April 1, 1959

Committee on Business Legislation
State House
Augusta, Maine

Gentlemen:

This letter is in response to the oral request of Senator Arthur Charles that this office examine S. P. 179, L. D. #482 and submit to the committee any comments we might have on the said Legislative Document.

The first item which we would like to comment upon is the last sentence of section 2. This sentence contains, substantially, the same words, and has the same effect as its counterpart in the present law, and has been declared unconstitutional by our Maine Supreme Court in the case of Wiley vs. Sampson - Ripley Co., 151 Me. 400.

The sentence in question is contained in that section which sets forth the penalty for violation of the provisions of the Unfair Sales Act, and reads as follows:

> "Evidence of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him, together with any sales taxes or excises levied or imposed upon such merchandise by the State or the United States of America not already included in the invoice or replacement cost to him, shall be prima facie evidence of intent to injure competitors or destroy competition."

That sentence held unconstitutional by the court reads as follows:

> " --- proof of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him as herein defined shall be prima facie evidence of intent to injure competitors and destroy competition."

The sentence in L.D. 482 in and of itself is quite clear and, once evidence is entered showing that a business advertised or sold or offered for sale an item of merchandise below cost, then the law presumes the advertisement, sale, or offer to have been accomplished from an intent to injure competition, and the burden shifts to the defendant to disprove such intent.

Your committee is completely aware, we are sure, of the principle of law followed by courts in a criminal case - that the defendant is presumed innocent until his guilt is proved beyond a reasonable doubt.

The sentence we question changes that principle, and says that upon evidence of one fact, sale of merchandise below cost, then a prima facie case has been made that defendant made such sale with intent to injure competition, thus removing the requirement of the State's proving guilt beyond a reasonable doubt, and, instead, presumes guilt, and requires the defendant to prove his innocence.

This presumption, with respect to both the criminal and civil portions of the present law, was held to be unconstitutional in the above cited case.

To be sure, occasionally certain evidence may be used as prima facie evidence of another conclusion. But that evidence must have a reasonable connection to the conclusion drawn. It must lead, reasonably and logically, to the presumed conclusion. Thus it is commonly known that a certain quantity of intoxicating liquor consumed by a person results in intoxication. This relationship between quantity of liquor drunk and its effect is so scientifically certain and ascertainable that the court has upheld a law which says that the presence of a stated quantity of alcohol in the blood is prima facie evidence of being under the influence of intoxicating liquor.

But our court has said that the sale below cost has no necessary relationship to an intent to injure competition. As an example, the court cited an instance where several creditors might besiege a debtor business for payment of bills. Perhaps the only possible way to accumulate the funds to pay off such creditors would be by sale below cost. Such cases compel the court to conclude that "the presumption created here has no relation in experience to general facts."

Our comment then would be that the last sentence of section 2 being a known unconstitutional provision, should not be re-enacted as law, but rather, should be eliminated from our statutes.

As a second comment we would point out that a county attorney as such has no restraining powers. Such powers rest in the court as indicated in the first sentence of section 4. We would suggest that the words "and restrain" contained in the second sentence of section 4 - "It shall be the duty of the several county attorneys, in their respective counties, to enforce and restrain the violations of this chapter." are not proper, and certainly not needed in view of the preceding sentence which provides that:

"Upon complaint of any person, the Superior Court shall have jurisdiction to restrain and enjoin any act forbidden or declared illegal by any provision of this chapter."

Very truly yours,

James Glynn Frost
Deputy Attorney General

JGF:CBH