Trade Regulation—"Cost" in Unfair Practice Act—[Cal.].—Plaintiff sought an injunction to restrain the defendant from selling groceries at less than their cost, in violation of section 3 of the California Unfair Practices Act.[1] From a judgment denying the injunction, plaintiff appealed. *Held*, affirmed. Defendant did not sell at less than cost "for the purpose of injuring competitors and destroying competition" as required by the statute; and even if he had, the statute is unconstitutional because of its vagueness and uncertainty in establishing a method of ascertaining cost. *Balzer v. Caler*.[2]

In the eighteen fair trade practice acts which have been passed there is no more than an incomplete definition of "cost."[3] Accounting, as well as judicial opinion has questioned the efficacy of these statutes which adopt cost as the minimum legal standard for price and attempt to define it in a perfunctory manner.[4] This legislative attempt to relate price to cost is based upon a belief that sales below cost are economically and ethically unsound, and are unfair methods of competition, since anyone who voluntarily accepts a loss on sales is motivated by an intent to cripple his competition and ultimately secure a monopoly.[5]

The accountants' attacks upon "cost" is based upon their own divergence of opinion on how to deal with the factors not specifically covered by the statutory definition. Upon such cost questions as (1) the proper base,[6] (2) factors to be included,[7]

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pensation where death is due to natural causes instead of by accident." Indianapolis Abattoir Co. v. Bryant, 67 Ind. App. 225, 229, 119 N.E. 24, 25 (1918).

[1] Cal. Gen. Laws, Act 314 as amended by Gen. Laws of 1937 c. 860, § 3, effective Aug. 26, 1937.

[2] C.C.H. Trade Regulation Service ¶ 25,079 (Cal. Dist. Ct. App., 3d App. Dist., Dec. 18, 1937); see also People v. Kahn, 60 P. (2d) 596 (Cal. App. 1937), noted 14 N.Y. U. L. Q. 394 (1936); Charles Mering v. Del Paso Heights Market, C.C.H. Trade Regulation Service ¶ 25,028 (Cal. Superior Ct. Nov. 19, 1936).

[3] C.C.H. Trade Regulation Service ¶ 900–9971 (Arizona, Arkansas, California, Colorado, Connecticut, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Wyoming); see also the Robinson-Patman Act, 49 Stat. 1526 (1937), 15 U.S.C.A. § 13(a) (1937), which prohibits price discriminations except those which make "due allowance for difference in costs."

[4] McNair, Marketing Functions and Costs and the Robinson-Patman Act, 4 Law and Contem. Prob. 338 (1937); Cupp, Unfair Practices Act, 10 S. Calif. L. Rev. 18 (1936); Hamilton, Cost as a Standard for Price, 4 Law and Contem. Prob. 214 (1937); Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640 (1936); Anderson, Selling Below Cost under N.R.A., 13 Certified Public Accountant 605 (1933); 63 Jour. of Accountancy 10 (1937); Zorn and Feldman, Business under the New Price Laws (1937).

[5] See the Wholesale Drug Industry Code, Rule 3, C.C.H. Trade Regulation Service ¶12,645 (1937).

[6] Shall invoice, replacement cost, or whichever is lower be used? Is depreciation to be calculated on a straight line, output, or interest method?

[7] Should interest on only borrowed capital or total investment be included? How include advertising contracted for in advance?

(3) the temporal basis,[8] and (4) the allocation of overhead expenses to specific items,[9] there is no uniformity amongst the experts. Hence, the court's determination in the instant case that the act was unconstitutional because of its vagueness was merely the judicial recognition of the confusion that might arise in attempting to determine cost under the statute.

Draftsmen of unfair practice statutes have one of two possibilities in avoiding the objections of vagueness. They may incorporate within the statute, or in administrative rules and regulations, a detailed set of approved accounting principles to cover every accounting question which conceivably might arise. This is the approach of the income tax law. However, such an attempt to secure greater definiteness through greater detail only adds to the complexity and soon reduces to cumulative loophole plugging. Moreover, such regulations are undesirable, since they apply equally to those whose conduct is reprehensible and against whom the statutes are aimed, as well as those whose acts for some particular reason are not censurable. Furthermore, the effectiveness of the statute in eliminating the evils of below cost selling depends largely upon the ease and speed with which a seller can determine the permissible price and with which the state authorities can detect violation. To compel either the seller or the government to resort to detailed computations would be to hamstring the activities of both. The most convincing argument against a legislative selection of detailed accounting methods which must be followed in every case is that such methods would not be applicable to particular industries and would ignore the fact that particular levels of distribution demand different cost treatment. An attempt to prescribe general accounting techniques fails to consider the peculiar conditions prevailing in each trade. Most of the conflicts in cost accounting methods disappear upon separate consideration of specific problems in particular trades.

