be considered,[24] including the fact that special diligence is said to be required of taxpayers,[25] publication as to absent residents should be held to be reasonably calculated to give notice. But though necessary and reasonable, the court in the instant case seemed to feel that one notice where no definite time was set for the hearing was a failure to provide the best available method of notifying the taxpayer.[26] This position seems sound because the legislature could have set a specific date for the return day or at least have limited it to a more definite time, instead of requiring a taxpayer to watch for one notice over a period of as high as five months, a task especially burdensome to those whose residence is within all six taxing districts and who would thus be obliged to watch for six notices. While it is not clear whether the court would uphold the statute were it redrafted in line with the foregoing analysis or whether it had further objections (lack of justiciability and reasonable classification) which the concurring opinion raised, it would seem that a redrafted statute should be upheld as to residents.

Trade Regulation—Invalidity of Unfair Practices Act for Uncertainty—[Nebraska]. —An injunction was issued against a grocer who had advertised and sold coffee at a price below the "cost price" to him within thirty days prior to the sale to restrain further violation of the Nebraska Unfair Practices Act, section 3[1] of which provides that it is unlawful "to sell, offer for sale or advertise for sale" below cost "where the effect of such sale below cost . . . may lessen, injure, destroy, hinder or suppress the competition of competitors." "Cost" for a retailer is the invoice cost within thirty days of the sale or replacement cost, whichever is lower, plus a markup not less than the "minimum cost of distribution by the most efficient retailer," prima facie evidence of which is a six per cent markup.[2] The defendant pleaded that the statute was void for uncertainty and that it violated the due process clauses of the federal and state constitutions. *Held*, judgment reversed and proceedings dismissed without determination of the constitutionality of the statute. Since the statute contained no definition of criminal intent or guilty knowledge, the ordinary person would not know beforehand what course it was lawful to pursue. The statute is not sufficiently clear to sustain either criminal prosecution or civil proceedings. *State ex rel. English v. Ruback*.[3]

Statutory provisions against sales below cost, similar to the statute construed in

[24] Town of Hinckley v. Kettle River R. Co., 70 Minn. 105, 110, 72 N.W. 835, 836 (1897); Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

[25] North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925).

[26] "If the statute fixed the first day of a definite term of court, or if the levies were required to be on file with the clerk by a fixed date, the taxpayer would have some definite information from which the date of hearing could be ascertained." Griffin v. Cook County, 369 Ill. 380, 392, 16 N.E. (2d) 906, 912 (1938).

[1] Neb. L. 1937, c. 137, § 3.

[2] Actual cost of doing business is defined as the percentage which overhead expenses were to total volume of sales for the year immediately preceding the violation. It must include "without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, buildings and fixtures, transportation and delivery cost, light, heat, power and water, credit losses, all types of licenses, taxes, insurance and advertising." *Ibid.*

[3] 281 N.W. 607 (Neb. 1938).

the instant case, supplement legislation[4] aimed at price cutting practices which many business men consider unfair and destructive competition. The chief constitutional hurdle faced by these rather recent statutes prohibiting sales below cost is the objection that they are attempts to fix minimum prices in businesses not affected with a public interest.[5] Proponents of such legislation offer two answers to the objection: (1) these are not price fixing statutes. Their purpose is to limit destructive price cutting, a practice the legislatures believe to be economically wasteful and harmful to free competition; (2) since the case of *Nebbia v. New York*,[6] the view of what constitutes public interest has been enlarged. If a necessity to regulate an evil exists and the legislation enacted has a reasonable relation to the accomplishment of the ends properly sought, such legislation will be sustained. Business, to be affected with a public interest, does not have to possess all the quasi-public characteristics of the public utilities.

The objection is further made that the definitions of cost in these statutes are so vague that the statutes are unenforceable,[7] even granting that the ends sought are justifiable. It is a great burden on business men to make them guess what system of accounting will be acceptable to the courts.[8] The possibilities of excessive and tedious litigation[9] and the danger of threats of litigation by competitors are to be noted in considering the wisdom of any statute which requires business men to base their ordinary trading activities upon an accurate determination of their actual total cost of doing business.[10] The requirement of an intent to injure competitors may remove some of the objections to the indefiniteness of these provisions,[11] but there is still the possibility of subjecting an innocent man to vexatious litigation to prove that his sales were not below cost.

