1967

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 Appellant

In The Supreme Court of the State of Utah

TRADE COMMISSION OF UTAH,
STATE OF UTAH,
Plaintiff - Appellant,

- vs -

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

and UTAH RETAIL GROCERS'
ASSOCIATION
Intervenor - Appellant.

BRIEF OF APPE

Appeal from the judgment
Third District Court of Salt Lake
Honorable Stewart M. Hanson

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11034
Case No.

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This case involves a complaint by the plaintiff, the Trade Commission of Utah, herein referred to as the "Trade Comission," against the defendants, Skaggs Drug Center, Inc., herein referred to as "Skaggs," Grand Central Stores, Inc., d/b/a Warshaw's Giant Food and Grand Central Drugs, Inc., herein referred to as "Grand Central," charging a violation of the Utah State Unfair Practices Act, here-

in referred to as the "Act" unless more specific sections are cited.

DISPOSITION IN LOWER COURT

A complaint was filed in the District Court of Salt Lake County on the 16th day of Septeber, 1966, by the Trade Commission charging Skaggs on six counts and Grand Central on five counts of violating the Utah State Unfair Practices Act. On the 22nd day of December, 1966, pursuant to a motion, the Utah Retail Grocer's Associatoin was permitted to intervene as a party plaintiff. The matter came on for hearing on the 16th day of May, 1967, before the Honorable Stewart M. Hanson, sitting without a jury, at Salt Lake City, Utah. After having entered its Findings of Fact and Conclusions of Law, the court entered judgment on the 13th day of September, 1967, in favor of the defendants and against the plaintiff and intervenor on each count of plaintiff's complaint.

RELIEF SOUGHT ON APPEAL

The appellant respectfully submits that the judgment of the lower court be reversed.

STATEMENT OF FACTS

On the 23rd day of June, 1966, Skaggs and Grand Central each advertized Crest Family Toothpaste at fifty cents, which is below cost as defined in the Act, with intent and purpose of inducing the

purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor. (R. 37)

On or about June 16th, 1966, Shoppers' Discount Store, Inc., herein referred to as "Shoppers Discount," advertised and sold Aqua Net Hair Spray at forty-nine cents, which was a sale below cost as defined in the Act. On June 23rd, 1966, Grand Central advertised Aqua Net Hair Spray, and Skaggs advertised Style Hair Spray, a comparable product, for sale at forty-nine cents, each of which was a sale below cost as defined in the Act. The sale by Grand Central and Skaggs was an endeavor to meet the price of Shoppers Discount, all of which are competitors. Neither of said defendants at any time had any actual knowledge that the Shoppers Discount price on such item was a sale below cost, as defined by the Act. The Trade Commission, to the knowledge of Skaggs or Grand Central, had not taken any action against Shoppers Discount to enforce the provisions of the Act with respect to its sale of Aqua Net Hair Spray for forty-nine cents. However, Skaggs and Grand Central made no effort to determine if the price of the competitor's item was below cost or not. (T. 62, 43) Aqua Net Hair Spray is a product with wide wholesale price fluxuations which can be purchased by retailers, including Skaggs, Grand Central, and Shoppers Discount, in numerous ways from many different suppliers. (R. 37, 38)

On or about June 20th, 1966, Skaggs advertised cartons of cigarettes for $2.73, and gave a cigarette

lighter free with each purchase of a carton, which cigarette lighter cost Skaggs twenty-five cents each. The sale of the carton of cigarettes alone was not a sale below cost as defined in the Act, but the combined sales, cigarettes and lighter if taken together and considered a single item, was a sale below cost as defined in the Act. (R. 39)

On June 16th, 1966, Skaggs advertised in the Provo Daily Herald in Provo, Utah, the sale of Vimanal Vitamins at eighty-three cents per one hundred tablets, which sale was a sale below cost as defined in the Act. In the Provo, Utah trade area, Vimanal Vitamins are offered for sale and sold exclusively by Skaggs, thus Skaggs has no competitors with respect to said item. (R. 39, 40)

