contract, since there was some problem with the trial court's interpretation of the contract. The *Burt* case did not bring into question the constitutionality of the Unfair Practices Act. The only question was whether or not the defendant would, by honoring the contract, violate the Act and the court held that the defendant could not use the Act as a defense.

Intervenor-appellant further cites in support of this proposition *Wholesale Tobacco Dealers' Bureau* v. *National Candy & Tobacco Co.*, 82 P.2d 3, (Calif. 1938). The facts of this case are distinguished *infra*. However, it

should be noted that there was not a hearing on the merits in the case. The case came up on defendant's admissions to violations of the Act. In response to the argument that the court should not go behind the purpose of the statute as stated by the Legislature, the court stated:

> In the first place, mere sincerity or honesty of purpose on the part of the legislature does not alone justify the statute. *The declaration in the statute as to its purposes, does not determine whether the means provided in the statute are reasonably designed to accomplish those purposes.* The courts may properly inquire into the subject. *Wholesale Tobacco Dealers' Bureau* v. *National Candy & Tobacco Co., supra,* at 11. (Emphasis added.)

This case clearly supports the authority of the trial court to make the findings made.

It should be noted that the objections made to the statute involved in *Wholesale Tobacco Dealers* were that it was in violation of the due process and equal protection clauses of the Fourteenth Amendment. As far as the case states, there was no objection as to any violation of any California constitutional provision such as Article XII, Section 20 of the Utah Constitution. At page 15 the court states:

> In its *true* sense, it [the Act] is not a price-fixing statute at all. It merely fixes a level below which the producer or distributor may not sell with intent to injure a competitor. (Emphasis added.)

But, while the court makes the above statement, all of the cases it cites supporting the action of the Califor-

nia legislature were price-fixing cases, cases which upheld the right of a state to fix minimum prices under its police power.

In *General Electric* v. *Thrifty Sales, supra,* the Utah Supreme Court held the Utah Fair Trade Act to be unconstitutional as a price-fixing statute. That statute itself did not fix prices. The court found that the *effect* of the statute was to fix prices. The trial court in the instant case concluded that the effect of the Unfair Practices Act is to fix prices. Such being its effect, the Unfair Practices Act also violates Article XII, Section 20 of the Utah Constitution.

Intervenor-appellant argues that the statutory 6% presumption is not a price-fixing statute, but is in fact an aid to the retailer. This position goes contrary to the general purposes of presumptions in all statutes as set forth above in Point 2. The reason for having a presumption is to aid the plaintiff or the prosecution where the facts are not readily available to them. The presumption in fact puts a burden upon the defendant to go forward with the evidence, which burden he would otherwise not have. Hence, it is quite difficult to say that the presumption in this case aids the defendants.

Intervenor-appellant further likens this presumption to the 10% standard deduction provisions in Federal and state income tax laws. This analogy is completely inapposite. Both Federal and state income tax

laws allow a 10% standard deduction in place of an itemized deduction. However, it will be noted that under Federal and state income tax laws, it is possible to keep records and itemize your deductions. This itemization is an after-the-fact computation which is not at all difficult. Hence, there is a reasonable alternative to the 10% standard deduction. It should also be noted that the 10% standard deduction does not involve any presumptions. A taxpayer need not even take the 10% standard deduction if he does not wish to take it. He will not be prosecuted for a crime nor will he be sued for damages. Under tax laws, at the end of the year a person can sit down with his books and records and determine exactly what he has spent for various items. In contrast, the 6% statute would require a person to sit down before he sells an item, before he incurs rents, before he pays his light bill, before he pays wages, and other overhead expenses, and allocate to each bottle of aspirin that he sells a specific portion of each of these expenses. The record keeping required for tax purposes is not burdensome and not impractical because it is an after-the-fact record keeping system. It is submitted that this is the exact system upon which defendants operate. The court has found that operating under this system, the 6% presumption provides no alternatives to these defendants since they cannot prove a lesser cost.

Intervenor-appellant argues that the court misinterpreted the statutory term "cost" as requiring an exact standard. Intervenor-appellant cites the case of *Balzer* v. *Caler*, 74 P.2d 839 (Calif. 1938) as being a

case holding the statute invalid as requiring a showing of exact cost. A reading of the case cited by intervenor-appellant reveals that this was not the holding of the lower court in the case. This case does not discuss a showing of exact cost. In fact, this case was decided upon an evidentiary question and all of the talk in the case with respect to the constitutional questions is dictum. The California Supreme Court affirmed the case based upon evidentiary facts and held that it did not need to reach a constitutional question. *Balzer* v. *Caler,* 82 P2d. 19 (Calif. 1938).

In further support of its proposition that an exact showing of cost need not be made, intervenor-appellant next cites *People* v. *Payless Drug Stores,* 153 P.2d 9 (Calif. 1944). Intervenor-appellant is entirely incorrect in citing this case for the proposition "cost" means a figure arrived at by reasonable accounting methods. The court in this case held that the factual background for determining the constitutionality of the cost provision was not presented and hence could not be decided. *People* v. *Payless Drug Stores, supra,* at 14-15. In neither the *Payless* case nor the *Wholesale Tobacco Dealers* case relied upon by intervenor-appellant was the factual presentation sufficient to allow a decision on this issue. Therefore, the holding contended by intervenor-appellant for these cases is not in fact the holding. The court in *People* v. *Payless Drug Stores,* supra, at page 15, states:

> [A]ny difficulty in computing cost is a factual one, and statutes are not declared invalid because in

their application factual difficulties *may* arise. (Emphasis added.)

In holding that factual difficulties *may* not invalidate a statute, the California Supreme Court is not holding that factual impossibility or unreasonableness cannot be the basis of invalidation of a statute. In *Broadbent* v. *Gibson*, 140 P.2d 939 (Utah 1943), the Utah Supreme Court held that the Utah Sunday Closing law could not be applied uniformly throughout the state without being unreasonably discriminatory. The holding of the court was based in part upon the difficulty of administration of such a law and the discriminations arising from such administration. In the instant case, the district court held that the requirement placed upon defendants to ascertain their costs prior to selling these particular items would be unreasonable. This was strictly in accordance with the evidence in the case.

In further support of its contention that "cost" as used in the Utah statute should be construed to mean an average cost rather than an exact standard, intervenor-appellant cites the case of *State* v. *Langly,* 84 P.2d 767 (Wyo. 1938). At page 14 of its brief, intervenor-appellant states that:

> The *Langly* opinion answered the contrary holding of the California lower court in *Balzer* v. *Caler, supra,* which was later disapproved also by the Supreme Court of California as noted above.

No reasonable reading of the cases cited by intervenor-appellant can be said to hold that the California Supreme Court disapproved the constitutional issue in *Balzer* v. *Caler.* As stated above, that case did not reach

the constitutional question. The case was not even cited in *People* v. *Payless Drug Stores, supra,* nor *Wholesale Tobacco Dealers' Bureau* v. *National Candy & Tobacco Co., supra,* the cases upon which intervenor-appellant relies.

Intervenor-appellant also relies on the Wyoming case of *State* v. *Langly, supra,* as upholding their contention that the term "cost" is not unconstitutionally vague and ambiguous. They fail to mention the facts of the *Langly* case. In that case, the defendant entered a plea of guilty to a criminal charge under the Wyoming statute, and thereafter filed a motion in arrest of judgment claiming that the statute was unconstitutional. Therefore, there was no trial upon the merits of the case. The trial court had no evidence before it as to the actual facts. Hence, any determination with respect to the constitutionality of the statute involved could not have been based upon the reasonability of its application, since the application of the statute was not questioned by the evidence. In fact, the majority of the court felt that it was not even necessary to discuss the cost definition portion of the statute. *State* v. *Langly, supra,* at 781. Intervenor-appellant at pages 14 and 15 of its brief, cites a long quotation from the above case. The quotation, in itself, dictum though it may be, proves the case for defendant-respondent. In order to get the full meaning of this quote, the entire section should be quoted, including the part omitted by intervenor-appellant.

> These illustrations suffice to show the obstacles in the way of the legislature to do what the California court above-mentioned intimates should be

done, and that these matters had better be left to general business methods. The legislature, doubtless, had such general business methods — reasonable standards of cost-accounting for the various classes of business — in mind and believed them to exist. *If they do not exist — if cost cannot be ascertained — then the act in question should be held to be unconstitutional. If, on the other hand, cost is ascertainable, under reasonable methods, then such cost is purely a question of fact, definite and certain, and the standard of conduct set by the legislature, too, is definite and certain. The non-existence of such reasonable methods cannot be presumed by the court, and if that is so, then the burden of showing it, in order that we might act upon it, was on the defendant, for upon him lies the duty to show the statute to be unconstitutional* [citation omitted], *but no evidence was introduced in this case* . . . . Hence, we should hardly be justified, in the absence of evidence to the contrary, in holding that it did not have in mind [the Legislature] such reasonable accounting methods in the belief that they in fact exist . . . . In that view of the case, the standard set by the legislature is virtually reduced to one of "reasonableness." And it is held that "reasonableness" as "the standard of an act which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law." *State* v. *Langley, supra,* at 779, 780. (Emphasis added.)

