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STATUTORY INHIBITION AGAINST SALES BELOW COST

J. Wesley Oler*

I. INTRODUCTION

"It is to be deprecated that our law can devise no means of regulating our existence save by threatening us with the shaved head and the striped shirt."* In addition to Congress, however, legislative bodies in forty-eight states assemble frequently and tarry long over their labors, the tangible results of which are statutes filling tome upon tome, separated only by interstrata of dust that may be symbolic of the citizen's relief after adjournment sine die.

In the modern era an unwonted note of enthusiasm sometimes has crept into the ordinarily monotonous voice with which legislative bills are intoned through first, second and third readings, for behind some of them lurks the beneficent spirit of reform, essaying currently the quest of an El Dorado known as "social and economic justice." Not the least among the dragons at which legislators aim their inspirational lances are "unfair" business practices. These are manifold and various. With express statutory prohibition against one of them—sales of, offers to sell, and advertisements of intent to sell at less than cost—this article is concerned.** Although there are as yet few decisions on this subject, those that have been pronounced afford so much material that it would

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No attempt is made herein to enter upon a discussion of statutory provisions which prohibit sales below cost by implication only, such as the Robinson-Patman Act and the Federal Trade Commission Act. (See Sears, R. & Co. v. Federal Trade Commission, 258 F. 307, 6 A. L. R. 358 (1919; C. C. A. 7th), holding that the sale of a particular commodity at less than cost is not unlawful under the Federal Trade Commission Act, if unaccompanied by action tending to injure or discredit competitors or deceive purchasers as to the real character of the transaction). Nor are prohibitions against sales at more or less than "real value" considered here (See International Harvester Co. v. Kentucky, 234 U.S. 216, 58 L. ed. 1284, 34 S. Ct. 853 (1914), involving such an inhibition). Two provisions frequently found in statutes prohibiting sales below cost declare it unlawful to discriminate in prices as between or among different localities, or to give away any article, but consideration of these provisions is not within the scope of the present paper. And of course statutes for the maintenance of contractual prices for trademarked goods are not reviewed here. It will be noted also that the article does not treat decisions arising under industrial recovery codes interdicting sales at less than cost. Illustrative decisions involving such codes are: Chicago Flexible Shaft Co. v. Katz Drug Co., 6 F. Supp. 193 (1934; D.C. Del.), appeal dismissed in 72 F. (2d) 548 (1934; C.C.A. 3d); United States v. Canfield Lumber Co., 7 F.
be impractical here to attempt to do more than review them. For the most part, therefore, the writer has refrained from injecting opinionative ideas into the discussion and has adhered to the case authority, although occasional lapses from this program will be detected.

The use of "loss leaders" fell under statutory ban in South Carolina as early as 1902.8 Not until the passage of the Robinson-Patman Act, however, did many of the states expressly interdict sales below cost. But at this writing Pennsylvania's statutory provision against the sale of merchandise at less than cost9 is but one of at least eighteen such enactments.6 Their number is growing apace. A few states have inhibited sales below cost in particular businesses only.7

Most of the statutes have been blighted by being passed with that insufficiency for important details that is encountered too often in legislative operations.


8South Carolina Civil Code of 1912, §2451 (1902, XXIII, 1057) provided: "If any person, persons, company, partnership or corporation engaged in the manufacture or sale of any article of commerce or consumption from the raw material produced or mined in this State, shall, with intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell at less than the cost of manufacture, or give away their manufactured products, for the purpose of driving out competition or financially injuring competitors engaged in the manufacture and refining of raw material in this State, said person, persons, company, partnership, association or corporation resorting to this method of securing a monopoly in the manufacture, refining and sale of the finished product produced or mined in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and, on conviction, shall be subject to the penalties of this Act." See note 2, supra.

4Act of June 19, 1936, chap. 592, 49 Stat. at L. 1528, §113, §13a, §13b. The third section of this act declares it unlawful, in cases to which the statute is applicable, to sell or contract to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." See note 2, supra.


The indolent practice of introducing bills which are but verbatim copies of laws on the statute books of other states already has multiplied errors that should have been manifest to anyone intrusted with power to participate in legislative deliberations.\(^8\) From their nature the statutes have a rough road to travel through the courts; evidence of indifference in their enactment will not help to ease the trip.