On June 23rd, 1966, Skaggs and Grand Central each offered Bayer Aspirin (100cm) at fifty-five cents per one hundred. Bayer Aspirin is supplied and delivered directly to the defendants retail outlets by the supplier without cartage cost to the defendants. Bayer Aspirin is a product in constant demand by customers of defendants with a high turnover and with little labor, waste, spoilage, or advertising cost to defendants. The sale of Bayer Aspirin at fifty-five cents 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 was a sale below cost as defined in the Act. (R. 40)

On or about June 20th, 1966, Skaggs advertised for sale at $13.49 Polaroid Swinger Cameras, limited to one per customer, which was less than the entire

supply owned or possessed by Skaggs. The price at which said item was sold was a sale below cost as defined in the Act. The court found that but for the presumption set forth in Repl. Vol. Utah Code Ann. § 13-5-5(2) (1962), that Skaggs, by such sale, intended to injure competitors or destroy competition, there was insufficient evidence introduced by plaintiff's to justify a finding by this court that Skaggs offered said items for sale 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. (R. 40)

On June 16th, 1966, Grand Central advertised Lee's Men's Pants at two pairs for $5.00, which was a sale below cost as defined in the Act. The court found that the sale by Grand Central was not with the intent to induce 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 store at the time of Lee's Men's Pants. (R. 41)

On November 8th, 1965, Grand Central purchased frozen tom turkeys at thirty-three and one half cents a pound. Thereafter, on December 17th, 1965, more than thirty days after the original purchase, additional frozen tom turkeys were purchased at an invoice cost of thirty-seven and one half cents per pound. On December 17th, 1965, and thereafter, Grand Central had in stock co-mingled frozen tom turkeys purchased on November 8th,

1965, at thirty-three and one half cents per pound and frozen tom turkeys purchased on December 17th, 1965, at thirty-seven and one half cents per pound. The co-mingled turkeys were subsequently sold by Grand Central on and after December 17th, 1965, for thirty-seven cents per pound, which was a sale below cost as defined in the Act in that the turkeys purchased November 8th, 1965, were sold more than thirty days from the date of such purchase and the replacement cost of the same at that time was thirty-seven and one half cents per pound, and the turkeys purchased on December 17th, 1965, were sold at thirty-seven cents which was a sale below cost as defined in the Act. The sales by Grand Central on or prior to December 8th, 1965, of the turkeys purchased on November 8th, 1965, were not sales below cost as defined in the Act.

ARGUMENT

POINT I

THE COURT ERRED IN HOLDING THE ACT IN ITS ENTIRETY AS UNCONSTITUTIONAL, VOID AND UNENFORCEABLE AND IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE UTAH CONSTITUTION, ARTICLE I, SECTIONS 1, 2, 7, 18, 23 AND 24, ARTICLE VI, SECTION 36, AND ARTICLE XXII, SECTION 20, IN THE FOLLOWING RESPECTS: (A) THE STATUTORY PRESUMPTION THAT IN THE ABSENCE OF PROOF OF A LESSER COST, THE COST AS DEFINED IN THE ACT MEANS SIX PERCENT (6%) ABOVE INVOICE OR REPLACEMENT COST, LESS TRADE DISCOUNTS, EXCEPT CASH DIS-

COUNTS, PLUS FREIGHT CHARGES (OR 6¾ PERCENT THAT THE RETAILER PAYS FOR CARTAGE) IS AN ARBITRARY, UNREASONABLE AND UNCONSTITUTIONAL STANDARD IN THAT IT APPLIES THAT SAME STANDARD TO ALL GOODS AND TO ALL MERCHANDISE WITHOUT REGARD TO DIFFERING PRICE AND COST FACTORS INHERENT IN RETAIL MERCHANDISING AS WELL AS DIFFERENT PRICE AND COST FACTORS PERTAINING TO THE INDIVIDUAL RETAILER. ALSO, IT IS PRICE FIXING IN THAT IT IS NOT A REAL ALTERNATIVE. (R. 43, Conclusions of Law, a, c, d, and e)

