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Trade Regulation—1961 Tennessee Survey (II)

*Leo J. Raskind**

I. Requirements Contracts Under Section 3 of the Clayton Act

II. Actions for Treble Damages—Private Actions Under Public Law

III. Trade Names Under Tennessee Law

This field of law, not previously treated independently in the annual survey, is designated as Trade Regulation or alternatively as Government or Public Control of Business. In the limit, this body of doctrine is an amalgam of tort and contract principles bearing the impress of the equity practice. These distinct principles are now embodied in both state and federal statutes as the foundations of legal control over competitive commercial conduct.[1] Their scope extends, with different emphasis, from public utility rate regulation to a variety of aspects of market structure and conduct in the unregulated sector of the economy. The principal stuff of which its lawsuits are made includes pricing practices (price-fixing or discriminatory pricing) and other forms of collusive behavior, exclusive dealing arrangements, tying arrangements, mergers, trademark protection, and unfair competition.

The decided cases within the period of this survey touch only a few of these topics.

I. Requirements Contracts Under Section 3 of the Clayton Act

In *Tampa Electric Co. v. Nashville Coal Co.*,[2] the Supreme Court had before it a requirements contract which had been held illegal both by the United States District Court for the Middle District of Tennessee and the Court of Appeals for the Sixth Circuit.[3] Justice Clark's opinion reversing the lower courts announced an important departure in the judicial construction of section 3.

It is standard practice in the commerce of production and distribution for a seller to enter into a contract conditioning the sale (or lease) of goods and commodities on the buyer's (or lessee's) promise not to handle

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1. See Tenn. Code Ann. §§ 69-101-519 (Supp. 1961) and the federal statutes cited *infra*.
2. 365 U.S. 320 (1961). The case is again before the district court for a determination of damages.
3. 168 F. Supp. 456 (M.D. Tenn. 1958), *aff'd*, 276 F.2d 766 (6th Cir. 1960).

the wares of any competing supplier. These arrangements are known as exclusive dealerships or exclusive arrangements. Two variants of such exclusive dealership contracts are recognized. The requirements contract is one which obligates the buyer to purchase all of his needs of a given commodity, such as iron ore or coal, from the contracting seller. Another variant is the tying contract which obligates the buyer to purchase an ordinary fungible good in order to acquire some patented or distinctive commodity of which the seller is the sole or principal source. All such agreements are within the purview of section 3 of the Clayton Act which makes it unlawful

> for any person . . . to lease . . . or contract for sale of goods . . . or other commodities on the condition [that the] purchaser shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such . . . contract may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[4]

The last clause, dealing with the effect of the agreement on the competitive process, is central to the construction of this provision.

Enacted in response to dissatisfaction with judicial construction of the Sherman Act as a means of policing the channels of distribution, section 3 was not conceived as an absolute bar to the exclusive arrangements.[5] As the report of the Attorney General's Committee recognizes, such arrangements may have merit in promoting competition as well as in impeding it.[6]

Historically, section 3 was applied to situations where the dominant seller of a given commodity entered into widespread exclusive arrangements.[7] From a Supreme Court opinion involving a tying arrangement, the doctrine emerged that a seller who utilized tying arrangements involving "a not insubstantial" amount of commerce would be held to have violated section 3 without more.[8] Subsequently the controversial opinion in *Standard Oil Co. v. United States* (commonly referred to as *Standard Stations*) announced the proposition that this construction of the language of section 3 might be applied to a requirements contract as well.[9] This arose as follows: In the government's suit against the Standard Oil Company of California, evidence was introduced to prove that Standard, which sold

4. 38 Stat. 731 (1944), as amended, 15 U.S.C. § 14 (1958).
5. See Whitwell v. Continental Tobacco Co., 125 Fed. 454 (8th Cir. 1903); 51 CONG. REC. 15637-40 (1914).
6. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 145 (1955); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962).
7. Penick & Ford, Ltd., 14 F.T.C. 261 (1930); Carter Carburetor Corp., 28 F.T.C. 116 (1939).
8. International Salt Co. v. United States, 332 U.S. 392 (1947). See Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).
9. 337 U.S. 293 (1949).

