retailer who refused to buy from him). Under the anti-trust acts the lowering of local prices by a national company in order to eliminate competition and create a monopoly while absorbing temporary resultant losses by higher prices in other areas, has been enjoined. *United States v. Great Lakes Towing Co.*, 217 Fed. 656 (D.C. Ohio 1914); see Nims, Unfair Competition § 301 (3d ed. 1929). Although courts have not so held, economists have suggested that the practice of selling loss leaders should be deemed unfair competition. Seligman and Love, Price-Cutting and Price Maintenance, c. 19 (1932). See Rogers, Predatory Price-Cutting as Unfair Trade, 27 Harv. L. Rev. 139 (1913).

There is a clear-cut distinction between these proscribed practices and the price-cutting in the instant cases: Where price-cutting has been held unfair, it has eliminated competitors by means other than greater productive efficiency. Consequently, it could not bring about the social benefits said to justify competition, *i.e.*, the elimination of inefficient enterprises and the furnishing to society of the maximum utility at the minimum cost. See Stevens, Unfair Competition 16–18 (1917); Seligman and Love, Price-Cutting and Price Maintenance 141, 458 (1932). In the instant cases, however, the competition was competition of productive efficiency which was designed to increase volume by reducing prices and which might ultimately increase want satisfaction. Under prevailing assumptions, such competition is socially desirable despite the evils incidental to it. See *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 129 (1904). But it has been suggested that competition demoralizing to industry should be curbed despite temporary resultant benefits to consumers. Gaskill, Price Control in the Public Interest 58, 65, 101 (1931). Even under this view, it is questionable whether injunctive relief was proper. Police measures and collective bargaining respectively might be used to combat the evils of racketeering and low wages. Should these measures prove ineffectual, a statute fixing minimum prices and establishing an administrative board would more effectively protect the public interest than a decree granted at the request of a monopolistic trade association. However, the enforcement of such a statute would probably involve administrative difficulties. See Terborgh, Price Control Devices in NRA Codes (1934). Moreover, its constitutionality would be questionable. The *Nebbia* case, involving a statute fixing the price of milk, announced that the test of the constitutionality of such regulation would be its reasonableness. *Nebbia v. New York*, 291 U.S. 502, 536 (1934). Application of this test to cases involving minimum price statutes for the cleaning, barber and similar industries has resulted in a preponderance of decisions holding the regulation unreasonable and the statute unconstitutional. *Becker v. State*, 185 Atl. 92 (Del. 1936); *Kent Stores of New Jersey v. Wilentz*, 14 F. Supp. 1 (1936) (cleaning); *State ex rel. Fulton v. Ives*, 167 So. 394 (Fla. 1936) (barbers); *Rohrer v. Milk Control Board*, 121 Pa. Super. 281, 184 Atl. 133 (1936) (milk). See *Royce v. Rosasco*, 287 N.Y.S. 692 (N.Y. 1936); *Albert v. Milk Control Board*, 200 N.E. 688 (Ind. 1936) (milk); *In re State ex rel. Attorney General*, 264 N.W. 633 (Wis. 1936), noted in 11 Wis. L. Rev. 430 (1936) (Wisconsin Recovery Act making it the duty of the governor to prescribe reasonable codes of fair competition upheld). In view of these decisions, the price fixing decree may present the phenomenon of a court regulating matters which a legislature may not constitutionally regulate.

Evidence—Burden of Proving Bona Fide Purchase—[New York].—A grantor having delivered a deed in escrow for the plaintiff, executed a deed of the same land to the defendant. The latter deed was recorded. The defendant claimed the land as a bona fide purchaser. *Held*, a subsequent grantee has the burden of proving that he is a bona fide purchaser for value and without notice. *Hood v. Webster*, 271 N.Y. 57, 2 N.E. (2d) 43 (1936).

The prevailing rule in American jurisdictions is that the burden of proving the payment of the purchase price in good faith, without notice of the prior unrecorded interest is upon one who claims as a bona fide purchaser. *Shraiberg v. Hanson*, 138 Minn. 80, 163 N.W. 1032 (1917); *Title Guarantee & Trust Co. v. Henry*, 208 Cal. 185, 280 Pac. 954 (1929); *Young v. Hamilton*, 213 Iowa 1163, 240 N.W. 705 (1932); *Cook v. Knight*, 173 S.C. 278, 175 S.E. 506 (1934). Likewise, one who claims under a grantor who acquired his title by fraud has the burden of proving both value and lack of notice. *Ochenkowski v. Dunaj*, 232 App. Div. 441, 251 N.Y.S. 589 (1931). A compromise rule in a few states imposes the burden of proving payment of a valuable consideration upon the subsequent purchaser, though the burden of proving notice is imposed upon the prior grantee. *Shotwell v. Harrison*, 22 Mich. 409 (1871); *Morris v. Daniels*, 35 Ohio St. 406 (1880). Such a division may be explained as follows: (1) Payment of the purchase price is peculiarly within the knowledge of the grantee under the deed having priority of record; (2) lack of notice being a negative fact, courts are somewhat reluctant to impose this burden on the subsequent grantee when the prior grantee could prove it as an affirmative fact. *Shotwell v. Harrison*, 22 Mich. 409 (1871). However, this reluctance is not universal, since the element of the negative fact is not an invariable test but merely one of many factors of fairness and expedience that must all be considered in determining who will bear the burden of proof on a specific issue. 5 Wigmore, Evidence § 2486 (2d ed. 1923).