The very cases cited and relied upon by intervenor-appellant prove the case for defendant. The *Langly court,* in dictum stated that if cost could not be ascertained, then the Act in question should be held unconstitutional. The lower court in the instant case found (1) that defendants were using reasonable, cost-accounting

methods, and (2) that it would be unreasonable to require defendants to refine their costs as required by the Act since cost in many cases cannot be so refined. These findings of the court are supported by the evidence. It should further be noted that in this case cited by intervenor-appellant, the court did not have before it evidence upon which it could rightly decide whether or not the statute was unconstitutional in its use of the term "cost." Therefore, it was only proper that the statute be upheld. In the absence of any evidence to the contrary, the court stated:

> [W]e must *presume* that the legislature did not intend to prescribe that the cost must be absolutely exact, that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost," what business men generally mean, namely, the approximate cost arrived at by a *reasonable rule. State* v. *Langly, supra,* at 779. (Emphasis added.)

This language of the court is pure dictum. See *State* v. *Langly, supra,* at 781. The cases cited by intervenor-appellant as being in accord with this view, without exception, are also cases which arose without a trial on the merits. *Wholesale Tobacco Dealers' Bureau* v. *National Candy & Tobacco Co.*, 82 P.2d 3 (Calif. 1938), was a case which came up upon an admitted violation of the Act. There was no trial. The sole question presented on appeal had to do with the constitutionality of certain sections of the Act. From the agreed state of facts which the court sets forth, it would appear that the "cost" question was moot in this case, since cost of doing business was a well-established fact in the industry involved.

Wholesale Tobacco Dealers' Bureau v. *National Candy & Tobacco Co., supra* at 7. Hence, it will be seen that this case is entirely inapposite and nonsupport for the proposition cited. The question of cost was not a factor in the case, and no evidence was taken as to the reasonableness of a cost determination. Further quoting from the same statement of the court:

> *We have no way of ascertaining in this case whether the provisions relating to the cost of doing business contained in the act are too uncertain and indefinite to reasonably be applied by any merchant.* Appellant and its supporting amici curiae urge with great vehemence that it is practically impossible for any merchant to have available the necessary facts for calculation of cost of doing business as applied to each article during the course of any current year. Respondent and its supporters urge that simple and proper accounting practices will disclose the necessary information. Under such circumstances the issue cannot and should not be determined in this proceeding. *When and if the issue is properly presented against a proper factual background with the appropriate evidentiary material, this court can then and only then determine the reasonableness of this provision. Wholesale Tobacco Dealers' Bureau* v. *National Candy and Tobacco Co., supra.* (Emphasis added.)

Associated Merchants v. *Ormesher,* 86 P.2d. 1031 (Mont. 1939) is also cited as being in accord with the *Langly* case in upholding the proposition that cost need not be specifically determined. The evidence in this case, on appeal, consisted only of the judgment roll without the evidence adduced at trial. The court stated at page 1032:

> [H]ence the only question for us to determine is whether Chapter 80 is valid. This we must determine from the Act itself *without the aid of factual background save as appears from the findings of fact.* (Emphasis added.)

There was no finding of fact as to the reasonableness or unreasonableness of the cost determination provision. At page 1036 the court quotes extensively from *State v. Langly* and comes to the conclusion that the Legislature has, by the Unfair Practices Act, virtually enacted a rule of reasonableness. If the test is reasonableness, the lower court in the instant case found as a matter of fact and as a conclusion of law the requirements of the Utah statute were unreasonable as applied to these defendants.

State v. Sears, 103 P.2d 337 (Wash. 1940) is also cited in support of the proposition that cost need not be specifically determined. That case arose upon the overruling of a demurrer and defendant having elected to stand on his demurrer appealed. There was no evidence taken as to the application of the statute to specific facts. The case was decided wholly upon the pleadings and the law involved. At page 344 the court states:

> *If we had before us a proper factual background,* we might more easily determine whether or not the terms "cost" and "cost of doing business," as defined by chapter [sic] 221, are not too uncertain and indefinite to reasonably be applied by any merchant, *but we have in this case only the language of the statute,* and *we are not prepared to say at this time, judged by the language of the statute alone,* that simple and proper accounting practices will not disclose the necessary information. (Emphasis added.)

It can be seen from the facts of this case and the language of the court itself that the court did not consider that the proper factual background had been presented for the determination of the reasonableness question as to cost determination. The court had no other choice but to uphold the statute.

Intervenor-appellant further cites the case of *Dikeou v. Food Distributors Ass'n*, 108 P.2d 529 (Colo. 1940), as support for the proposition that cost need not be specifically determined. Cited as upholding the constitutionality of the averaged cost determination, this case is inapposite. At page 531, the court states:

> *The constitutionality of the Act is not challenged either in the briefs or assignments of error.* (Empasis added.)

Flank Oil Co. v. Tennessee Gas Transmission Co., 349 P.2d 1005 (Colo. 1960) is another case cited by intervenor-appellant in support of this same general proposition. The posture of the case is adequately set forth in the following quote from page 1009:

> In seeking reversal, the plaintiff raises the following points: (1) that it was improper to determine the constitutionality of the Act on motion to dismiss; that the lack of valid standard is not apparent on the face of the statute and consequently the question of adequacy of the standard is ascertainable only in light of the evidence on the trial.

The appellate court did uphold the statute but it had no alternative. It had no evidence as to reasonableness

of the standard of cost and hence could not hold the standard unconstitutional. At page 1013 the court makes an extensive quotation from *Wholesale Tobacco Dealers Bureau of Southern California, Inc.*, v. *National Candy & Tobacco Co., supra,* in which the California court comments upon its inability to pass upon the constitutional question because the issue is not properly presented in an adequate factual background. The *Flank* case, in approving and restating this position taken in the California case, is in fact saying that it has not had the proper evidentiary background presented. Hence, the court in the *Flank* case was not considering the reasonableness of the "cost" determination standard since it did not have before it the proper evidence to do so.

Intervenor-appellant further cites the case of *People* v. *Kahn,* 60 P.2d 596 (Calif. 1936) as upholding the California statute against the "void for vagueness" defense. Defendant in that case was arguing that the term "cost" in the statute involved was so vague and ambiguous as to make it impossible to comply with the statute. It should be noted that this was a criminal case which arose upon defendant's plea of guilty. Therefore, as in the other cases cited by intervenor-appellants, there was no competent evidence before the court as to reasonableness or to show impossibility or possibility of proving cost.

In upholding the statute, the court in the *Kahn* case also made much of the fact that the statute required an intent to injure competitors and destroy competition. Hence, the uncertainty of the cost determination was aided by the requirement that actual intent to injure com-

petitors and destroy competition be shown. The Utah Act here questioned does not require a showing of actual intent to injure competitors and destroy competition. All that is required is "an intent and purpose of inducing the purchase of other merchandise." The Utah Act presumes that such an intent is bad and should be punished. It is doubtful, had such a presumption been available under the California statute, whether the California court would have upheld the Act.

In contrast to the factual bases upon which the cases cited by intervenor-appellant arose, the case of *State ex rel. Anderson* v. *Fleming Co.*, 339 P.2d 12 (Kan. 1959), arose after a trial on the merits in an action for an injunction. The statute there involved (an unfair practices act applying only to milk) was held unconstitutional because it had no definition of cost. The court rejected the "good faith" argument based upon the difficulty in accounting and bookkeeping systems. Under different systems, different costs would be determined.

For the proposition that the Unfair Practices Act with its presumption as to cost to the retailer is not a price-fixing measure, intervenor-appellant also cites *Rust* v. *Griggs*, 113 S.W. 2d 733 (Tenn. 1938). The appeal in that case arose on the overruling of a demurrer filed by the defendant which challenged the construction put upon the Act by complainant and which also challenged the validity of the whole Act. A chancellor overruled the demurrer and granted the injunction as prayed. The defendant elected to stand upon his demurrer, sought a special appeal and was granted a special appeal to the

Supreme Court of Tennessee. The case did not arise from an exploration of the facts at trial. The merits of this case were never tried. It should be noted that as to the price-fixing issue, the court summarily dismissed the issue without even considering it.

> In consideration of this statute we may first *observe* that it is not a price-fixing law. It is not therefore necessary to consider decisions of this court and the Supreme Court of the United States respecting statutes of that sort. *Rust* v. *Griggs, supra,* at 735. (Emphasis added.)

As can be seen from this language (which is all of the language relating to price fixing in the case) the court did not even seriously consider the matter for which intervenor-appellant cites the case.

Intervenor-appellants further cite this case in support of their proposition that 6% presumptions as to cost have generally been upheld. Again, the factual background of the case should be noted and it should be observed that there was no evidence before the court as to the effect of this presumption, as there is in the instant case. *Rust* v. *Griggs, supra* at 736. It is also interesting to note the difference in the statute involved in the *Rust* case which allowed the price or cost to be set at "cost to the most efficient retailers." In the case at bar, cost must be set at a "proportionate part" of one's own cost. As to the quote on the bottom of page 33 of intervenor-appellant's brief, it should be noted that the facts of the *Rust* case severely water its efficacy. Defendant-Respondents' case is made by the last sentence of the last sentence of the quote. Intervenor-appellant quotes "the presumption thus created of course *may be*

rebutted." (Emphasis added.) The presumption as to cost of doing business in the Utah statute now before the court has been shown by the facts of this case to be a conclusive presumption and *not* rebuttable.

At page 38 of its brief, intervenor-appellant cites *McIntire* v. *Borofsky,* 59 A. 2d 471 (N.H. 1948) in support of the proposition that the *prima facie* evidence of a violation provided in the statute was constitutional. This case was an action for an injunction. At page 472 the court quotes the New Hampshire statute which states that:

> The advertisement or sale at less than such cost "shall be *prima facie* evidence of a violation of this chapter."