23% of the total taxable gasoline gallonage in seven western states, had entered into requirements contracts covering 16% of the retail gasoline outlets in those states, and that 6.7% of the retail gasoline sold in this region was sold by dealers who were parties to such arrangements with Standard. On the trial the district judge refused to admit evidence offered by Standard to show that these contracts were economically beneficial and did not restrain competition.[10] On appeal to the Supreme Court, Mr. Justice Frankfurter, writing for a majority of five, applied the spirit of the strict tying arrangement construction to section 3, concluding that even though such contracts could be beneficial, a court was bound to infer illegality if the contract covered a substantial amount of commerce. Prior to the *Tampa Electric* opinion, this principle of quantitative substantiality enjoyed an uneasy dominance.[11]

The facts in the *Tampa Electric* case are of classic simplicity. A seller repudiated a twenty-year requirements contract for bituminous coal, characterizing it as illegal.[12] In the subsequent suit for a declaratory

10. United States v. Standard Oil Co., 78 F. Supp. 850 (S.D. Cal. 1948).

11. The extensive criticism of the commentators can be grouped under two headings: criticism of the harshness and inflexibility of the rule, and criticism of the ambiguity of quantitative substantiality as a standard. Under the first heading, see Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913 (1952); Sunderland, *Changing Legal Concepts in the Antitrust Field*, 3 SYRACUSE L. REV. 60, 80 (1951); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1180 (1952); Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Legality Under the Clayton Act*, 98 U. PA. L. REV. 10 (1949); KAYSEN & TURNER, ANTITRUST POLICY 159 (1959). Under the second heading see Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 30-31 (1959).

Judicial response to the *Standard Stations* decision reflected a diversity of interpretations. Some courts followed it literally, *e.g.*, Red Rock Cola Co. v. Red Rock Bottlers, Inc., 1952-53 CCH Trade Cas. ¶ 67375; other courts tended to give it relatively little weight, United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949). Still other courts accepted part and rejected part, Puett Elec. Starting Gate Corp. v. Harford Agricultural & Breeders Ass'n, 1950-51 CCH Trade Cas. ¶ 62570; Dictograph Prods. v. FTC, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955).

Another aspect of the uncertainty surrounding the *Standard Stations* doctrine was reflected in the way the Federal Trade Commission alternately blew hot and cold towards it. At first, the Commission considered itself bound by this opinion. See Horlicks Corp., 47 F.T.C. 169 (1950); Underwood Corp., 49 F.T.C. 1123 (1953). In 1954, the Commission rejected this position by overruling a hearing examiner who had relied upon the *Standard Stations* case to exclude evidence offered to prove that competition had increased despite the exclusive arrangements. Maico Co., 50 F.T.C. 485 (1953); Maico Co., 51 F.T.C. 1197 (1955) (consent order). See also HANDLER, ANTITRUST IN PERSPECTIVE 124-26 (1957).

Until 1960 the Commission followed the *Maico* path, admitting evidence on all relevant variables in addition to substantiality. See Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954); Revlon Prods. Corp., 51 FTC 260 (1954); Outboard Marine & Mfg. Co., 52 F.T.C. 1553 (1956). In 1960 the Commission returned to the *Standard Stations* doctrine, announcing the shift in Mytinger & Casselberry, 1960-61 TRADE REG. REP. ¶ 29091.

12. The original contract was a twenty-year agreemeut to provide coal for its new

judgment on that issue, the seller asserted the illegality and unenforcibility of the contract under section 3 of the Clayton Act and sections 1 and 2 of the Sherman Act.[13] The repudiating seller prevailed. Both lower courts, applying the controlling doctrine established a dozen years earlier in the controversial *Standard Stations* opinion of Mr. Justice Frankfurter, held section 3 of the Clayton Act to be violated by a showing that this requirements contract covered a substantial segment of interstate commerce and accordingly drew the traditional inference that its effect was to violate section 3.[14]