II. CONSTITUTIONALITY

A. Validity of purpose or object.

The courts have experienced no difficulty in holding that statutory provisions prohibiting sales at less than cost, if enacted for the avowed purpose of preventing monopolies and fostering fair competition, have a legitimate objective which is embraced within the sovereign power of the state to preserve and promote the general welfare.\(^9\) Thus, it has been said with reference to the validity of these statutes: "We have no hesitancy in holding that, generically, legislation prohibiting unfair competition and preventing acts which stifle competition is well within the surveyed limits of the police power."\(^10\) "That the prevention of monopolies and the fostering of free, open, and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no citation of authority."\(^11\) "Legislation to foster free competition and to prevent monopolies is quite uniformly sustained."\(^12\)

That the purpose of the Pennsylvania Fair Sales Act is the advancement of fair trade practices is clear from both its short and full titles.\(^13\) The body of the act, however, is not enlightening on this point, and as against the contention that the purpose of the statute may be inferred, Judge Gardner of the Allegheny County Court of Quarter Sessions has said that the failure of the act to state in terms the policy of the Commonwealth is a fatal defect, for the reason that without an expression of policy the courts have no intelligent basis for interpretation.\(^14\) It may be suggested, however, that this unnecessarily confuses

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\(^8\) An apparent error in the California statute, as it read in its 1935 form, whereby the courts were directed to construe the act "literally," that its beneficial purpose might be subserved, was copied with magnificent unconcern in the Arkansas, Colorado, Kentucky, Montana, Wyoming and Nebraska acts. In 1937 the California legislature corrected the quoted word by making it "liberally."


\(^12\) Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).

\(^13\) The first clause of the full title reads: "An Act to insure and protect fair trade practices in distribution."

the legislative purpose, on the one hand, with that of the defendant, on the other, and fails to distinguish between the object of the act and the means employed to reach a legitimate end.

B. Validity of means employed.

1. Accomplishment of legislative purpose.

An obvious temptation confronts the courts to challenge the legislative conclusion that sales below cost tend to strangle fair competition and foster monopoly, but it has been said that a determination by the legislature that such sales so result may not be questioned judicially. In other language, a court will not substitute its own conception of what is practical economics in place of the ideas maintained on that subject by the lawmakers.

In similar vein, the Supreme Court of California has also held that, owing to reasonable doubts on the point, the courts are concluded by the legislature's determination that a prohibition against sales at less than cost will help prevent the creation of monopolies and foster free, open and fair competition. But some courts have not hesitated to state the opinion that the statutes under consideration cannot accomplish their purpose, because large industries purchase in such great quantities that their unit costs are lower than those of merchants with small businesses, and the chain grocery store, for instance, is enabled under the statutes to sell legally at prices lower than those at which the independent grocer may sell.

To take this view, however, is to disregard the usual exception provided for in the statutes, whereby one is permitted to sell at less than cost in a bona fide attempt to meet a competitor's legal price.

2. Fixing prices in businesses not "affected with a public interest."

The courts are not in agreement as to whether a statutory prohibition against sales at less than cost is appropriately termed "price fixing." Some have denied

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19Section 5 of the Pennsylvania Fair Sales Act, for example, states that the provisions of the act shall not apply to sales, "(f) where the price of merchandise is made to meet the legal price of a competitor for merchandise of the same grade, quality and quantity."
the propriety of that appellation. Thus, of the California act, as amended in 1935, it was said:

"In its true sense it 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. In all other respects price is the result of untrammeled discretion."

Where this view prevails, a consideration of case authorities on the validity of price-fixing laws has been deemed unnecessary. But some courts, including a lower one in Pennsylvania, have treated these statutes as attempts to fix prices in businesses not affected with a public interest, and condemnable as such. So, in a case recently decided by Valentine, J., sitting in the Luzerne County Court of Quarter Sessions, after stating that the Commonwealth cannot fix prices at which commodities may be sold, services rendered, or property used, unless the business or property is "affected with a public interest," and repeating the well-known classification of businesses clothed with public interest, as announced in the Wolff Packing Co. Case, the learned judge observed that the Pennsylvania statute fixes the prices of tangible personal property generally, and is not confined to a single commodity, such as milk.