The statute also provides for a *6% markup* to cover the cost of doing business in the absence of proof of a lesser cost.

In commenting upon the *prima facie* evidence provision of the statute, which, it should be noted, is not contained in the Utah statute, the court stated:

> That part of Section 2 providing that advertisements or sale below cost are *prima facie* evidence of a violation of the Act is also attacked. *Since no conclusive presumption of guilt is created,* Wigmore sees no constitutional problem. 4 Wig. Ev. 2d Ed. §1356. So long as there is a *rational connection between the fact to be proved and the fact presumed,* the statute is valid. *McIntire* v. *Borofsky, supra,* at 473.

The *prima facie* evidence statutes which intervenor-appellant continues to cite as supporting cases are not

the same as the 6% presumption as to cost of doing business provided in the Utah statute. The Utah statute contains no *prima facie* evidence provision. Defendant is arguing against the conclusiveness of the 6% presumption. Therefore, the cases relating to *prima facie* evidence provisions of statutes are inapposite. It should be noted that in all of these cases cited by appellants on *prima facie* question, the statute also contains a presumption such as contained in the Utah statute. With respect to the *prima facie* provision of the New Hampshire statute, the *McIntire* court goes on to state that in New Hampshire *prima facie* evidence as used means only evidence to be considered by the jury. An absence of other evidence does not compel a verdict of guilty. The court states, "In view of the limited effect given to *prima facie* evidence in this jurisdiction, we cannot say that its application to unfair competition is unreasonable." Since the New Hampshire courts have construed *prima facie* evidence provisions very narrowly and since under New Hampshire law failure to rebut a *prima facie* case does not mean guilt and also since Utah statute contains no *prima facie* provision but only a 6% presumption as to cost of doing business also contained in the other statutes, it would appear that these cases involving *prima facie* provisions are not applicable at all to the instant case.

Based upon the construction of the above cases as set forth and the distinguishing factors evident in each of these cases, intervenor-appellant's arguments as to cost seem to be straw men. In the first place, the Utah statute requires an exact computation of cost. No other

reading can reasonably be given the words "a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be six percent . . . ." But, even if plaintiff's argument as to a reasonableness standard were adopted, the lower court found that requiring defendants to compute the cost in order to comply with the statute was *unreasonable* and arbitrary, and constituted unconstitutional price fixing. This is truly within the weight of the evidence presented at the trial. It is significant that none of the cases cited by intervenor-appellant involve a situation where a trial was had on the merits with evidence presented as to reasonableness of the standard. All of these determinations were made at the appellate level and many of the courts, as has been pointed out, indicated their inability to make a determination because of the lack of factual background. It is also significant that none of the cases cited by appellants are based upon statutes containing the language "*proportionate part*" contained in the Utah Act.

The argument of defendants in this regard is that under their merchandising conditions and their bookkeeping and accounting methods, proportionate costs for items sold cannot be determined in many cases prior to their sale. Here the statute requires a determination of exact cost — *proportionate part* of the cost of doing business. The court found that such a requirement is unreasonable and many times impossible. Intervenor-appellant argues for a reasonable allocation of costs to each item and states:

> Thus, ascertainment of the cost of any item is not only possible, but at the present time is actually done by Skaggs before the item is priced. Brief of Intervenor-appellant at 19.

It is submitted that intervenor-appellants are misconstruing the statute and taking out of context the statements made at the trial and cited on pages 19 and 20 of its brief. It will be seen from the citations to the record made on pages 19 and 20 of intervenor-appellant's brief that the allocations of cost practiced by Skaggs and Grand Central are decidedly different. Therefore, on the very same item with the very same invoice price, Skaggs and Grand Central can come up with a different "cost" under the Act. Both defendants testified that this was only an average or estimated cost and not a proportionate cost as required by the statute. After its statements as to the allocation of different items by Skaggs and Grand Central, intervenor-appellant makes the following statement:

> There is no allocation of office expense or utilities, but it is submitted that such an allocation could be made on some reasonable basis without undue difficulty or expense.

There is no foundation in the record for such a statement, there was no evidence introduced at the trial that such was the case. Intervenor-appellant has fabricated this supposed evidence from whole cloth. In fact, the opposite was found. The trial court found that such allocations could not be reasonably made by the defendants. It will be seen from the transcript and the record in this case that such a finding was amply supported by the evidence and cannot be overturned by this court.

The quotations from Mr. Hayward of defendant, Grand Central, and Mr. Sinclair of defendant, Skaggs, as to their accounting procedure set forth on pages 20 and 21 of intervenor-appellant's brief, do nothing but support defendants' case. Both Mr. Hayward and Mr. Sinclair give as one reason for their failure to allocate many of the costs to the merchandise the fact that such allocation would be impractical and unreasonable. Both admitted that such allocation might not be impossible. It is submitted that there is very little in this world which is impossible. The Utah Act, however, requires an exact or proportionate allocation of the costs of doing business and the standard, as set forth by the cases cited in intervenor-appellant's brief, is not one of "possibility." The standard contended by intervenor-appellant is of reasonability and the court, in the instant case, found that the Utah statute requiring, as it does, the allocation of proportionate cost to particular items was unreasonable. On page 21 of its brief, intervenor-appellant states:

> There is absolutely no basis in the evidence for the apparent conclusion that further refinement of accounting procedures used by either of the defendants would be or is an impossible or even an impractical alternative.

It is submitted that the following references to the transcript do, in fact, provide ample evidence for the finding that this refinement would be unreasonable, that being the standard rather than impossibility or impracticality. (R. 106, 111, 115, 116, 118-19.) Since the allocation of costs as required by the statute is unreasonable, and creates in fact an irrebuttable presumption that the

"proportionate part" of a retailer's cost of doing business is 6%, the statute in fact fixes prices at invoice price plus 6%, and contravene's Article XII, Section 20 of the Utah Constitution.

A comparison of the 6% presumption to the 10% standard deduction of the federal and state income tax laws is completely inappropriate. *See* discussion at pages 46-47, *supra*. The alternative to the 10% standard deduction under the income tax laws is computable by after-the-fact accounting methods. No taxpayer is required to predict in advance what his deductions will be and allocate them to specific items of merchandise. However, the 6% presumption created by the Utah Unfair Practices Act requires cost accounting in advance of sales. It requires the merchant to predict in advance what his "cost of doing business" is and then allocates this cost to the various items of merchandise which he sells. It is submitted that after such merchandise is sold, for instance at year's end, a merchant could, by after-the-fact accounting methods, allocate a fairly accurate cost to the items of merchandise which he has sold. It is therefore submitted that the legislature did not aid the merchant by the use of the 6% presumption and even if it were intended to aid the merchant, it does not in fact aid the merchant. The court is correct in its finding that the 6% presumption leaves no alternative and in fact becomes a conclusive presumption of the cost of doing business, and unconstitutionally fixes prices.

Respondents are not, as alleged by intervenor-appellants, seeking to have their cost accounting done for them by someone else. Respondents assert, and the court

so held, that the statute is unworkable. They cannot allocate their costs to the items sold and hence cannot comply with the statute.

POINT 4

THE STATUTORY REQUIREMENT THAT "COST TO THE RETAILER" BE THE "COST . . . TO THE RETAILER WITHIN THIRTY DAYS PRIOR TO THE DATE OF THE SALE, OR DATE OF OFFERING FOR SALE" AND THAT "REPLACEMENT COST" BE THE PRICE AT WHICH MERCHANDISE SOLD OR OFFERED FOR SALE COULD BE BOUGHT "AT ANY TIME WITHIN THIRTY DAYS PRIOR TO THE DATE OF THE SALE, OR DATE UPON WHICH IT IS OFFERED FOR SALE" DISCRIMINATES AGAINST A LARGE VOLUME RETAILER SUCH AS DEFENDANT AND DEPRIVES IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIES IT EQUAL PROTECTION OF THE LAW. FURTHER, SAID PROVISIONS ARE VAGUE, AMBIGUOUS AND UNREASONABLE AND PLACE UNREASONABLE BURDENS UPON DEFENDANTS.

Large volume retailing operations such as defendants are able to exist in today's competitive world because of their efficiency. One area in which they are able to economize is in their purchasing departments. As stated in the testimony of Mr. Keith Warshaw, the person in charge of purchasing for defendant, Grand Central has several different methods of buying, depending upon the particular merchandise.

With respect to much of the merchandise purchased by Grand Central, the testimony is that it is purchased far in advance of the sale date. An example is given of Christmas merchandise. Mr. Warshaw testified that Christmas merchandise may be bought as far as six months in advance. As a result of this early buying, defendant receives substantial discounts. The testimony explains that one of the reasons for these discounts is that early buys such as this enable manufacturers to keep their plants in operation the year around. Mr. Warshaw also testified that if he were to run out of some of this merchandise purchased at an early date and have to restock it near Christmastime, the price would be substantially higher due to the loss of the early buying discount, possibly a volume discount, and freight factor. On these early buys where large quantity is bought, the freight would be substantially reduced on a per-item basis. Therefore, the testimony is that whenever possible, defendant Grand Central buys early and buys in volume.