In granting the defendant's motion for summary judgment, the district court viewed the agreement as a total requirements contract of such magnitude in tonnage terms that, by comparison with the existing annual coal consumption for the entire state of Florida, it covered "manifestly a large and substantial volume of commerce for a period of 20 years."[15] The district court followed the inner logic of the *Standard Stations* doctrine to its inexorable conclusion that this contract, which would "pre-empt" or "engross" such a substantial quantum of commerce from the competitors of the contracting seller, left "no escape from the conclusion that its effect, under the circumstances disclosed is to 'probably lessen competition, or create an actual tendency to monopoly.'"[16]

The Court of Appeals for the Sixth Circuit affirmed, Judge Weick dissenting.[17] The two judge majority remained within the rubric of the *Standard Stations* doctrine, finding the necessary substantiality both in the tonnage and in the dollar terms of the contract.[18] The sole dissenter was unable to view the *Standard Stations* doctrine as dispositive. Judge Weick's opinion presaged, in part, the Supreme Court's view of the case. For, like Justice Clark, he noted the special circumstances of the buyer's status as a

steam generating plant, the Gannon Station. On May 23, 1955, the original signatories were Tampa Electric (buyer) and the Potter Towing Company, a Tennessee partnership of David K. Wilson and Justin Potter (seller). Subsequently the partnership interest in this contract was transferred to Nashville Coal, Inc., a subsidiary of West Kentucky Coal Company. According to the contract, seller was to supply the total requirements of fuel at the Gannon Station, deliveries to start about March 1957. Brief for Appellant in the Court of Appeals, pp. 9a-10a (appendix). In April, 1957 just prior to the first delivery of coal, the seller advised Tampa Electric that no coal would be delivered at the contract price; the seller asserted the illegality of the contract under section 3. In August, Tampa Electric entered into a covering agreement with the Love and Amos Coal Company by purchase order, an arrangement which was converted to a four-year requirements contract cancellable on an annual basis. Appellant's Brief in the Court of Appeals, pp. 35a-36a (appendix). The Sherman Act issue was not reached.

13. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

14. See note 3 *supra*.

15. 168 F. Supp. at 459.

16. *Id.* at 461.

17. Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766, 774 (6th Cir. 1960).

18. *Id.* at 771.

regulated public utility and recognized its correlative requirement of an ample and certain supply of fuel at a known price.[19] In the remainder of the dissent, Judge Weick departed from all his judicial brethren who considered this case by expressing two principal points of difference with the majority and with the lower court.

First, he noted the troublesome aspect of the assertion of illegality stemming from the repudiating seller. Judge Weick would have refused the seller's plea of his own violation of the antitrust laws as a release from his contractual obligation.[20] Second, he found that the appropriate line of commerce was not coal, as the district court and the majority had assumed without discussion, but rather boiler fuels including coal, fuel oil, gas, and atomic energy. Viewed in this broader commercial context, he concluded that the contract fell below the test of substantiality within the meaning of the *Standard Stations* doctrine.

In contrast to the lower courts, the Supreme Court opinion applied a construction of section 3 that materially altered the relevant criteria for the determination of the legality of a requirements contract under section 3. Without overruling the doctrine of *Standard Stations*, Justice Clark, writing for a majority of seven justices, announced an approach that negated the basic premise of the *Standard Stations* opinion.[21] In effect, Justice Clark returned to the fundamental dichotomy posed by Justice Frankfurter earlier, and chose the opposite alternative.[22] While Justice Frankfurter arrived at the principle of quantitative substantiality by clearly rejecting an economic inquiry to prove the actual or substantial diminution of competitive activity in the construction of section 3, Justice Clark announced a list of variables framing the effect of the contract on competition as the ultimate issue under section 3. Under the *Standard Stations* opinion, proof that the basic agreement accounted for a substantial segment of interstate commerce was the dispositive issue. Given this finding of substantiality, further proof of the effect on competition was foreclosed by the inference that the forbidden slackening of competitive activity would necessarily follow.[23] For Justice Frankfurter, any alternative to this process of inference from the finding of substantiality was to embrace a "standard of proof, if not virtually impossible to meet, at least most ill-suited for

19. *Id.* at 776.