Under the doctrine of Nebbia v. New York, however, the question whether these statutes fix prices in businesses not affected with a public interest is an unnecessary inquiry. It has been well said:

"In passing upon the validity of such statutes the sole constitutional yardstick by which they should be measured is the necessity for and the reasonableness of the regulation. The question as to whether the statute involves direct or indirect price-fixing is a false quantity."

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22 Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).


As answering a contention that a retail grocery business, not being affected with a public interest, cannot validly be subjected to a state law prohibiting sales below cost for the purpose of injuring competitors and destroying competition, the following language used by a Federal District Court properly states the modern doctrine:

"The words 'affected with a public interest' mean nothing more than 'subject to the exercise of the police power.' . . . The Fourteenth Amendment to the Constitution of the United States does not prohibit governmental regulation by the state for the public welfare. It conditions the exertion of the admitted power of the state by insuring that the end shall be accomplished by means which are consistent with due process. The guaranty of due process demands only that the means shall not be unreasonable, arbitrary, or capricious, and that they shall have a real and substantial relation to the object sought to be attained."

The state statutes, however, must hurdle not only the Federal Constitution, but also the local constitutions, and it is to be observed in this connection that the Pennsylvania act has been held to contravene §§1 and 9 of Article 1 of the state constitution, as well as the Fourteenth Amendment to the Constitution of the United States.

3. Wrongful intent or injurious effect in sale.

Most of the acts prohibit sales at less than cost only if the seller has the specific intent or purpose to injure competitors and destroy competition. Some permit, as an alternative for proof of wrongful intent, a showing that the sale below cost has had an injurious effect upon competition or the public. By the Pennsylvania and New Jersey acts, however, neither a designated intent or purpose, nor a given effect, is expressly required.

Where the violation of a statute is conditioned upon the seller's wrongful intent or purpose, the constitutionality of the act may be more easily sustained than if no such intent or purpose is required. Thus, in upholding a provision against sales made at less than cost for the purpose of injuring competitors and destroying competition, the Supreme Court of California said that it was to be borne in mind that the statute did not regulate the selling of commodities, but merely prohibited the predatory trade practice of selling below cost with intent

29In Com. v. Hodin, 33 Pa. D. & C. 449a (1938; Luzerne Co. Quarter Sessions Ct.) the statute was said to offend Art. 1, §§1 and 9, of the Pennsylvania Constitution, as well as the Fourteenth Amendment to the Federal Constitution. In Com. v. Zasloff, 88 Pitts. L. J. 597, 33 Pa. D. & C. 447a (1938) it was regarded as violating Art 1, §1, of the Pennsylvania Constitution, as well as the Fourteenth Amendment to the Federal Constitution.
to injure competitors—a practice which the legislature on reasonable grounds had determined to be vicious and unfair. In similar spirit, the Arizona Unfair Sales and Practices Act appears to have been regarded as valid because it does not declare sales below cost to be unlawful per se, but only when they result in deceiving a purchaser or prospective purchaser, or in substantially lessening competition or unreasonably restraining trade, or in a tendency to create a monopoly.

Conversely, the absence of a requirement that the seller have an unlawful intent, or that the sale have an injurious effect on others, has served to produce a judicial reaction against the validity of the Pennsylvania act. Thus, one court has condemned the statute as ignoring a distinction between guilt and innocence, applying irrespective of the existence of fraud or destructive competition, and forbidding sales below cost where such evils are absent as well as where they are present. In another decision invalidating the statute, it was said that while the court was not prepared to hold that the sale of goods at less than cost for the specific purposes of injuring competitors and destroying competition could not be validly forbidden, the Pennsylvania act asserted the prohibition regardless of purpose or intent.

How sound such reasoning may be is doubtful. The Supreme Court of the United States has said that although the general rule at common law was that scienter constituted a necessary element in the indictment and proof of every crime, and that this was followed in regard to statutory crimes, even where the statutory definition did not in terms include it, there has been a modification of this view in respect of prosecutions under statutes whose purpose would be obstructed by such a requirement. This observation suggests, first, that into the Pennsylvania statute might be read an element of scienter, intent, or purpose—a suggestion apparently already rejected on the ground that a criminal statute will be strictly construed in accordance with its terms; and, second, that the Pennsylvania legislature may have regarded intent to injure competitors by selling below cost so difficult of proof that the practical expedient was to dispense with the necessity of evidence thereof.