(B) 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, Conclusions of Law, f)

(C) THE ACT IS ARBITRARY, UNCONSTITUTIONAL AND UNREASONABLE IN PROHIBITING A SALE BELOW COST AS DEFINED IN THE ACT WHERE THE ONLY INTENT OF THE RETAILER IN PRICING THE ITEMS BELOW COST IS TO INDUCE CUSTOMERS OF THE RETAILER TO PURCHASE OTHER MERCHANDISE OF THAT RETAILER, AND IS VAGUE AND AMBIGUOUS IN DEFINING THE PROHIBITED INTENT OF UNFAIRLY DIVERTING TRADE FROM A COMPETITOR OR INJURING A COMPETITOR. (R. 44, 45, Conclusions of Law, g, h)

(D) THE STATUTORY PRESUMPTION OF PERCENTAGE MARKUP PRESENT IN THE ACT WITH ITS CRIMINAL SANCTIONS UNCONSTITUTIONALLY

SHIFTS THE BURDEN OF PROOF TO DEFENDANTS. (R. 43, 44, Conclusions of Law, b, i)

(E) THE TERM "LEGAL PRICE OF A COMPETITOR" AS USED IN SECTION 13-5-12 (d) IS UNCONSTITUTIONALLY VAGUE, AMBIGUOUS, AND UNENFORCEABLE IF CONSTRUED AS REQUIRING A RETAILER TO DETERMINE AT HIS PERIL WHETHER A COMPETITOR IN ADVERTISING OR SELLING A PARTICULAR ITEM IS NOT A SALE BELOW COST AS DEFINED IN THE ACT WITH THE INTENT PROHIBITED BY THE ACT. (R. 45, Conclusions of Law, k)

(F) HE PRESUMPTION SET FORTH IN SECTION 13-5-9 (2) PRESENT IN THE ACT, WITH ITS CRIMINAL SANCTIONS UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANTS AND ARBITRARILY ASSUMES A PROHIBITED INTENT WITH A FACT UNRELATED TO THE STATE OF MIND OF THE DEFENDANT. (R. 45, Conclusions of Law, I)

Nearly all states of the Union have some form of legislation governing unfair business practices with the majority of them having some provision prohibiting sales below cost. There have been a number of reasons given for the need of such legislation.

The United States Supreme Court in **Safeway v. Oklahoma Retail Grocers Ass'n,** 360 U.S. 334 (1959) stated:

> . . . one of the chief aims of state laws prohibiting sales below cost to put an end to "loss-leader" selling. The selling of selected goods at a loss in

order to lure customers into the store is deemed not only **a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what generally is not true,** namely, that a store which offers such an amazing bargain is full of other such bargains. **Clearly there is a reasonable basis for a conclusion that selective price cuts tend to perpetrate this abuse** . . . (Emphasis added.)

The Utah State Supreme Court gave another reason in **Burt v. Woolsulate,** 146 P.2d 203 (1944) in which it stated:

. . . As a part of the same movement resort was had to the Unfair Practices Acts. These latter statutes could not standardize prices as Fair Trade Acts had done, but they did **aim at alleviating the hardships of "cut-throat," competition.**

. . . One of the practices aimed at by these statutes is that, common with chain stores, of selling at lower prices in one locality than in another and making up losses incurred by profits in other stores. . . . (Emphasis added.)

This latter approach of selling at different prices at different stores was admitted in testimony given on behalf of Skaggs Drugs and Grand Central (T. 48, 49, 122) Of course, the eventual effect of this "cut-throat" competittion is to drive the smaller merchant out of business and leave fewer and fewer companies to compete until they eventually dominate the market and destroy competition.