The statute, by requiring that cost be determined within thirty days prior to the date of sale or the date of offering for sale, severely discriminates against defendants in that it neutralizes this ability they have to buy early and to buy in volume. If Grand Central were to purchase Christmas wrapping paper six months before Christmas on an early-buy program, under the statute any of this wrapping paper sold on Christmas Eve would have to be sold based upon a theoretical replacement cost on November 24. The testimony in the record indicates that the cost on November 24 would be substantially greater than the cost actually paid for the merchandise.

Hence, the statute is requiring Grand Central to purchase on the same basis that the small corner grocery store would purchase, where this grocer cannot, due to his volume, take advantage of early buying or volume buying. Early buying and volume buying are legitimate business practices. By denying defendant the benefit of these legitimate business practices and forcing it to set its prices at the prices of its less efficient competitors, the Act in fact discriminates against defendants and denies them equal protection of the law. *See Cohen* v. *Frey & Son, Inc.*, 80 A.2d 267 (Md. 1951). In taking from defendants this advantage which they are able to gain through their efficiency and size, the statute is taking from the defendants their property without due process of law, and violates equal protection of the law. *Cohen* v. *Frey, supra; Serrer* v. *Cigarette Service Co.*, 76 N.E. 2d 91 (Ohio 1947). *See State* v. *Wender,* 141 S.E. 2d 359 (W. Va. 1965).

The testimony also indicates that on certain occasions defendant Grand Central has advertised specials. As set forth in the stipulation, Grand Central purchased turkeys on November 8, 1965, at $.33½ per pound. Thereafter, on December 17, 1965, mor ethan thirty days after the original purchase, defendant purchased additional turkeys at an invoice cost of $.37½ per pound. On December 17, 1965, and thereafter, defendant had in stock commingled frozen tom turkeys purchased on November 8, 1965, at $.33½ per pound and on December 17, 1965, at $.37½ per pound. These commingled turkeys were subsequently sold by defendant on and after December 17, 1965, for $.37 per pound. Under the Act, this was a

violation because the turkeys purchased on November 8, were sold more than thirty days after purchase. Therefore, the "cost to the retailer" should have been determined upon the basis of replacement cost or a theoretical replacement cost. If Grand Central had advertised a special beginning December 7, and running through Christmas, on turkeys based upon the lower original cost, under the statute, after December 8 it would have to raise the price even though it was still selling the initially-purchased turkeys. Such a requirement places an unreasonable burden upon defendant to keep its merchandise segregated so that it knows when it purchased each item. It also penalizes defendant in that it does not allow it to take advantage of its earlier price and sell for a correspondingly lower price. In attempting through this method to stabilize prices, the Act in fact discriminates against the more efficient retailer and promotes the inefficient retailer.

This thirty-day pricing requirement is arbitrary, unreasonably discriminatory and has no relevance to the purpose of this statute. *See State* v. *Mason,* 78 P.2d 920 (Utah 1938). Statutory discriminations such as this resulting in limitations upon the defendant's property rights, are valid only if they have a reasonable relationship to the purpose of the Act. See *State* v. *Mason, supra.* The legislative policy of the Act and its purpose as stated in Section 13-5-17, Utah Code Annotated (Repl. vol. 1962), 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 compe-

tion is destroyed or prevented." The thirty-day requirement does not in any way foster and encourage competition, nor does it prohibit unfair and discriminatory practices. In fact, what it does is prohibit fair and efficient retailing. It cannot be argued that the prevention of efficient retailing helps to preserve honest competition. As stated before, all this does is promote inefficiency and tend to stabilize the retailing market on the level of the more inefficient retailer. This cannot be said to "safeguard the public." Utah Code Ann. §13-5-17 (Repl. vol. 1962).

Further, it should be noted that by placing the thirty-day restriction in the definition of replacement cost and invoice cost, the statute creates a vague, ambiguous and unenforceable standard placing an unreasonable burden on the retail merchant. *See* discussion page 77, *infra*. In a large volume retailing operation such as that of defendant, it is virtually impossible for defendant to keep track of his stock so as to know whether or not he is selling it within the thirty-day period. The Act would seem to require that defendant check his shelves every day to make sure that not one bottle of aspirin or one can of hair spray is being sold (or offered for sale) more than thirty days after its purchase based upon the purchase price. Then, after having found his bottle of aspirin or can of hair spray on the shelf which was purchased more than thirty days before its sale date (or offer for sale) he would have to adjust the price. There arises then the possibility that he could have thirty different prices on the same item of merchandise. That is to say if purchases of aspirin or hair spray were made

each day of the month, then thereafter the ones not sold prior to the expiration of the thirty-day period would have to be re-marked. Hence, every day certain of the items would be re-marked, based upon the fluctuating price of the commodity. As was stated in the testimony of Mr. Keith Warshaw, items such as hair spray fluctuate in price greatly. (R. 63) To keep track of these prices in order to comply with the Act would be impossible. The Act also becomes vague and ambiguous in its determination and use of the thirty-day period in that it does not say whose price the replacement price shall be As stated in the testimony of Mr. Keith Warshaw, there are numerous places where one can obtain hair spray. (R. 63-64) Hence, it cannot be determined whether the theoretical replacement price is to be based upon the price at which the retailer could have bought this same commodity from the same supplier, from a different supplier, from a wholesaler, from a jobber or even as a jobber.

In its application, this section of the statute becomes so vague and ambiguous and places such a burden upon the merchant that it cannot be upheld as constitutional. *See State ex rel. English* v. *Ruback,* 281 N.W. 607 (Neb. 1938); *Henrie* v. *Rocky Mtn. Packing Corp.,* 202 P.2d 727 (Utah 1949). The trial court in the case at bar concluded that:

> The definition of the term "replacement cost" in the Act is vague, ambiguous and unenforceable and places an unreasonable burden on the retail merchant in determining whether or not his price for a particular item of merchandise is or is not in violation of the Act." (R. 44)

For the proposition that the term "replacement cost" may be easily ascertained by merely keeping abreast of the current market and is not violative of standards of vagueness, intervenor-appellant cites *Hill* v. *Kusy,* 35 N.W. 2d 594 (Neb. 1949). This case arose when plaintiff filed for a declaratory judgment and an injunction against defendant for violating the Sale-Below-Cost Act. Plaintiffs also asked for damages and for equitable relief. Defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action against him. The trial court overruled the demurrer and gave the defendant time to further plead. Defendant refused to further uplead and the trial court decreed the Act was not unconstitutional. The case cited by defendant did not arise upon a trial on the merits. It came up on a demurrer. The trial court did not have before it the facts or circumstances which the lower court in the instant case had. The following quote appears on Page 597 of the *Hill* case, and should be noted with resepect to the proposition for which intervenor-appellant cites the case:

> It further is urged that there is a lack of clarity, which renders the act void, in the meaning of the terms used in the act, such as "replacement cost," "proportionate part of the cost of doing business" and "unfairly diverting trade from a competitor." The terms may present difficulties in application *when the sufficiency of evidence in fact questions is presented.* Mere difficuilty of application in the process of litigation is not enough to enable a court to say that a statute is unconstitutional. (Emphasis added.)

In the instant case, the trial court had ample evidence before it to sustain its findings and conclusions that the "cost" provisions of the Utah Act were unconstitutional. These findings should be upheld on this appeal.

POINT 5

THE STATUTORY DEFINITION OF COST, BY PERMITTING THE DEDUCTION OF TRADE DISCOUNTS AND EXCLUDING THE DEDUCTION OF CASH DISCOUNTS, IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS AND DISCRIMINATES WITHOUT REASON BETWEEN TYPES OF DISCOUNTS.

Classifications, in order to be valid, must be reasonable. Mr. Justice Wolfe, in the case of *State* v. *Mason*, 78 P.2d 920 (Utah 1938), very ably sets out the test:

> Of course, every legislative act is in one sense discriminatory. The Legislature cannot legislate as to all persons or all subject matters. It is inclusive as to some class or group and as to some human relatonships, transactions, or functions and exclusive as to the remainder. For that reason, to be unconstitutional the discrimination must be *unreasonable* or *arbitrary*. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some *basis* for the differention between the classes for subject matters included as compared to those excluded from its operation, provided the differention *bears a reasonable relation to the purposes to be accomplished by the act*. *State* v. *Mason, supra* at 923. (Emphasis added.)

It is also clear that statutes proscribing otherwise legitimate conduct must be sufficiently clear so as to inform the possible violator of a violation. In *State* v. *Packard,* 250 P.2d 561 (Utah 1952), Mr. Justice Crockett set forth the test very clearly:

> 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 responsibility of applying and enforcing it. *State* v. *Packard, supra,* at 564. (Emphasis added.)

The statute involved in the instant case violates both of these above-mentioned rules in that it unreasonably and arbitrarily excludes "discounts for cash" from the favorable treatment given "all trade discounts" in the definition of cost to the retailer. The Act is also unconstitutionally vague and ambiguous in that it fails to adequately define the terms "trade discounts" and "cash discounts."