4. Certainty of terms.

It is settled that under the due process clause of the Fourteenth Amendment to the Federal Constitution, a state may not validly create a criminal

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Com. v. Zasloff, 88 Pitts. L. J. 597, 33 Pa. D. & C. 447a (1938). Query: Why should the rule of strict construction operate to preclude an interpretation that would make the Commonwealth's task of proof more difficult?
offense without defining it in terms so clear that a reasonable man may understand the rule of conduct which the law prescribes. So, for a state to attempt to compel a person, under pain of penal consequences for his failure, to know the "real value" of an article whose price he has combined to control, is in contravention of due process of law.86

All of the existing statutes prohibiting sales at less than cost make a violation of their provisions a criminal offense, and in some instances punishment may be so severe as to include a fine of a thousand dollars and imprisonment for six months. Under the South Carolina act, indeed, the offender is liable to a forfeiture of five thousand dollars for each day's violation. The statutes, therefore, are peculiarly susceptible to the constitutional limitation mentioned in the preceding paragraph. In fact, it is the alleged vagueness of their meaning generally, and especially with reference to the determination of "cost," that has chiefly exposed them to attack on constitutional grounds.87 In this connection it is significant that in some of the cases sustaining the validity of these statutes, the inquiry whether "cost" was defined by the statutes in intelligible language was not actually involved, because the defendant admitted, or the proof showed, that he had made the sales in question at prices below cost.88

Although it has been said that the legislature must be presumed to have used terms with a meaning reasonably definite to those affected, that there is nothing to indicate that the ordinary business man does not know whether he is selling an article below cost, and that the difficulty of determining the cost of an article is a factual, not a legal one,89 several definitions relating to cost have been declared too indefinite to meet constitutional requirements. Thus, in condemning, by way of dictum, a definition of "cost of doing business" or "overhead expense" as all costs of doing business incurred in the conduct thereof, and embracing, without limitation, labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licensing, taxes, insurance, and advertising, a California court made this critical comment:40

87Something of this nature seems to have been in the mind of Gardner, J., in Com. v. Zasloff, 88 Pitts. L. J. 597, 33 Pa. D. & C. 447a (1938), when he said of the Pennsylvania act: "The statute does not assert the policy of this State to prohibit the practices which the Commonwealth contends it is aimed at; and this is fatal, because without an expression of policy we have no intelligent basis for its interpretation."
88Wholesale Tobacco Dealers Bur. v. Nat. Candy & Tobacco Co., — Cal. (2d) —, 82 P. (2d) 3, 118 A.L.R. 486 (1938) (defendant stipulating that the lowest possible cost of doing business was 3% above net cost of the goods, and that it sold the goods at net cost plus 1%); People v. Kahn, 19 Cal. App. (2d) 758, 60 P. (2d) 596 (1936) (defendant pleading guilty to a violation of the terms of the statute); Mering v. Del Paso Heights Market, C.C.H. Trade Reg. Serv. 122,028 (1938; Cal. Super. Ct.) (proof being uncontradicted that some of the defendant's sales were at less than cost as defined by the act).
89People v. Kahn, 19 Cal. App. (2d) 758, 60 P. (2d) 596 (1936)
90Balzer v. Caler, 74 P. (2d) 839 (1937; Cal. App.), affirmed on other grounds in — Cal. (2d) —, 82 P. (2d) 19 (1938).
"The statute fails to state what period of time is to be included in estimating overhead expenses which are to be added to the invoice price of the article to be sold so as to determine the cost for resale thereof. A merchant's stock in trade varies from time to time. Meats, bakery products, and certain classes of groceries deteriorate rapidly. Is the merchant to take stock and hold an accounting every time he wishes to display for sale a few leader articles below normal price for the purpose of advertisement? For the purpose of such sales is he to estimate his average overhead expenses for the period of a year, or for a month, or is he to ascertain that sum on the very day on which he proposes to sell the forbidden article? By what standard is a merchant to determine such elements as depreciation of goods, selling cost, or credit losses? What is to be the measure of the value of his equipment? Is there to be no limit of expenditures for interest, insurance, or advertising? The statute throws no light upon these perplexing problems. Every merchant is left to guess at the rules and standards to be applied and to determine for himself the period for which the overhead expenses are to be calculated. The section is therefore uncertain and void in that regard."