[4] The other statutory measures are: (1) exception of resale price maintenance contracts from the anti-trust laws. These are generally called Fair Trade laws. See Grether, Experience in California with Fair Trade Legislation Restricting Price Cutting, 24 Calif. L. Rev. 640 (1936); Elliott, Fair Trade and Resale Price Maintenance, 10 So. Cal. L. Rev. 1 (1936); C. C. H. Trade Regulation Service ¶ 2808 *et seq.* collects the statutes. (2) The Unfair Trade Practices acts, in which the sales below cost provisions are frequently included, prohibit price discriminations between localities and persons. See Cupp, The Unfair Practices Act, 10 So. Cal. L. Rev. 18 (1936); Grether, *op. cit. supra*, at 645; note in 32 Ill. L. Rev. 816 (1938); for statutes see C. C. H. Trade Regulation Service ¶ 2310 *et seq.* See also a symposium on Price Discrimination and Price Cutting, 4 Law and Contemp. Prob. 271–419 (1937). On unfair competition generally, see a Symposium on the Law of Unfair Competition, 21 Iowa L. Rev. 175–454 (1936).

[5] Balzer v. Caler, 74 P. (2d) 839 (Cal. App. 1937) noted 5 Univ. Chi. L. Rev. 524 (1938); Commonwealth of Pennsylvania v. Hodin, C.C.H. Trade Regulation Service ¶ 25177 (Pa., Luzerne County 1938); State of New Jersey v. Packard-Bamberger & Co., Inc., C. C. H. Trade Regulation Service ¶ 25164 (N.J. Dist. Ct. 1938).

[6] 291 U.S. 502 (1933).

[7] See 5 Univ. Chi. L. Rev. 524 (1938).

[8] See Hamilton, Cost as a Standard for Price, 4 Law and Contemp. Prob. 321 (1937).

[9] Consider the complicated records involved in litigation concerning public utilities rates.

[10] Speaking of the Robinson-Patman Act one writer suggests that "Trial is to proceed by the ordeal of cost accountancy," Hamilton, *op. cit. supra* note 8, at 323.

[11] People v. Kahn, 19 Cal. App. (2d) 758, 767, 60 P. (2d) 596, 600 (1936); but see Balzer v. Caler, 74 P. (2d) 839 (Cal. App. 1937).

In requiring intent to injure competitors as part of the offense, the sales below cost statutes may be classified according to their language into four groups: (1) prohibition of sales below cost "for the purpose of injuring competitors and destroying competition" or "with the intent to" injure competition;[12] (2) prohibition of sales below cost "with the intent or effect of injuring a competitor";[13] (3) prohibition of sales below cost "where the effect of such sale below cost may lessen, injure, prevent or destroy competition of competitors";[14] (4) flat prohibitions of sales below cost.[15]

Statutes of the first type have been held constitutional in state supreme courts. In California, whose statute has been the pattern for most of the states which have this type of legislation, an intermediate court believed the act to be unconstitutional despite its requirement of intent because it viewed the act as an attempt to fix a minimum price in a business not effected with a public interest.[16] The California supreme court, however, upheld the constitutionality of the act.[17] The Tennessee supreme court held an act of the second type requiring intent or effect "of injuring competitors" constitutional as legislation aimed at the prevention of fraud and not an attempt to fix prices.[18] In New Jersey[19] and Pennsylvania[20] intermediate courts have decided that flat prohibitions of sales below cost are attempts to regulate prices in private business and are violative of due process.

Statutes of the third type, enacted by Oregon and Nebraska, fall somewhere between the flat prohibitions of the New Jersey law and the "intent or effect" provision of the Tennessee act. The language "where the effect may be to lessen competition of competitors" is quite similar to that used in the Robinson-Patman Act prohibiting unfairly discriminatory prices.[21]

The legislature has the power to preserve competitive conditions and prevent monopoly. If the lawmakers think that selling below cost has a destructive effect on healthy competition, they may legislate against such practices. Sales below cost, even where "cost" includes overhead, might be flatly forbidden[22] were it not for the

[12] Arkansas, California, Colorado, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, South Carolina, Wyoming. Statutes collected in C.C.H. Trade Regulation Service ¶ 2310 *et seq.*

[13] Arizona, Tennessee, Utah, Virginia, *ibid.*

[14] Nebraska, Oregon, *ibid.*

[15] New Jersey, Pennsylvania, *ibid.*

[16] Balzer v. Caler, 74 P. (2d) 839 (Cal. App. 1937).