The record in this case is replete with references to the different types of discounts obtained by defendants, *e.g.* R. 68-69, 72-73, 84, 90-91. Some of these discounts were described by Keith Warshaw as early booking, warehouse, anticipation, advertising, free goods, and volume discounts. (R. 68-69) In many cases, defendants

also receive a discount for early payment. In order to be able to deduct a discount from the selling price of an item, defendants must first determine whether this discount is a trade discount or cash discount. With no definitional standards placed in the Act, this places upon defendant a heavy burden. Whether defendants can legally deduct from its "cost" the early booking discount, the warehouse discount, the anticipation discount, the advertising discount, the free goods discount or the volume discount must in the final analysis be determined by a court. In taking any of these discounts as a deduction on its "cost," a retailer is acting at its peril for at a later date any one of these discounts could be classed as a "cash discount" and hence disallowed. Disallowance of the discount could then subject the retailer to liabilities and prosecution under the Act for a sale below cost. This latent ambiguity contained in the terms "trade discount" and "discounts for cash" places an unreasonable burden upon defendant. Under the standards set forth in *State* v. *Packard*, *supra*, this statute must be declared unconstitution. It is not sufficiently definite so as to inform a person of ordinary intelligence, who would be law abiding, what his conduct should be in order to conform to its requirements. It would take a person with a divine intelligence in order to determine what the Legislature intended by the terms used in the statute. Nor is the statute sufficiently definite so as to advise a defendant accused of violating it with what he is charged. If defendants were to take, for instance, their anticipation discount as a trade discount and hence deduct it from their "cost," they could be prosecuted under the

Act for a criminal violation and for civil penalties if it were later determined that this anticipation discount is really a cash discount. The same would be true with any of the other discounts mentioned. Further, the statute is not susceptible of a uniform interpretation and application by those charged with the responsibility of enforcing and applying it. Each retailer, by his type and volume of business, receives many different types of discounts. These discounts are variously enumerated. Many of the discounts, though called by a different name, are essentially the same. Uniform application and interpretation of this section would require regulations clearly setting forth each of the allowable discounts and each of the non-allowable discounts. Due to the very nature of the retailing business, this would be practically impossible. The types and kinds of discounts vary with the type of business involved. The vagueness of the standard creates practical impossibility with respect to enforcement.

Under present retail marketing methods, where many types and kinds of discounts are received and where such discounts vary greatly between different classes of businesses and different sizes of businesses, there is absolutely no basis for differentiation between "trade discounts" and "discounts for cash." Neither does this differentiation bear any reasonable relation to the purpose of the Act. If what is meant by the statutory term "discount for cash" is the discount many suppliers and manufacturers give to the retailer who pays prior to the tenth of the month, there is absolutely no reason for distinguishing this type of discount from a discount

received due to volume buying or one received due to early buying. All of these discounts are available to the merchant who can qualify for them. Some merchants are in a position to buy early. Some merchants are in a position to buy in large volume. Other merchants may be in a position to pay early. One merchant may be in a position to take advantage of all of these discounts while another merchant might be able to take advantage of only one. To distinguish between the discounts arbitrarily and unreasonably distinguishes between different types of merchandising operations. *Cf. Cohen* v. *Frey & Son, Inc.*, 80 A.2d 267 (Md. 1951). Economically there is no basis for such distinction since all of the discounts grant an equal advantage to the person who can take advantage of them and an equal disadvantage to the person who is unble to take advantage of them. There is nothing inherently different about discounts for prompt payment and discounts for volume or for early buying. They all amount to preferential treatment for particular purposes. The statutory discrimination between these types of discounts is unreasonable and arbitrary in including discounts labeled trade discounts and excluding discounts labeled discounts for cash. *See State* v. *Mason*, 78 P.2d 920, 923 (Utah 1938).

Another requirement of *State* v. *Mason* is that the differentiation must bear a reasonable relation to the purposes to be accomplished by the Act. As stated in Section 13-5-17 of the Act, the purpose of the Legislature in passing the Act was 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.'' Discrimininiating between ''trade discounts'' and ''discounts for cash'' can be shown to bear no reasonable relation to this stated purpose of the Act. If a cash discount would be inimical to the purposes and policy of the Act, so would be a trade discount, since both serve exactly the same function. The trial court in the case at bar concluded that ''the statutory definition of cost by permitting the deduction of trade discounts and excluding the deduction of cash discounts is ambiguous and discriminates without reason between types of discounts.'' (R. 44) This conclusion of the court is amply supported by the evidence adduced at the trial and by simple logic.

POINT 6

THE ACT IS ARBITRARY, UNREASONABLE AND UNCONSTITUTIONAL IN PROHIBITING SALES BELOW COST AS DEFINED IN THE ACT WHERE THE ONLY INTENT OF A RETAILER IN PRICING THE ITEMS BELOW COST IS TO INDUCE CUSTOMERS OF THAT RETAILER TO PURCHASE OTHER MERCHANDISE FROM THAT RETAILER, AND HENCE IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND ARTICLE XII, §20 OF THE UTAH CONSTITUTION.

There is ample evidence in the transcript of the trial that defendant Grand Central has a fairly stable clientele. Much of the testimony of the witnesses for the defense was to the effect that its pricing policies were de-

veloped with the thought in mind of protecting its established clientele, while of course increasing it where possible. (R. 53-55) Section 13-5-7 of the Sale-Below-Cost Act in subsection (a) provides:

> It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act *with the intent and purpose of inducing the purchase of other merchandise* or of unfairly diverting trade from a competitor or otherwise injuring a competitor impairs and prevents fair competition, injures public welfare, is unfair competition contrary to public policy and the policy of this act and is declared to be in violation of this act.

The italicized portion of the above-cited statute presents the problem discussed in this Point. The Act would seem to prohibit a sale below cost with the intent and purpose of inducing the purchase of other merchandise regardless of the unfairness or fairness of the transaction and also regardless of who made the purchase or what was purchased. This provision would seem to prohibit such a sale even if the sale were for the sole purpose of inducing a regular customer of defendant to purchase other merchandise which a competitor did not even sell. The Act would seem to make no requirement that it be shown that such a transaction in any way harmed a competitor of defendant or took from the competitor any business. As distinguished from the phrase which prohibits unfairly diverting trade from a competitor, or injuring a competitor, the above-italicized portion of the Act prohibits conduct which is in no way shown to harm a competitor. Absent the element of harm to a com-

petitor, there would be no harm to competition. Since there is no harm to competition, this provision is not reasonably related to the purpose of the Act and is hence unconstitutional. *See State* v. *Mason,* 78 P.2d 920 (Utah 1938).

Even if the Act were interpreted to read that the sale below cost with the intent and purpose of inducing the purchase of other merchandise also required a showing of diverting trade from another merchant, the statute would still be unconstitutional. In prohibiting a sale with the intent and purpose of inducing the purchase of other merchandise while not prohibiting a like sale without this intent and purpose, the statute sets up a classification. As set forth in *State* v. *Mason, supra,* a classification, in order to be deemed reasonable, must contain some basis for the differentiation and must be reasonably related to the purposes of the Act. Judicial notice can be taken of the fact that all competitors are in business with the intent and purpose of inducing the purchase of merchandise. Inherent in the idea of competition is the fact that if one competitor makes a sale, another competitor may lose a sale. Hence, the very essence of our competitive system is that each participant is out to get all that he can get by fair means. In so operating, one of the chief goals of the competitor is to divert business away from his competitors. There is nothing inherently bad about this goal — this is perfectly legitimate business and is amply supported by the Utah Constitution.

Article XII, Section 20 of the Utah Constitution expresses the overriding concern of the members of the

Constitutional Convention with the idea of free and untrammeled competition. This particular section of the Constitution was enacted specifically to promote and enforce the idea of free competition. The Sale-Below-Cost Act was supposedly enacted in furtherance of this constitutional policly. Nothing in the italicized portion of the above-cited statute can be said to promote competition. The conduct prohibited in this section is in fact the very essence of competition. In prohibiting such conduct, the statute goes contrary to the specific policy of the Utah Constitution.

It should be noted that the italicized portion of the above-quoted statute should be read along with its disjunctive phrase. Since the second phrase "or of unfairly diverting trade from a competitor or otherwise injuring a competitor" is written in the disjunctive, it must be read that way. By placing an "or" before the second phrase, the obvious purpose of the Legislature was to differentiate between the first and the second phrases. The second phrase requires an intent to treat unfairly or injure a competitor. The requirement of intent to injure provides the necessary criminal intent to support the criminal statute. Such a requirement is strictly in line with the policy of Article XII, Section 20 of the Utah Constitution, and the policy set out in Section 13-5-17 of the Sale-Below-Cost Act. Statutes similar to the above-italicized portion of the Utah Act have been held unconstitutional because they had no requirement of criminal intent. *State ex rel. Anderson* v. *Fleming Co.*, 339 P.2d 12 (Kan. 1959); *State* v. *Packard-Bamberger & Co.*, 8 A.2d 291 (N. J. 1939); *Englebrecht* v. *Day*,

208 P.2d 538 (Okla. 1949). Since it cannot be read as including the requirements of unfairness or injury, this portion of the Utah Act must be held to be unconstitutional as a violation of due process under the Federal Constitution, and Article XII, Section 20 of the Utah Constitution. *See Fairmont Creamery Co.* v. *Minnesota*, 274 U.S. 1 (1927).