Likewise, a provision in the Minnesota Unfair Practices Act, to the effect that an established cost survey of a particular trade in the vicinity of an alleged violation of the statute shall be competent evidence against a defendant member of such trade, has been held to be unconstitutionally vague, for the reason that the statute does not define a cost survey, nor state who shall draw it up, nor who shall pass upon its fairness, nor delineate the locality within its operation. So also, on the ground that the word "may" contemplates mere "possibilities," the Supreme Court of Nebraska has declared invalid for uncertainty the declaration in the Nebraska Unfair Practices Act that it shall be unlawful to sell at less than cost, where the effect thereof "may" lessen, injure, destroy, prevent, hinder or suppress competition.

5. Equality and reasonableness of particular provisions.

Although uniformity in effect is a virtual impossibility and not to be expected of any law, it has become almost a matter of habit to challenge the validity of statutes on the ground that they make discriminations having no justifiable basis. Enactments prohibiting sales at less than cost have not been excepted from such attacks, and in this regard have had varying fortune in the courts.

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41Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (1938; D.C., Minn.).
On the one hand, the contention has been repelled that the Tennessee Unfair Sales Act unconstitutionally discriminates as between efficient and inefficient retailers, in that it defines cost as including a markup amounting to (not) less than the minimum cost of distribution "by the most efficient retailer," such markup to be six per cent. in the absence of proof to the contrary. And the California Unfair Practices Act, revision of 1935, has been sustained as against the argument that it does not have uniform operation because it gives an advantageous position to large chain and department stores, whose unit costs, by reason of greater purchasing power, are less than those of merchants with small businesses.

Provisions of the Minnesota Act, however, making an established cost survey a prima facie test in determining cost, where such a survey exists for the particular trade in the vicinity of the alleged violation of the statute, but providing for another method of computing cost in the absence of such a survey, have been held to effect an arbitrary discrimination which invalidates the act.

In other instances attacks upon provisions of the statutes have been directed at their reasonableness generally. With respect to the Tennessee Unfair Sales Act, for example, it was contended unsuccessfully, in view of exceptions in the statute permitting isolated transactions and clearance sales at less than cost, that a retailer who had bought at low prices more than sixty days before resale was denied his constitutional property rights by provisions of the act prohibiting sales at less than cost and defining cost to a retailer as the lower of (1) purchase price, where the invoice bore date not more than sixty days before resale, or (2) replacement cost, as of the date of the resale, of the quantity last purchased by the retailer—less trade discounts other than for cash, and plus the statutory markup. And through an interpretation of the words "most efficient retailer" as being used in a generic sense, rather than as singling out any particular individual, the same statute safely weathered the argument that an unreasonable and oppressive burden was placed upon a retail seller to seek out the most efficient retailer, under a provision of the act requiring a retail seller to add as an element of cost a markup amounting to (not) less than the minimum cost of distribution by the most efficient retailer.

The Minnesota Act did not fare so well at the hands of a Federal District Court, which found to be unconstitutionally arbitrary and discriminatory a provision of that statute disregarding current selling costs by defining the cost of doing business as the average of all costs of doing business during the calendar year immediately preceding an alleged violation, or such shorter time as the seller

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45 Rust v. Griggs, — Tenn. — 113 S.W. (2d) 733 (1938).
47 Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (1938; D.C., Minn.).
48 Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).
49 Ibid.
may have been in business, if not for a full year; and as similarly invalid, when applied to a case where it did not give effect to actual prices charged by the manufacturer, a provision defining cost to a merchant as the manufacturer's list price, less published discounts, plus the merchant's cost of doing business.

In a few of the statutes prohibiting sales at less than cost appear indicia of an endeavor to circumvent objections to the vagueness of the provisions by establishing convenient presumptions.