The Illinois court has adopted a double rule. In equity, the burden of proof is placed on the one claiming as a bona fide purchaser. *McGuire v. Gilbert*, 270 Ill. 160, 110 N.E. 377 (1915). Whereas in actions at law, the burden of proof is upon the person alleging bad faith or want of consideration. *Anthony v. Wheeler*, 130 Ill. 128, 22 N.E. 494 (1889); *Lowden v. Wilson*, 233 Ill. 340, 84 N.E. 245 (1908). The same distinction had been made by an early New York supreme court. *Jackson v. McChesney*, 7 Cow. (N.Y.) 360 (1825). However, the court in the instant case ignored this distinction as well as the previous case applying it. Since the proof of payment or non-payment of the consideration will have the same effect at law or in equity, the distinction is hardly justifiable.

Much of the difficulty in which courts have found themselves may be due to the fact that they have failed, in many instances, to clarify the term "burden of proof," or to distinguish between the burden of persuasion and the burden of producing or going on with the evidence. See *Young v. Hamilton*, 213 Iowa 1163, 240 N.W. 705 (1932); *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 75 N.E. 800 (1905). It would seem that the analysis given by the majority of the New York Court of Appeals in the present case is accurate. The court stated: that there must be credible evidence that the subsequent purchaser had paid a valuable consideration for his deed, in excess of the formal recital of consideration in the deed itself; that such evidence would also give rise to an inference that he was a purchaser in good faith; but that only the burden of going on with the evidence, and not the burden of persuading the jury would shift to the prior grantee. Thus the principal case enunciates the rule adhered to by the majority of courts. Failure of the prior grantee to produce rebutting evidence should result in a directed verdict; but if contrary evidence is produced, the case should be for the jury, with the normal burden of proving both value and lack of notice on the subsequent purchaser.

In the normal situation this burden of persuasion never shifts. 5 Wigmore, Evidence § 2489 (2d ed. 1923); *McAdams v. Bailey*, 169 Ind. 518, 82 N.E. 1057 (1907); *Lebens v. Wolf*, 138 Minn. 435, 165 N.W. 276 (1917). However, even the burden of persuasion, on a particular issue, has been said to be shifted if the party having the burden produces evidence raising a strong policy presumption, *e.g.* the presumption of legitimacy arising on proof that the mother was married at the time of birth. See Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 921 (1931). Perhaps therefore, in some states where proof of recording does raise a strong presumption that the legal title is with the recorded deed, a result contrary to the principal case might well be reached. See *Hoyt v. Jones*, 31 Wis. 389 (1872); *Lampe v. Kennedy*, 56 Wis. 249, 14 N.W. 43 (1882) (holding the burden of proving both notice and lack of consideration on the prior grantee).

Insurance—Interpretation of Risk Exclusion Clause in Automobile Owner's Liability Policy—[New York].—The plaintiff brought suit on a liability insurance policy for injuries caused to him by the insured's automobile. At the time of the accident the defendant's seventeen year old son, who had a junior operator's license, was driving the car on his return from a social visit. The defendant insurance company pleaded the clause in the policy providing that the policy "shall exclude any obligation of the company . . . . while any described automobile is being driven . . . . by any person *under the age fixed by law. . . .*" (Italics added.) The New York statute stipulated that "No license . . . . shall be issued to any person under eighteen years of age, except that junior operators' licenses may be issued to minors who have arrived at the age of sixteen years, but who have not reached eighteen years of age . . . . provided, however, that such license shall entitle a licensee to operate a motor vehicle . . . . only in traveling to and from school, and in the usual and ordinary pursuit of the business of the parent or guardian of the licensee." N.Y. Cons. Laws 1935, c. 64-a, § 20. *Held*, (three judges dissenting), for the plaintiff. The driver was not a person under the age fixed by law, and the exclusion clause in the policy did not excuse the insurance company from liability merely because the terms of the license had been violated. *Taylor v. U.S. Casualty Co.*, 269 N.Y. 360, 199 N.E. 620 (1936).

The exclusion clause in this policy can be literally interpreted in two ways: (1) the driver was to observe the restrictions of his license and would be "under the age fixed by law" in driving for purposes which a junior operator's license did not sanction, (2) he was only to be of age to receive any license and his violation of its restrictions would not make him "under the age fixed by law." By accepting the latter interpretation and imposing liability, the court in the principal case recognized the policy of construing ambiguous terms of insurance contracts in favor of the insured. Vance, Insurance § 179 (2d ed. 1930).

In applying this policy the courts have uniformly accorded no effect to general "catch all" exclusion clauses. 29 Col. L. Rev. 1023 (1929). They have allowed recovery despite the usual clause that the insurer is liable only for injuries resulting from negligent operation of a motor vehicle by one *legally* using or operating the same,