Significant at this point is the enforcement procedure of the Utah Trade Commission with respect to this provision of the Act. Mr. J. Gordon Browning, Executive Secretary of the Utah State Trade Commission, testified with respect to the enforcement procedures of the Trade Commission. The following dialogue between Mr. Browning and Mr. Waldo is significant:

> Q. (by Mr. Waldo) Let's take the violation that is alleged in the complaint here of selling Bayer Aspirin at less than cost. How do you determine the other, the more or less thing of the violation, but the intent element of the violation? What is your procedure in determining that aspect?
>
> A. Now as to the monopoly, it is my understanding that the word "monopy" has been taken out. I am just not quite —
>
> Q. Well, there are two elements involved in the violation, is that not so?
>
> A. Right.
>
> Q. One you have to sell below cost, and second you have to have one of these intents that is deemed unlawful by the Act. Now, what I am asking you is how you determine the intent that is deemed unlawful by the Act.
>
> A. Well, the fact that there is a legal price would indicate to me that it could be intended, if it is

> below the legal price, and the person knows it is below the legal price. I would have to think that this in my mind would be intention. (R. 124-125)

From the foregoing quote it will be observed that in enforcing this Act the Trade Commission in fact has a presumption of intent from the sale below cost. There is no statutory presumption provided for this purpose. Hence, the Trade Commission not only does not require any actual showing of unfairness or injury to a competitor, but assumes or presumes intent from the fact that a sale was shown to be below cost. Such a presumption of intent to induce the purchase of other merchandise, along with the fact that this phrase cannot be read in conjunction with the phrase providing for unfair or injurious treatment to a competitor, renders the italicized phrase in the above-quoted statute completely unconstitutional and contra the policy of the Act itself.

Except for the stipulation of the parties as it relates to Count I of the Complaint, there is no evidence whatsoever in the record in the instant case that defendants had any intent or purpose to unfairly divert trade from a competitor or otherwise injure a competitor. There is evidence to support the proposition that defendants did have an intent and purpose to induce the purchase of other merchandise. Intervenor-appellant argues that proof of an intent to gain business from a competitor is proof of an intent to injure the competitor. In support of this proposition, it cites *Laundry Operating Company v. Spalding Laundry & Dry Cleaning Company,* 383 S.W. 2d 364 (Ky. 1964). The plaintiff in that case was ap-

peal from a summary judgment entered against it on the basis of pretrial depositions, the opening statement of counsel, and the testimony of its president and chief witness. It was agreed that no further additional facts in *support* of the complaint would have have been developed in the course of the trial. At the trial a summary judgment dismissing the complaint was granted on the basis that there was not sufficient evidence to support a finding that defendant had intended to injure competitors and destroy competition. This dismissal was reversed on appeal. Upon thorough analysis of the extensive quote from the appellate opinion set out by intervenor-appellant at page 39 of its brief, it will be seen that the theory of the court in that case was unsound. In that case, the defendant had called on customers of its competitor laundry company and offered them two weeks' free service if they would try its service. By this method the competitors' customers were lured to defendant. The court held that in calling upon customers of its competitor and offering this free service, defendant knew or should have known that he was unfairly diverting trade from his competitors. It is submitted that these facts do not sustain the holding of the court. Even if the facts do sustain the holding, the facts were much more gross than any involved in the instant case. In no part of the instant case were either of the defendants knowingly soliciting particular customers of competitors. All they were doing was trying to expand their own business. The court stated in *Laundry Operating Co.*, "We do not suggest that a purpose to divert or capture a competitor's business is wrong or unethical. *It*

is perfectly legitimate so long as it is not carried out unfairly.'' *Laundry Operating Co.* v. *Spalding Laundry & Dry Cleaning Co., supra* at 366. The whole essence of the case was that it was not too difficult to infer intent from the actions of defendant. That is, intent to injure its competitors, when it went right out and solicited specific customers which it knew it would be taking from competitors. Nothing approaching this conduct occurred in the case now before the court.

Even if a presumption of intent was explicitly provided under the Utah Act, such a presumption would be unconstitutional, under cases cited by appellant and cases cited herein at 72 supra. On page 34 of its brief, intervenor-appellant cites *Great Atlantic & Pacific Tea Company* v. *Ervin*, 23 F. Supp 70 (D. Minn. 1938).

Intervenor-appellant cites this case for the proposition that, ''although the court held the statute in question unconstitutional on grounds which do not apply to the instant case, the court specifically held that the *legislature* may properly presume that the markup may be fixed at 10% in the absence of a showing of a lesser markup.'' Brief of Intervenor-Appellant 34. True, the the legislature may indulge in such a presumption under certain conditions. However, this statement by intervenor-appellant is expressly contrary to the holding of this case. The case expressly holds that the 10% presumption in the absence of proof of a lesser cost is unconstitutional. In this regard, the court states:

> With respect to the presumption created by the sixth paragraph of section 3 of part 2, we have already pointed out that, in our opinion, the fact

of *guilty intent is not reasonably to be inferred from the fact of sale at less than* 10% *per cent* [*sic*] *above the cost of the goods.* No doubt, the presumption of guilt would be helpful to the state in the prosecution of alleged violators of the statute, but it would be as hurtful to the accused as it would be helpful to the accusor. *Intent is something which is easily asserted and hard to disprove. To cast upon a merchant who has sold goods at less than* 10% *per cent* [sic] *above their cost, the burden of establishing that the sale was not made with an intent to injure competitors or destroy competition, subjects him to unreasonable hardship.* We think the disadvantage to him of the presumption of guilt should be regarded as outweighing the advantage of the presumption to the state. *Great Atlantic & Pacific Tea Co.* v. *Ervin, supra,* at 82. (Emphasis added.)

POINT 7

THE TERMS "UNFAIRLY DIVERTING TRADE FROM A COMPETITOR," "INJURING A COMPETITOR," and "LEGAL PRICES OF A COMPETITOR" AS USED IN THE UNFAIR PRACTICES ACT ARE UNCONSTITUTIONALLY VAGUE, AMBIGUOUS AND DO NOT SUFFICIENTLY WARN THE POTENTIAL VIOLATOR OF THE PROHIBITED ACTS AS CONSTRUED AND APPLIED BY THE TRADE COMMISSION.

The United States Supreme Court has held that:

> . . . 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. *Connally* v. *General Const. Co.,* 269 U.S. 385, 391 (1926).

The standard of definiteness required by the Utah court in order to sustain the validity of a statute over a charge of void for vagueness is adequately set forth by Mr. Justice Crockett in the case of *State* v. *Packard*, 250 P.2d 561 (Utah 1952). In that case, Russell Packard was convicted of failing to register with the Industrial Commission before commencing employment. Conviction was had under a Utah statute requiring "every person before commencing employment with a person, firm or corporation whose employees are out on a labor strike called by a *national recognized union* to register with the Industrial Commission of Utah." Section 49-1-29, Utah Code Ann. (1943). (Emphasis added.) Defendant contended that this statute was void because it was vague and uncertain. The phase relied upon in the argument for vagueness was the phrase "called by a national recognized union." Defendant argued that these terms were not susceptible of definition sufficient to warn defendant of the possible consequences of his action.

With respect to the question of uncertainty and vagueness of statutes, the court set down some standards which should be applied in the case at bar. The court held that a statute, in order to be valid, 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 unform interpretation and application by those charged with responsibility of applying and enforcing it." *State* v. *Packard*, *supra*, at 564.

In applying these standards to the wording of the statute involved in the *Packard* case, the court held that the terms "a national recognized union" injected such uncertainty into the statute as to render it void for vagueness. The court held that the problem with the terms as used in the statute was that one could not ascertain who was to recognize the union, if it was to be recognized, whether it was to be recognized by the public generally, by other labor organizations, by industrial leaders, by the NLRB or some other source, or whether the average citizen having heard of the union gave it national recognition. The court went on to state:

> There is, of course, no legal standard referred to in the statute or known to us, by which it may be determined what a "nationally recognized" union is. *State* v. *Packard, supra*, at 564.

Absent such a standard, the court held the statute unconstitutional. The further problem inherent in this statute, the court held, was that a person of average intelligence could not conveniently identify which unions would come within the statute and which unions would not. The uncertainties of the statute were such that a person might be "perplexed to know whether he had to register before going to work. Therefore, the statute is so indefinite and uncertain that it is unconstitutional, as ruled by the lower court." *State v. Packard, supra,* at 565.

A similar problem arose in an earlier Utah case, *Henrie* v. *Rocky Mtn. Packing Corp.,* 202 P.2d 727 (1949). This opinion was written as the result of a rehearing of the case originally heard and reported in 196 P.2d 487

(1948). The case involved the provisions of Section 14-6-3 of the Utah Code Annotated (1943). That statute made it a misdemeanor to employ a minor under the age of 18 years "in any place of employment, *dangerous or prejudicial* to the life, health, safety or welfare of such minor." (Emphasis added.) Young Mr. Menrie was killed as a result of possible negligence on the part of his employer. The issue of the case was whether the father of the deceased youth should be able sue his employer for wrongful death or whether the accident was under the jurisdiction of the Industrial Commission and governed by limitations on liability. The court had, in a previous case, determined that the question of whether the Industrial Commission or the court had jurisdiction was based upon whether a misdeamenor had in fact been committed by the defendant. If a crime had been committed, or if deceased was illegally employed, the trial court would have sole jurisdiction. If he was legally employed, the Commission had exclusive jurisdiction. Whether he was legally or illegally empoyed depended upon whether his place of employment was "dangerous or prejudicial" to health, life or safety in violation of the above-cited statute. The key word in the statute is "dangerous." The court in the *Henrie* case held that the term "dangerous," being a comparative term, was too vague and ambiguous to constitute the standard for a crime. The court states:

> It is a principle too familiar to require citation of authority, that penal statutes, to be constitutional, must be clear and definite in their terms so that there may be known exactly what conduct is proscribed. *Henrie* v. *Rocky Mtn. Packing Corp., supra,* at 729.