A statutory presumption that the cost of distribution by the most efficient retailer shall be six per cent., in the absence of contrary proof, has been upheld. And in relation to the element of cost, a court approved a statutory presumption that any sale at less than ten per cent. above the manufacturer's published list price, less published discounts, or, in the absence of such list price, at less than ten per cent. above invoice or replacement cost, should be prima facie evidence of a violation of a statute prohibiting sales at less than cost for the purpose of injuring competitors and destroying competition. But the latter presumption, it was held, offended constitutional principles, because a guilty intent could not reasonably be inferred from the mere making of a sale below cost, and because it placed upon a merchant an unreasonable burden to show he did not have the wrongful intent. Similarly, provisions of a state statute inhibiting sales below cost were said to violate the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution, where, as read together, they stated that in a prosecution of a person, as officer, director, or agent, for a violation of the act, it should be enough to allege and prove the unlawful intent of the principal for whom he acted, and that a person who assisted or aided in the violation, directly or indirectly, as director, officer or agent of an offender of the act, should be equally responsible for the offense.

6. Interference with interstate commerce.

Section 1(c) of the Pennsylvania Fair Sales Act requires that costs to the wholesaler and retailer must be bona fide costs, and that sales to consumers, retailers and wholesalers at prices which cannot be justified by existing market conditions "within this State" shall not be used as a basis for computing costs with respect to sales by retailers and wholesalers. Such a provision has been sustained as against the argument that it invalidly burdens interstate commerce

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48 Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (1938; D.C., Minn.). Compare Balzer v. Caler, 74 P. (2d) 839 (1937; Cal. App.), affirmed on other grounds in — Cal. (2d) —, 82 P. (2d) 19 (1938), in which the court criticized the California Unfair Practices Act for its silence as to the time to be included in computing cost of doing business.

49 Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (1938; D.C., Minn.).

50 Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).

51 Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (1938; D.C., Minn.).

52 Ibid. §3 of the Pennsylvania Fair Sales Act provides that proof of any advertisement, offer to sell, or sale at less than cost shall be prima facie evidence of a violation of the act.

53 Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (1938; D.C., Minn.).
by denying the seller the privilege of employing actual cost figures on merchandise bought in another state at prices below those obtaining where the statute is in force.

III. CONSTRUCTION AND APPLICATION

A. Strict or liberal construction.

At an earlier point advertence was made to the apparent typographical error in a number of the acts, the courts being therein directed to construe the statutes "literally" in order that their beneficial purpose may be subserved. The word "liberally" probably was intended, and a few of the statutes now correctly provide for a liberal construction.

In the absence of statutory direction as to how they shall be interpreted, the acts will probably be construed strictly, at least when their penal provisions, as distinguished from those setting up civil remedies of injunction and damages, are involved. Strict construction has already been declared the proper one for the Pennsylvania act.

B. Wrongful intent or injurious effect.

Under the discussion of the validity of the statutes attention was directed to the fact that only the Pennsylvania and New Jersey acts fail to require, specifically or by most obvious implication, that the prosecution or complainant allege and prove a wrongful intent or injurious effect to have accompanied the sale below cost. It is customarily necessary to show a purpose on the part of the seller to stifle competition, or at least to show an injury to competitors as the result of the sale. So, sales below cost have been said not to be unlawful under the Tennessee Act unless made with the intent or effect of deceiving the public, injuring creditors (sic), or destroying competition, since that statute provides that it shall be a misdemeanor to sell at less than cost in contravention of the policy of the act, which is directed against sales below cost with intent or effect of inducing the purchase of other merchandise, or of unfairly divert-

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54 Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).
55 See note 8, supra.
56 See the amended California act of 1937, and the Arizona and Utah statutes, cited in note 6, supra.
ing trade from a competitor, or otherwise injuring a competitor, where the result is to tend to deceive or mislead a purchaser or prospective purchaser, or to lessen competition substantially or restrain trade unreasonably, or to tend to create a monopoly.69

According to the terms of some of the statutes a sale at less than cost is unlawful only if made with the purpose of injuring competitors "and" destroying competition.60 By a common rule of construction, however, courts might construe this word to mean "or."61