The alternative to such a detailed approach is to delegate to courts or, perhaps, administrative bodies, the application of flexible standards. A judicial approach to the accounting problems would involve the recognition of the particular character of each trade and industry.[10] A court, aided by the testimony of accountants, should be competent to decide what are established accounting principles and practices in a trade, and, if need be, in a particular locality, or, in the absence of such proof, to evaluate conflicting accounting practices and determine their applicability to the case before it. Moreover, the flexibility under this approach enables a court to administer the act so as not to affect those whose conduct is not reprehensible under the statute. Fair practice statutes are designed to curb exaggerated loss leaders selling and to set a loss limitation floor.[11] Hence, even though a defendant were able to prove by his accounting method that he was not selling below cost, if by the accounting principles of the

[8] Shall the period be a day, week, month, or year? Are not seasonal and cyclical changes to be included?

[9] For example, how are joint products to be treated? By-products? Fast selling items as compared to slow selling items? Single products sold to wholesalers and retailers? Single retailer or wholesaler selling several articles?

[10] 51 Harv. L. Rev. 694, 702 (1938); McAllister, Government and Some Problems of the Market Place, 21 Iowa L. Rev. 305, 319 (1936).

[11] Zorn and Feldman, Business under the New Price Laws 317 (1937).

trade he were, he could not justify his cost differential under this approach. The present, and undoubtedly future, activities of trade associations, may aid greatly in effectuating this type of a statute by giving to state officials, retailers, and courts the criteria by which to judge the level of cost. These activities are in outlining accounting principles applicable to each trade and in conducting cost surveys for different trades in particular localities. Confining trade associations to aiding courts in determining cost, eliminates, on the one hand, the objection to government-dominated associations, as for example, under the N.R.A., and on the other hand, offers the opportunity for modified self regulation to be exercised by the individual trades.

A statute has recently been proposed by the grocers association in lieu of any general unfair practices act applicable to its members. The proposal is to define cost as invoice cost plus a minimum mark-up of 6%. The advantages of such a statute are that it gives the business man a quick method of determining his legally minimum selling price, and the government authorities an easy way of detecting violations. But the percentage fixed as the minimum mark-up must necessarily be an arbitrary figure. Furthermore, such a statute may be stigmatized as legislative price fixing.[12]

Regardless of the type of statute used, however, there is now an unmistakable legislative disposition in the United States to supplement the "vertical" operation of existing resale price maintenance laws with the "horizontal" operation of sales below cost laws.

Wills—Election—Devise of Another's Property—[Ohio].—A husband devised a life estate in several parcels of land to his wife and a remainder in fee to the plaintiff. One of these parcels, the Melish Ave. land, was owned at this time in fee by the wife. After his death, the wife accepted the various life estates under the will and later devised the Melish Ave. land to the defendant. The executor of the wife's will made an application to the probate court for a certificate of transfer[1] of the land to the defendant. The plaintiff thereupon filed suit alleging ownership of the fee under the husband's will. The defendant demurred. *Held*, judgment for the plaintiff since the intention of the husband was to confer benefits, including the life estate, upon his wife only if she relinquished her fee in the Melish Ave. land according to his will. *Foyes v. Grossman*.[2]

The reasoning of the court is unconvincing because it is based upon the assumption that the husband knew that he did not own the Melish Ave. land. In his will, the husband referred to the parcels of land collectively as "my real estate." Moreover, had he known that his wife owned this property, he probably would have adopted the simple method of bequeathing the other property to his wife, upon the express condition[3] that she convey the remainder in the Melish Ave. land to the plaintiff, instead of conveying the wife's property to the plaintiff.

But even though the husband mistakenly believed all the parcels of land to be his

[12] New State Ice Co. v. Liebman, 285 U.S. 262 (1932); see Nebbia v. New York, 291 U.S. 502 (1934).

[1] Throckmorton's Ohio Code 1936 § 10509-102.

[2] 56 Ohio App. 375, 10 N.E. (2d) 930 (1937).

[3] See 36 Col. L. Rev. 439 (1936); Lundquist v. 1st Lutheran Church, 193 Minn. 474, 259 N.W. 9 (1935).