In **Old Dearborn Distributing Co. v. Seagram Distillers Corp.,** 299 U.S. 183, 57 S. Ct. 139, 81 L.Ed 109 (1936), the court said:

> **There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, The evidence to that effect is voluminous; * * *.**

The majority of the courts have upheld the constitutionality of laws which prohibit sales below cost and have said that they are not violative of the due process and equal protection clauses of the federal, and our respective state constitutions. They have held that it is within the police power of the state and the legislature is vested with wide discretions in determining whatever economic policy may be deemed to promote the public welfare and the courts are not able to override the policy so long as the laws bear a reasonable relationship to the legislative purpose and are neither arbitrary and discriminatory nor vague and ambiguous. See **Avella v. Almac's,** 211 A.2d 665 (R.I. 1965); **Guine v. Civil Service Comm'n,** 141 S.E.2d 364 (W.V. 1965); **Bordon v. Thompson,** 353 S.W.2d 735 (Mo. 1962); **Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.,** 68 N.M. 228, 360 P.2d 643 (1961); **Simonetti, Inc. v. State ex rel. Gallion,** 272 Ala. 398, 132 So.2d 252 (1961); **State v. Consumer Warehouse Market,** 183 Kan. 502, 329 P.2d 638 (1958). Other decisions are collected and analyzed in 128 A.L.R. 1126 and 118 A.L.R. 506.

The Supreme Court of the United States in **Nebbia v. People of State of New York,** 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1933), stated:

> So far as the requirements of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities Co. v. United States, 193 U.S. 197, 337, 338, 24 S. Ct. 436, 457, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with

> the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.
>
> . . . The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. . . .

(A)

The Act is not too vague in that it is impossible to show a lesser cost than that of the presumed 6% cost because of the problem of accurately allocating all of the variable accounting costs to any single item. The lesser cost must be a "markup to cover a proportionate part of the cost of doing business."

This was the principle point of issue in the case of **Flank Oil Co. v. Tennessee Gas Transmission Co.,** 349 P.2d 1005 (Colo. 1960), and the court after reviewing the various cases concluded that the phrase "cost of doing business" was not too vague and quoted from **State v. Langley,** 84 P.2d 767 (Wyo. 1938):

> Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost," what businessmen generally mean, namely the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts dis-

closed, be said to be unreasonable, and does not disclose an intentional evasion of the law, and the method so adopted should be accepted as correct. In other words, all that man is required to do under this statute is to act in good faith. . . The standard set by the legislature is virtually reduced to one of reasonableness. And it is held that "reasonableness" as "a standard of an act, which can determine objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law."

The court went on to say:

The fact that the act is difficult to administer does not justify a ruling of invalidity and it would appear that the defendants "complexity" argument finally reduces itself to this. In People v. Payless Drug Store, supra, the court commented. . . "Any difficulty in computing cost is a factual one, and statutes are not to be declared invalid because in their application factual difficulties may arise." (25 Cal.2d 108, 153 P.2d 15). In Hale v. Kusy, supra, the Nebraska court said: . . . "Mere difficulty of application in the process of litigation is not enough to enable a court to say that a statute is unconstitutional" (150 Neb. 643, 35 N.W.2d 597).

In regards to applying the six percent figure to differing price and cost factors of various types of merchandise, the court in **State v. Consumers Warehouse, supra,** stated:

Another contention advanced by appellee is that the **Act is arbitrary, unreasonable and discriminatory because, in defining costs, G.S. 1949, 50-401 (a) and (b) sets a standard markup of six-percent**

for retailers and two percent for wholesalers as the cost of doing business, in the absence of proof of lesser costs. The principal argument made on this point is that there are many lines or merchandise which are normally sold at a greater markup than the standards specified, hence the Act affords no protection from unfair competition by sales below actual cost in such lines of merchandise. Assuming the truth of this argument, it is directed merely against the wisdom of the legislature in selecting the area of competition to be afforded the highest degree of protection under the Act. We are unwilling to say that it was unreasonable or arbitrary for that body to conclude that the greatest danger to fair competition existed through price cutting in the high turnover, low markup business, where a slight margin separated profit from disaster, and that such businesses, coming within the scope of its terms, demostrates that it is not discriminatory. **Moreover, the legislature is not required to cover all evils of like character in a single Act (State ex rel. Mitchell v. Sage Stores Co.,** 157 Kan. at page 414, 141 P.2d at page 661, supra, and cases there cited).