In referring to the term "dangerous," the court called it an "accordian" term. The problem with the term was the shear difficulty placed upon an employer to determine whether or not his business was "dangerous." The court goes on to point out that some businesses are known to be dangerous. Such are called the inherently dangerous businesses such as mining, quarrying, railroading, and manufacturing of explosives and dangerous chemicals. In such industries there would be no doubt as to the dangerous nature. However, any industry or any line of work can possibly lead to injury or danger. The court pointed out that there was absolutely no "safe" work if that term were used literally. Since all businesses were not considered safe and all businesses were not considered dangerous, a burden was placed upon the defendant of making his own decisions as to whether his business was dangerous. Such a burden, the court held, could not be placed upon the defendant. The statute placing such a burden upon a potential defendant is so ambiguous and vague as to violate the constitutional standards.

At this point, it is essential to note that in the *Henrie* case there was no prosecution for violation of a criminal statute. This was a civil suit for damages. The court, however considered the criminal statute as a necessary part of the civil case, since a determination of whether or not defendant had committed a crime was essential to the civil case.

The terms "unfairly diverting trade from a competitor," "injuring a competitor," or "legal prices of

a competitor'' are just as vague, ambiguous and impossible of definition as were the terms ''national recognized union'' and ''dangerous'' used in the above-cited cases.

(A) What is meant by the terms ''unfairly diverting trade from a competitor''?

This phrase contains not just one but at least three ''accordian'' terms. First, the term ''unfairly'' should be considered. This word is definitely a word containing moral and ethical conotations. Fairness is a product of the cultural development of any particular society or sub-society. It is obvious that what is fair to one person is not necessarily fair to another. Fairness is also equated to the equally-undefinable term of justice. People generally feel that they have been dealt with fairly if they have been dealt with justly. The United States Supreme Court in the case of *United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81, 89 (1921) had before it a statute which made a person liable to criminal penalty if he willfully made ''any unjust or unreasonable rate of charge in handling or dealing in or with any necessities.'' In dealing with this statute, the court held that the above-quoted phrase made the statute void for vagueness in violation of the Fifth Amendment of the United States Constitution in that it did not require an ascertainable standard of guilt. The term ''unfairly'' in the statute at bar suffers from the same infirmity. It is truly an elastic term, the definition of which is based upon the subjective feeling and the cultural heritage of the person making the definition.

The next portion of this phrase to be considered is the word "diverting." The very essence of competition is the diversion of business from someone else to oneself. To concretely define the term "diverting" as used in the Utah Unfair Practices Act, however, is no easy task. Is it a diverting of trade from a competitor to sell to a *regular* customer of the seller an item which he might not ordinarily buy? The proceeding point can be illustrated by a hypothetical: Suppose a customer is in defendant Grand Central's store purchasing tobacco products which are "on sale." This customer is a regular customer of the store for tobacco products. However, on the particular occasion, as he enters the store he knows he needs some coffee, so in addition to his tobacco products he purchases some coffee. Competitor "A" of Grand Central does not sell coffee. Competitor "B" sells coffee of a brand different than that sold by Grand Central. Competitor "C" sells the same brand of coffee as Grand Central. Has this purchase diverted trade from competitors "A", "B" or "C"? In order to divert from someone, it must be shown that they initially had this trade. Which of the above competitors has the trade? In order to have the intent of unfairly diverting this trade from a competitor, a defendant would have to know who initially had the trade. How would defendant know who had the trade? Diverting connotes that the flow at one time was going in one direction and was later changed to another direction. Webster's 7th New Collegiate Dictionary defines the term "to divert" as "to turn in opposite directions," "to turn aside," "to turn from one course or use to another." All of the

aforementioned definitions require an existing course of action from which the diversion results. Does the Utah Unfair Practices Act require that a course of business be shown involving a competitor from which the defendant diverted the trade? Or, does the statute only require that a defendant make a sale and thereby imply that he must have diverted trade from someone else who was not able to make this sale? In not further defining the term "diverting," the statute becomes vague and ambiguous and impossible to administer. Further in the phrase "unfairly diverting trade from a competitor" we find the word "competitor." Defining a competitor is quite difficult in reality because it depends upon the circumstances. Which of the stores aforementioned, "A", "B", or "C", are competitors of defendant? Does defendant Grand Central, with its store in Murray, compete with the stores of defendant Skaggs in Bountiful? Does the Bountiful store of defendant Skaggs compete with the store of Shopper's Discount located on 35th South in Salt Lake City? Does the store of defendant Grand Central in Salt Lake City compete with the store of defendant Skaggs in Provo? Does the store of defendant Grand Central located in Salt Lake City compete with the store of one of the members of intervenor-appellant located in Midvale?

The precise definition of this term "competitor" is required in the statute in several aspects. In the first place, the statute prohibits unfairly diverting trade from a competitor; secondly, it prohibits the injuring of a competitor; and thirdly, it grants an exemption for meeting the legal prices of a competitor. How close must two

stores be in order to be competitors? Must the stores carry the same brands in order to be competitors? Must the stores be the same size in order to be competitors? Must defendant be aware of the existence of another store in order to have it as a competitor? None of these questions are answered by the statute.

(B) What is meant by the phrase "injuring a competitor"?

The term competitor has been discussed above. Therefore, the present discussion will be concerned with the term "injuring." This term would also seem to be quite elastic. It is nowhere pointed out in the statute what is meant by injuring. Must there be monetary damages provable in order to show an injury? The statute states that "actual damages" of the plaintiff need not be alleged and proved. Section 13-5-14. But must there be a certain amount of monetary damage in order to show an injury? How would a prospective defendant know he was "injuring a competitor"? From its mere statement and the proceeding questions, it becomes obvious that this term is not susceptible of an exact definition. It will be noted from a close examination of Section 13-5-7 of the Utah Act that the statute has disjunctive phrases. It provides that a violation will be made out for "unfairly diverting trade from a competitor" and then states "*or otherwise* injuring a competitor." The disjunctive "or" as used with the word otherwise indicates that the "injuring a competitor" spoken of in this sense is something different and apart from unfairly diverting trade from said competitor. It

is very difficult to envision what could be meant by this last phrase. Conceivably it could mean that if a prospective defendant is selling below cost and in a barroom one night pokes his competitor he has "otherwise injured the competitor." The absurdity of the preceding example points out explicitly the vagueness of the phrase.

In support of the proposition that "a businessman knows who his competitors are," intervenor-appellants cite *McElhone* v. *Geror,* 292 N.W. 414 (Minn. 1940). The facts of this case, as previously stated, reveal that no evidence whatsoever was introduced on the question of competition. It follows, therefore, that upon introduction of evidence it may well be shown that the term "competitor" is vague and ambiguous and the businessman does not know who his competitors are. The court in *McElhone* states,

> On this point the statute is definite and certain, *enough so anyway, to fend off the present attack so far as it proceeds on the supposition that it is otherwise. McElhone* v. *Geror, supra* at 419.

The language of the court is an admission that it did not have before it the facts upon which it could determine whether or not the statute was unconstitutional.

Intervenor-appellant cites *Borden Co.* v. *Thomason,* 353 S.W. 2d 735 (Mo. 1962) as upholding a statute against constitutional challenge of vagueness and uncertainty. The quote set forth at the top of page 50 of intervenor-appellant's brief supposedly upholds the proposition. It is submitted that the words of the quote in themselves answer the question in favor of defendant.

"Whether or not a sale below cost has unfairly diverted trade is a *matter of proof* in each instance and *must depend on the facts and circumstances shown.*" *Borden, supra,* at 754. The milk statute involved in the *Borden* case contained no criminal penalty and the court made much of this in its discussion of vagueness and definition of terms. The trial court found the issues for the plaintiff and granted the injunction. Defendants and intervenors appealed. There was extensive evidence taken in the case. Plaintiff presented evidence as to the vagueness, indefiniteness and impracticability of the application of the Act and testified as to its accounting methods and its allocation of costs, showing that it was impractical if not impossible to segregate its costs down to a specific such as a bottle of milk or a carton of cottage cheese. Plaintiff offered a witness, an accounting professor from a university, who was qualified as an expert and stated that the cost of a half pint of milk sold to a dairy customer on a particular day simply could not be ascertained. A witness for defendants testified that average prices have to be used because one cannot know whether a particular amount of a base product went into certain other products. This is the case because there were by-products left over from the milk pasteurization. At page 750 the court states:

> We quite agree that the cost of doing business, as mentioned in the statute, including labor costs, salaries paid executives and officers, rent, interest, depreciation, power supplies, maintenance of equipment, selling costs, advertising, transportation and delivery cost, credit losses and all types of permits and license fees, all taxes, insurance and overhead expenses of the processor or dis-

> tributor as mentioned in Sec. 1 [5] (§ 416.410[5]) cannot be definitely and exactly determined upon a day, hour or minute basis, or with reference to a *particular quart* of milk delivered on a *particular date. The statute makes no such requirement.* Practically all of the items mentioned in Sec. 416.410[5] accrue or are paid or the losses are sustained over some reasonable period of time. *Some lapse of time is necessary to determine them. Clearly average costs* may be used in the determinin gof the cost of any product controlled by the statute. (Emphasis added.)