Necessarily, circumstantial evidence must play an important role in establishing the seller's unlawful purpose in making a sale at less than cost. In one instance a mere advertisement of articles priced at less than cost, circulated in the vicinity where competitors conducted business, was treated as evidence of an intent to injure competitors and destroy competition.62 In another case an admission in the pleadings that the defendant advertised several products at less than cost, but others at more than market price, satisfied the court that he did so with the intent or effect of deceiving the public, injuring creditors (sic), or destroying competition.63

Allusion has been made at an earlier point to the fact that a number of legislatures have resorted to the expedient of creating a presumption that mere proof of a sale below cost shall be prima facie evidence of a violation of the statute.64 As noted, where wrongful intent is an element of the offense, the validity of such a presumption is at least doubtful.65 In any event the presumption has been held to be rebutted by a finding that the defendant sold at less than cost in order to meet competitors' prices, advertise his business, improve his trade, and stimulate consumers' interest.66

C. Judicial aid of statutory language.

Where necessary to make wrongful intent an element of the offense of selling below cost, the courts have not hesitated to supply a comma inadvertently omitted from the statutes.67 And the principle that, when several words are

69Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).
60The Arkansas, Colorado, Kentucky, Montana, Wyoming, and Minnesota acts so provide. In the 1937 amendment to the California act the word "or" replaced the word "and" at this point.
61For an instance in which this was done sub silentio in a statute relating to inheritance by adopted children, see Cave's Estate, 326 Pa. 358, 192 A. 460 (1937).
63Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).
64See note 52 supra, and text to which it refers.
65Balzer v. Caler, — Cal. (2d) —, 82 P. (2d) 19 (1938).
followed by a clause which is applicable as much to the first and other words as to the last, the natural construction demands that the clause be read as applicable to all, has been otherwise employed in the construction of such a statute. So also, a provision for including the "cost of doing business" in the computation of "cost" has been regarded as requiring merely that its "share" of the total cost of doing business be added when ascertaining the cost of a given article. Likewise, the word "not" has been supplied where patently omitted through inadvertence.

D. Specific applications.

On the theory that the Pennsylvania statute must be strictly construed, the Court of Quarter Sessions of Butler County, per Wilson, J., though convinced that the spirit of the act had been offended, acquitted one charged with violating the act, where he was shown to have purchased medicinal tablets in bottles at a cost of less than two-thirds of a cent per tablet, and to have then placed twelve of them in a paper box, and to have sold them, thus boxed, for twelve cents, when the cost to him of the regular tin box of twelve tablets was fourteen cents, retailing, according to the manufacturer's advertisements, at twenty-five cents per box.

A number of opinions emanating from the offices of state attorneys general may be of interest. It has been said, for example, that a store would probably violate the Wyoming act if it prepared and sold meals to the public at less than cost as a sideline to its regular business; that under the Montana and Minnesota acts a gift may be given with a purchase, if the price of the article sold is sufficient to cover the cost of the donated as well as the vended article; that under the Minnesota act the cost of trading stamps must be included in the computation of the cost of an article; a butcher selling to a restaurant, which in turn sells the cooked meat, is not a wholesaler, nor is a lumberman selling to a building contractor; stores selling the same article in different departments may not assert different costs for such article merely because of different departmental costs; and labor furnished by the proprietor, or voluntarily by mem-

Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).
People v. Kahn, 19 Cal. App. (2d) 758, 60 P. (2d) 596 (1936). Compare Balzer v. Caler, 74 P. (2d) 839 (1937; Cal. App.), affirmed on other grounds in — Cal. (2d) —, 82 P. (2d) 19 (1938), wherein literal construction of this provision of the statute was invoked to show its indefiniteness.
Rust v. Griggs, — Tenn. —, 113 S.W. (2d) 733 (1938).
bers of his family need not be included in determination of cost; and that under the Wyoming act it would be unlawful to operate a "suit club," in which a lucky contributor might obtain a suit of clothes for less than actual cost.

Rochester, N. Y.  

J. Wesley Oler

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The statutory inhibition against sales below cost adopted in Wyoming has recently been sustained in a very well considered opinion. See State v. Langley, Wyo., 84 P. (2nd) 767.