This is not a price fixing statute because there is an adequate alternative if the reasonable standard is used as adopted in **State v. Langley, supra.**

Even if it were price fixing this is not grounds for declaring the Act unconstitutional. The Court in **Nebbia v. People of the State of New York, supra,** stated:

> . . . But there can be no doubt upon proper occasion and by appropriate measures the state may regulate a business in any aspects, including the prices

> to be charged for the products or commodities it sells.
>
> . . .
>
> . . . Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

The court in **Wholesale Tobacco Dealers Bureau of Southern California, Inc. v. National Candy & Tobacco Co.,** 11 Cal.2d 634, 82 P.2d 3, at page 9 (1938), reviewed this same charge of price fixing and found a similar statute not to be so.

(B)

The court in **Avella v. Almac's,** 211 A.2d 665 (R.I. 1965), reviewed basically the same wording as found in the Utah statute and found that portion of the law here in question to be valid.

Here we do not have the problem of adding operating costs to each item. We are dealing only with the invoice cost which is easily calculated. The only possible problem might be some future rebate determined by accumulative volume purchasing. If this problem should arise, then the reasonableness standards of **State v. Langley, supra,** should be used.

(C)

It is claimed to be unconstitutional in that there is not a sufficient evil intent to create a criminal

statute. The example given is that "the intent and purpose of inducing the purchase of other merchandise" is not evil in that no one is injured and thus no evil result need be accomplished to make the seller guilty.

Utah Code Ann. § 13-5-17 (1962), sets forth the policy of the act:

> **The legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practice by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.**

Utah Code Ann. § 13-5-7(a) (1962), 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 a violation of this act.**

It is not the contents of the phrase, the "purpose of inducing the purchase of other merchandise," that the legislature has found to be evil. Rather, it is the selling of merchandise below cost to induce the

purchase of other merchandise that is evil. The courts have recognized this evil and have in effect said, as does the statute, that it is "a desructive means of competition" and "plays on the gullibility of customers by leading them to expect what generally is not true," and is therefore "a reasonable basis for a conclusion that selective price cuts tend to perpetrate this abuse." See **Safeway v. Oklahoma Retail Grocer's Ass'n, supra,** and **Burt v. Woolsulate, supra.**

The court in **Laundry Operating Co. v. Spalding Laundry,** 383 S.W.2d 364 (Kan. 1964) stated:

> **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. The legislature simply has declared it unfair to accomplish it through giving away goods or services or selling them for less than cost.**

The very nature of business is to acquire as much business as economically possible from any source, including any competitors. (T. 45, 46) Although the businessman may not have any evil feelings toward his competitor, he is like the walrus in "Through The Looking Glass" who shed copious tears as he devoured the innocent oysters who accepted his invitation to stroll along the beach. He meant them no harm of course. He merely wished to to eat them.

It is fundamental logic that prolonged competition by selling itmes below cost will soon result in

only the most financially strong company remaining and thus, competition is destroyed.

(D)

The criminal sanctions have not been made a part of this action and therefore should not be considered at this time. **Avella v. Almac's, supra.**

Even if it did apply, there is no shifting of the burden of proof but rather the shifting of the burden of going forward with the evidence, which is certainly not unconstitutional. 29 Am. Jur. 2d, **Evidence,** § 123 to 127. This is especially true when we are dealing with matters which are best known to the party charged as we are in these types of cases.