It is imperative in the *Borden* case to note that the Agricultural Commission of Missouri was empowered to make rules and regulations governing this statute. It was argued that all that was required to comply with the statute was a good faith attempt to allocate costs. But the court states at page 752:

> It is apparent we believe *that to permit costs to be ascertained only on a "good faith" and reasonableness" basis would leave each processor and dealer to determine his own method of determining cost and the validity of each method could only be tested and finally determined by litigation.*
>
> We must and do hold that [the statute] is valid and enforceable as against respondent's contentions; and that any alleged vagueness, *indefiniteness or difficulty in application may be remedied by reasonable rules and regulations which the Commission has the authority to adopt.* (Emphasis added.)

So, it can be seen from this case that the court realized the unworkableness of the test asked for by intervenor-appellant, that of reasonableness, for reasonableness, in every case and for every person, is going to be different.

The standard of reasonableness asked for by appellant, would make the Utah Sale-Below-Cost statute equally impossible to inforce.

(C) The final term to be considered under this point is the term "legal prices of a competitor" as set forth in Section 13-5-12(d) of the Utah Code Annotated.

In granting an exemption from the Unfair Practices Act for sales made in order to meet the "legal prices of a competitor" the statute really grants nothing to a potential defendant. What is meant by the term "legal" cannot be determined. For example, does this term mean legal as looked upon by a court, the Trade Commission, the police, the FBI, or the potential defendant. Actually, a legal price of a defendant could only be determined after a court hearing and a court determination on the matter. Anything short of this would be speculation. In requiring a defendant to speculate as to what the prices of a competitor are, the statute becomes vague and ambiguous and unenforceable. *State ex rel. Anderson* v. *Fleming Co.*, 339 P.2d 12 (Kan. 1959).

The enforcement procedure of the Trade Commission as testified to by Mr. Gordon Browning indicates that the Commission requires a retailer to determine at his peril whether a competitor, in advertising or selling a particular item, is advertising or selling below cost as defined in the Act, with the intent prohibited in the Act, *see* (R. 123-124). In other words, as interpreted by the Trade Commission, the Act seems to require a prospective defendant, before he can meet the prices of a competitor, to determine the subjective intent of that

competitor, since an illegal price requires a finding of intent. If this be the valid interpretation of this otherwise vague act, such an interpretation puts an unreasonable burden upon the defendant and is void for that reason. *See* (R. 120-139.)

In the instant case, the lower court in its conclusion 2(a) held that "defendants were entitled to assume the advertised price of Shopper's Discount for Aqua Net Hair Spray was the legal price in the absence of actual knowledge of an illegal sale by Shopper's Discount in violation of the Act" (R. 46.) This is in fact the lower court's interpretation of what is meant by the good faith meeting of the legal prices of competition exception to the Utah statute. The lower court, in fact, concluded that it is good faith to meet the advertised price of a competitor absent any actual knowledge that the price is not legal. This view is supported by the cases, *State ex rel. Anderson* v. *Commercial Candy Co.*, 201 P.2d 1034, 1038 (Kan. 1949). See *State ex rel. Anderson* v. *Fleming* Co., 339 P.2d 12 (Kan. 1959). Under this interpretation, the statute in this regard could be upheld as constitutional since it places no affirmative burden upon a prospective defendant. Intervenor-appellant cites the case of *McIntyre* v. *Borofsky,* 59 A.2d 471 (N.H. 1948), in support of the proposition that defendants do not have to examine the books of a competitor. The court in that case as quoted by intervenor-appellant on page 54 of its brief states:

> "If this required the retailer to examine his competitor's books to ascertain whether the competitors [sic] price was legal, it would be of doubtful validity."

With this defendant certainly agrees. Since a defendant cannot be validly required to examine his competitors' books, and since as testified by the witnesses at the trial of this matter, no competitor will tell his competitor what he has paid for certain items or whether he is selling the items below cost, the statute is unconstitutional if construed to so require.

In support of its proposition that the statute in question in this case is not so vague and indefinite as to violate constitutional standards, intervenor-appellant cites the *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), a case upholding the Robinson-Patman Act as not vague and ambiguous in the use of the terms "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." Intervenor-appellant is seriously mistaken in characterizing the statute in the instant case as similar to the Robinson-Patman Act. First, it should be noted that the Robinson-Patman Act did nothing more than codify the standard of reasonableness which has been held for years to be the standard in cases of due process. The Utah case sets out specific terms such as *cost, cost of doing business, unfairly diverting trade from a competitor, injuring a competitor, legal prices of a competitor,* and others. These terms are nowhere defined and it is obvious from the evidence and findings of the court in the instant case that there is sufficient ambiguity here that even the two defendants involved in the case define the terms differently. It should also be noted that the Robinson-Patman Act contains no presumption such as is contained in the Utah Act. A presumption, coupled

with vague and ambiguous language, makes a statute much more vulnerable since it shifts to the defendant a much greater burden.

At page 50 of its brief, intervenor-appellant states:

> It should be noted that, contrary to the defendants' allegations, part of the clause is defined. The word "unfair" obviously refers back to the terms "advertising, offer to sell, or sale . . . at less than cost."

Intervenor-appellants cite no authority for this "obvious conclusion." The statute does not specifically declare what is unfair. The intervenor-appellant's citation to *Laundry Operating Co.* v. *Spalding Laundry & Dry Cleaning Co.,* 383 S.W. 2d 364 (Ky. 1964), at page 51 does not cover this point. The quote set forth there is not concerned with the definiteness of the Act but with the propriety of the legislative purpose. Defendants are not arguing that the Legislature cannot set up standards. *People* v. *Payless Drugs* and *State* v. *Sears* cited on page 53 for the "legal prices of competitors" proposition have been distinguished previously on their facts.

On page 54 of its brief, intervenor-appellant cites *State* v. *Albertson's Inc.,* 412 P.2d 755 (Wash. 1966) as being in accord with the following quote from *State* v. *Sears,* 103 P.2d 337 (Wash. 1940):

> We are, therefore, of the opinion that if a merchant in good faith reduces his prices to meet those of a competitor, who he in good faith believes has a legal price, he will not be violating either the intent or the wording of the Act.

It should be noted that in the *Albertson* case, the defend-

ant was arguing that he was entitled to a presumption that prices found on the open market were legal until otherwise shown. The court upheld this argument and stated,

> If, by the above-quoted evidence, the state did not intend to concede the legality of Albertson's competitors' prices, it should have offered evidece to overcome the presumption that published prices of its competitors were legal prices. *State* v. *Albertson's Inc., supra.*

Hence the *Albertson* case goes much farther than the good faith requirement. It holds exactly what defendants have contended and what the trial court held in its conclusion: that absent any knowledge of an illegal price, there is a presumption that published prices are legal.

In the first paragraph of page 55 of its brief, intervenor-appellant states that it disagrees with the court's conclusion that absent actual knowledge there is a presumption that a sale by competitor is legal, and then goes off on an argument that defendants had a duty of affirmative action. The case previously cited by intervenor-appellant, *State v. Albertson's, Inc.*, 412 P.2d 755 (Wash. 1966) refutes its argument. That court uphold the presumption of legality and put upon the state the burden of rebutting such presumption. *Accord, State ex rel. Anderson* v. *Commercial Candy Co.*, 201 P.2d 1034 (Kan. 1949). The state, in the case at bar, did not prove that at the time they priced their hair spray defendants knew that the price set out by Shopper's Discount was in fact illegal. This was the burden placed upon the state. Until this burden is met, according to the case

cited by intervenor-appellant there is no requirement that defendant go forward with anything.

POINT 8

THE COURT DID NOT ERR IN HOLDING THAT PLAINTIFF FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SHOW THAT DEFENDANT GRAND CENTRAL, IN MAKING THE SALE OF ASPIRIN, LEE'S MEN'S PANTS AND TURKEYS INTENDED TO INDUCE THE PURCHASE OF OTHER MERCHANDISE OR TO UNLAWFULLY DIVERT TRADE FROM A COMPETITOR OR TO OTHERWISE INJURE A COMPETITOR.

The burden of proof was upon the plaintiff and it was not met. Appellant and intervenor-appellant cites no part of the record to support their position.

Further, it should be pointed out that the transcript of the trial at R.77 is in error in that the answer "Yes" on line 1 should be "No." Defendant Grand Central has moved to have the record corrected and an order making the correction was signed on February 16, 1968. R. 186-188.

CONCLUSION

After an adequate hearing on the facts, the trial court held the Utah Unfair Practices act to be unconstitutional in several respects. It is a price-fixing statute; it unconstitutionally shifts the burden of proof to a defendant; its presumptions are arbitrary and unreasonable; its terms are ill conceived and ill defined, rendering them unconstitutionally vague; its classifications are unconstitutionally discriminatory; and in practice, it is impossible to administer.

Without exception the cases cited by appellants which uphold similar statutes have been cases which did not arise on a fully developed set of facts, as did the case at bar. With the evidence before it, the trial court concluded that the Act, in its application to defendants, could not be sustained under the Utah and Federal constitutions. The holding of a trial court, based upon the evidence presented, should not be overturned.

Since the time of its inception, the Utah Constitution has protected the people of this state against numerous attacks by persons intent upon destroying the idea of free competition. The Unfair Practices Act, promoted by and enacted through the insistence of persons in the position similar to that of intervenor-appellants, is inimical to this traditional concept of free competition and free enterprise as applied to defendants. This Act was ill conceived and very poorly drafted. As a result, it seriously impinges upon the rights of respondents and others similarly situated.

Therefore, it is submitted that the facts, as adduced at trial, and the law, as hereinbefore set forth, amply support the findings of the trial court. The Utah Unfair Practices Act is unconstitutional.

Respectfully submitted,

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