[17] Wholesale Tobacco Dealers Bureau of So. Calif., Inc. v. Nat'l Candy and Tobacco Co., 82 P. (2d) 3 (Cal. 1938); see also State of Wyoming v. Langley, 84 P. (2d) 767 (Wyo., 1938).

[18] Rust v. Griggs, 172 Tenn. 565, 113 S.W. (2d) 733 (1938). In that case, however, the defendant had admitted having the intent to divert trade to the detriment of his competitor. Whether a defendant who had no such intent but whose sales below cost had that effect would be guilty was not actually decided.

[19] Commonwealth of Pennsylvania v. Hodin, C.C.H. Trade Regulation Service ¶ 25177 (Pa., Luzerne County 1938).

[20] New Jersey v. Packard-Bamberger & Co., Inc., C.C.H. Trade Regulation Service ¶ 25164 (N.J. Dist. Ct., 1938).

[21] As to the possible construction of the act, see McLaughlin, The Courts and the Robinson-Patman Act: Possibilities of Strict Construction, 4 Law and Contemp. Prob. 410 (1937).

[22] The sales below cost statutes generally exempt such sales in situations which tradesman think of as legitimate, for example, clearance sales or sales of perishables to prevent loss or

difficulty encountered by virtue of the intrinsic indefiniteness of any provision involving computations of actual costs of doing business. Where intent is not a requirement and overhead cost calculations enter into the definition of the offense, the rule that a criminal statute should be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,"[23] applies, as in the instant case. If in quest of definiteness the legislators use invoice price plus a fixed percentage markup as a criterion of "cost," such legislation will be properly branded as an attempt to fix minimum prices in business not affected with a public interest. A statute flatly prohibiting sales below invoice price, an easily ascertainable item, would be so definite as to escape the attack on the statutes requiring calculation of overhead, and would be much easier to enforce than the statutes including intent as an ingredient of the offense.[24] Such a statute would provide some kind of floor for the market, although having the disadvantage of excluding many price cutters from its operation.

The fact that those statutes which involve operating cost calculations and the proof of bad intent have been held constitutional does not close the question of their economic desirability.[25] This type of legislation has been fostered principally by trade groups, such as associations of druggists or grocers, and manufacturers who fear the inroads of larger distributors.[26] Insofar as these laws protect merchants from stiff competition made possible by economy of operation in the larger units, they are of questionable desirability; insofar as they protect from price competition having no relation to greater efficiency of the large scale operator, they are a proper exercise of the police power.

Trusts—Charitable Trust—Invalidity for Uncertainty—[North Carolina].—The testator gave $10,000 to his executors "to be held in trust and paid out and appropriated by them within twenty years after my death . . . to such corporations or associa-

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sales of damaged goods where notice is given to the public, sales by court officers and sales made to meet the legal prices of a competitor.

[23] Connally v. General Construction Co., 269 U.S. 385, 391 (1925).

[24] Grether, *op. cit. supra* note 4, at 687, mentions the difficulties in proving intent.

[25] "The use of 'loss leaders' for the purpose of injuring a competitor has been condemned by many economists. It has been urged that their use is injurious to the consumer in that the losses so sustained will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of employees, lowering of rents, depressing the wholesale prices, etc. It has many times been urged that such practices are destructive of competition and tend to create monopolies. . . . These arguments are mentioned not because we necessarily believe that they are sound, but to demonstrate that the practice condemned by this statute, according to the views held by a large portion of the body politic, tends toward the stifling of free and open competition, the creation of monopolies and is injurious to the consuming public." Wholesale Tobacco Dealers Bureau of So. Calif., Inc. v. Nat'l Candy and Tobacco Co., 82 P. (2d) 3, 13 (Cal. 1938). See also note in 32 Ill. L. Rev. 816, 847 (1938).

[26] See Burns, The Anti-Trust Laws and the Regulation of Price Competition, 4 Law and Contemp. Prob. 301, 319–20 (1937); McLaughlin *op. cit. supra* note 21, at 413; Grether, The Distributive Trades and Control of Price Competition, 4 Law and Contemp. Prob. 375, 390–91 (1937).