(E)

Section 13-5-12(d) exempts from the act the sales made:

. . . .

> **(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article, product, or commodity in the some locality or trade area.**

Under an identical provision found in the California law this point is discussed by the court in **People v. PayLess Drug Store,** 153 P.2d 9 (Calif. 1944), wherein the court stated:

> **The defendants contend that they should not be compelled to ascertain "legal prices" of their competitors before invoking the exception provided by**

subdivision (d) of section 6 for the reason that it is impossible to ascertain the legal prices of competitors goods without an audit of their books. The defendants have assumed an absolute prerequisite. The requirement is not absolute. It is merely that the defendants have endeavored "in good faith" to meet the legal prices of a competitor. A similar provision was upheld in **State v. Sears,** 4 Wash.2d 200, 103 P.2d 337, 345, the court saying "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." The provision therefore is not like that involved in **Commonwealth v. Zasloff,** 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120 (See, also, **State v. Packard-Bamburger and Co.,** 123 N.J.L. 180, 8 A.2d 291), holding invalid a provision which exempted the merchant if the price was made "to meet the legal price of a competitor as an absolute requirement without according him the opportunity of showing his good faith . . . ."

See **McIntire v. Borossky,** 59 A.2d 471 (N.H. 1948).

This approach is consistent with the recent case in the State of Washington of **State v. Albertson,** 412 P.2d 755 (1966), where the court refers to the "good faith" belief that the defendant was meeting the legal prices of a competitor. The court held that it was not necessary for the defendant to look at the books of a competitor to determine the legal price but he must "in good faith" believe the price to be legal. In that case the defendant had made an effort in good faith to determine if the price of his competitor was legal.

(F)

A presumption of illegal intent has been struck down in several cases from other jurisdictions. **W. M. Wiley v. Sampson-Ripley Co.,** 120 A.2d 289 (1956); **Motts Supermarkets, Inc. v. Traasinelli,** 148 Conn. 481, 172 A.2d 381 (1961). In those cases, the mere fact of a sale below cost created the presumption. However, even under these types of statutes, a number of courts have found such a presumption valid.

In **People v. PayLess Drug Stores, supra,** the court held that a presumption of unlawful intent may be made from the mere fact of the sale below cost:

> A statutory requirement that the defendant go forward with evidence to rebut a prima facie showing of guilty intent from proof of specified facts is permissable when the result has some rational relation to those facts and the defendant is given a fair opportunity to meet it by evidence. **Morris v. California,** 291 U.S. 82, 88, 54 S. Ct. 281, 284, 78 Law Ed. 664. That case designates as a test of permissibility that "the 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 or knowledge, the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Our statute does not withdraw from the accuser the burden of providing a violation, nor does it deprive the defendant of the benefit of presumption of innocence. Here there was a manifest disparity in conveniences of proof and opportunity for knowledge as between the plaintiff and the defendants. The defendants were in a better position

> to know the intent and purpose of their conduct, which it might be difficult for the plaintiff to prove. The Legislature merely enacted into law what is common human experience, but when a person causes injury by his acts, he should be deemed to intend such consequences unless he can excuse or explain his conduct by facts showing he had an innocent intent. It was so enacted to avoid the possible conclusion that the accuser, from whom the defendant's purpose is generally concealed, must produce affirmative evidence of guilty intent in every situation in order to make out a prima facie case of a violation of the act. After proof of a sales below cost and injury resulting therefrom, there is no undue hardships cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them in the specified exemptions in the act. The power to enact such a provision in appropriate cases has been upheld in this state.

The Wisconsin statute states that sales at less than cost "shall be prima facie evidence of intent to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor." In a most recent case, **State v. Eau Claire Oil Co.**, 151 N.W.2d 634 (Wisc. 1967), the court held:

> We hold there is a rational connection between the facts presumed in the last sentence of sub. (4) of sec. 100.30, Stats., viz., "intent to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor" and the evidence of the selling by de-

fendant of the mixed nuts, toilet tissue, and work gloves below cost. Therefore, it necessarily follows that the statutory presumption is constitutional as so applied.

See **Rocky Mountain Wholesale Co. v. Ponka Wholesale Mercantile Co., supra; Mering v. Yolo Grocery and Meat Market,** 127 P.2d 985 (Calif. 1942), and **McIntyre v. Borossky, supra.**

Our own statute requires a sale below cost **plus** a limitation on the quantity to be sold per customer. Thus, creating a much closer relationship between the fact presumed and the fact proven.

A merchants sole purpose for being in business is to get customers to his store and sell him merchandise at a profit. If he ceases doing this, he will soon be out of business.

He is not going to sell merchandise, such as a camera, at a loss just to make as many of his customers as possible happy, as is contended by the defendants. He obviously anticipates an economic gain from such an action. The gain of an economic advantage by loss selling is just what the legislature has declared to be an unfair business practice which impairs and prevents fair competition and thus injures the public welfare.

If there is any intent but to achieve an economic gain, why would Skaggs be so concerned about competitors purchasing the loss-leader items? (T. 39) In fact, this is the whole purpose of this provision which is to give the marchants a self-policing tool

whereby they can take the edge off the economic advantages of loss-leader selling by purchasing large quantities of loss-items sold.

POINT II

WITH RESPECT TO GRAND CENTRAL'S SALE OF AQUA NET HAIR SPRAY AT FORTY NINE CENTS AND SKAGG'S SALE OF STYLE HAIR SPRAY AT FORTY NINE CENTS ON JUNE 23rd, 1966, THE COURT ERRED IN HOLDING THEY WERE EACH MADE BY THEM IN AN ENDEAVOR IN GOOD FAITH TO MEET THE PRICES OF THEIR COMPETITOR, SHOPPERS DISCOUNT, AND IN HOLDING THAT THEY WERE ENTITLED TO ASSUME THAT THE ADVERTISED PRICE OF SHOPPERS DISCOUNT FOR AQUA NET HAIR SPRAY WAS A LEGAL PRICE IN THE ABSENCE OF ACTUAL KNOWLEDGE OF AN ILLEGAL SALE BY SHOPPERS DISCOUNT IN VIOLATION OF THE ACT. (R. 46(a).)

It is clear from the testimony given that there was absolutely no effort by Skaggs or Grand Central to determine whether or not the prices of their competitors were legal or not. (T. 3, 11, 24, 29, 43) No effort was made to contact the Trade Commission or any suppliers to see if the low prices of the competitors were below cost or not. Some effort would be necessary in order to claim good faith. This is especially true when they are both big users of the product and knew it was below their own cost as determined by the Act.

The answer given for selling below cost was that it was an answer to a competitive situation that couldn't be left unanswered. (T. 3) The law has pro-

vided a legal means to answer any illegal economic challenge such as this with triple damages awarded the injured party. Utah Code Ann. § 13-5-14 (1962).

It is submitted that such challenges be resolved by law rather than in the open competitive market place where an innocent small merchant gets injured. See **Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n** (Okla. 1957), 322 P.2d 179, 70 A.L.R.2d 1068 and affirmed by the U.S. Supreme Court, supra.

POINT III

THE COURT ERRED IN HOLDING THAT THE SALE BY SKAGGS OF CIGARETTES AND THE GIFT OF A CIGARETTE LIGHTER WITH A CARTON OF CIGARETTES DID NOT VIOLATE THE ACT BECAUSE THE SALE OF THE CIGARETTES ALONE WAS NOT A SALE BELOW COST AS DEFINED IN THE ACT AND THE GIFT OF THE CIGARETTE LIGHTER WAS A GIFT, NOT A SALE, AND NOT PROHIBITED BY SECTION 13-5-9 OF THE ACT. (R. 46, b)

Utah Code Ann. § 13-5-9(1) (Supp. 1965) has been interpreted to read that when the seller sells an item and in conjunction therewith, gives an item away, the cost to the seller of the item given away is not to be computed in considering whether the seller has violated the act. Utah Code Ann. § 13-5-9(1) (Supp. 1965) provides:

> For the purpose of preventing evasion of this act in all sales involving more than one item or commodity the vender's or distributor's selling price shall not be below the cost of all articles, products and commodities included in such transactions. Each

> article, product or commodity individually advertised or offered for sale, shall be individually subject to the requirements of § 13-5-7, when sold with other articles, products, or commodities.

When a merchant offers a carton of cigarettes at a specified price and offers to give away a lighter with the purchase, it is only reasonable to assume that the sale involved both the carton of cigarettes and the lighter and that the cost of both items must be taken into account. The terms "all sales involving more than one item", "when sold with other articles", and "shall be individually subject to" of the above statute makes this clear.

POINT IV

THE COURT ERRED IN HOLDING THAT THE PLAINTIFF FAILED TO INTRODUCE SUFFICIENT EVIDENCE THAT THE INTENT OF SKAGGS AND/OR GRAND CENTRAL IN MAKING THE SALE OF ASPIRINS, SWINGER CAMERA, LEE'S MEN'S PANTS, AND TURKEYS, WAS TO INDUCE THE PURCHASE OF OTHER MERCHANDISE OR TO UNLAWFULLY DIVERT TRADE FROM A COMPETITOR OR TO OTHERWISE INJURE A COMPETITOR. (R. 46, 47, 48)

All of the above prices are below cost. Skaggs and Grand Central are profit making businesses and if they sold all their items below cost they would soon be out of business. Making a profit on investment is their reason for existing. A sale below cost would be contrary to their interest unless they anticipated an over-all economic gain from such an

action. The economic gain of course is to bring customers into the store. (T. 5, 45, 46, 55)

The principal purpose for getting customers into the store by the use of low prices is to get them to purchase other merchandise. (T. 46)

The court in **North Carolina Milk Commission v. National Food Stores, Inc.,** 154 S.E.2d 548 (N.C. 1967) commenting on this point stated:

> **The very purpose and nature of competition involves the intent to attract to one's self customers who might otherwise trade with a rival producer or seller.**

In some cases the stores may have other reasons along with the reason to induce the purchase of other merchandise such as a desire to reduce inventory in items like Lee's Men's Pants or when they fail to purchase sufficient items, such as turkeys, at one price and must repurchase at a higher price for the same advertised sale. Although at times it may be difficult to determine the prevailing intent, the intent to induce the purchase of other merchandise is always there and when this is done with below cost selling the evil the legislature wished to prevent is present.

Even though it may be difficult to determine the prevailing intent, it is submitted that whenever a store induces a customer to purchase an item selling below cost it has taken that particular sale away from another store and has unfairly diverted trade

from a competitor by selling below cost. (T. 45, 46) The competitor has also been injured in that he did not get that particular sale or at least he did not have a fair opportunity to compete for it.

The court in **Laundry Operating Co. v. Spaulding Laundry and Dry Cleaning Co., supra,** stated:

> . . . opinion is that to the extent a competitor is caused to lose business, competition is destroyed. It would hardly be in keeping with common sense to hold that activities otherwise falling within the interdict of the statute would be proper so long as the intent of the guilty party is something short of a design to effect the complete destruction of competition. . . .

CONCLUSION

The Legislature, with the proper authority, has determined that the selling of merchandise below cost is dangerous to the public welfare and has passed a law to prevent it, with a few exceptions. The courts of other jurisdictions have held statutes similar to the statute here in question to be constitutionally valid as an attempt to prevent the evils of selling merchandise below cost and eventually destroying competition.

Also, the evidence was such that the lower court should have held the intent in making a sale below cost was to induce the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor.

It is respectfully submitted that the findings and judgment of the lower court be reversed in its entirety.

Respectfully submitted,

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