20. Kelly v. Kosuga, 358 U.S. 516 (1959) was decided subsequent to the district court's decision.

21. See note 2 *supra*.

22. While the approach of Justice Clark's opinion does, in part, parallel the reasoning of Justice Jackson's dissent in the *Standard Stations* case, it is closer to the rejected alternative of Mr. Justice Frankfurter's majority opinion. See 337, U.S. at 321.

23. "[T]he showing that Standard's requirements contracts affected a gross business of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the inference that competition has been or probably will be substantially lessened." 337 U.S. at 305.

ascertainment by courts."[24] Indeed, he saw an element of perversity in such a reading of the statute. To insist upon such an investigation would be to stultify the force of the congressional declaration that requirements contracts are to be prohibited whenever their effect *may* be to lessen competition.[25]

The extent of the disagreement between the opinions in these two cases over the ultimate question of section 3 is reflected in the factors which each Justice would weigh. Justice Frankfurter, expatiating upon the implications of his standard, mapped the terrain of proof which would be irrelevant thereunder. Accordingly he banished from consideration "evidence that competition has flourished despite use of the contracts . . . , the conformity of the length of . . . [the contract] term . . . , the status of the defendant as a struggling newcomer or an established competitor, . . . [and] the defendant's degree of market control . . . ."[26] In contrast, Justice Clark announced at the outset that substantiality of commerce covered by the contract at issue, at least when measured in terms of the dollar value of the contract, does not rise above the level of an incidental fact. This mode of substantiality he minimized as "ordinarily of little consequence."[27] Instead, Justice Clark, applying a statutory standard concerned with proof of the actual or potential lessening of competitive activity, returned to relevance some of the evidentiary matter previously dismissed by Justice Frankfurter.

For his construction of section 3 and its concomitant emphasis upon the slackening of competitive vigor, Justice Clark utilized a somewhat familiar list of variables. Courts (and perhaps the Commission)[28] are henceforth to weigh the effects of requirements contracts on the qualifying clause of section 3 by "taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce . . . , and the probable and immediate future effects which pre-emption of that share of the market might have on effective competition therein."[29] Further, the scope of inquiry into the lessening of competition is to include evidence of "particularized considerations of the parties' operations . . . ."[30]

Justice Clark found grounds for reversal in the failure of the lower court to define properly the relevant competitive market area within which this anti-competitive effect could be determined.[31] Assuming, with-

24. 337 U.S. at 310.
25. *Id.* at 311.
26. *Id.* at 308.
27. 365 U.S. at 329.
28. See note 11 *supra*.
29. 365 U.S. at 329.
30. *Id.* at 335.
31. "In applying these considerations to the facts of the case . . . it appears clear that both the Court of Appeals and the District Court have not given the required

out deciding, that the relevant product would be bituminous coal, Justice Clark rejected as invalid the lower court's finding of substantiality of the competitive restraint from the mere comparison between the annual tonnage of coal under the contract and the total consumption of coal recorded for peninsular Florida.[32] In general terms, Justice Clark's definition of the appropriate market area was phrased as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."[33] Applying this test, the market area was identified by the Court as the entire Appalachian area.[34] Thus viewed, the *Tampa Electric* contract did not "substantially foreclose competition" and moreover, it afforded lawful economic benefits to the buyer.[35]

The full import of this construction of section 3 remains uncertain. On its face the *Tampa Electric* opinion undercuts both the letter and spirit of quantitative substantiality as a reigning principle. As Milton

effect to a controlling factor in the case—the relevant competitive market area. This omission, by itself, requires reversal, for, as we have pointed out, the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition . . . , must be decided." 365 U.S. at 329.

32. "We do not believe that the pie will slice so thinly." 365 U.S. at 331.

33. *Id.* at 327.

34. The Supreme Court, like the district court, accepted Tampa's uncontroverted assertion that the seller was but one of 700 coal producers who could have furnished plaintiff's requirements. Brief for Petitioner in the Supreme Court, pp. 38-42. The accuracy of the number of possible competitors was not challenged by the seller. Indeed the existence of "a multitude of eager sellers" and "the fierce intensity of competition" conformed to the seller's theory of the case that the contract was unlawful "because it excludes all competitors from access to the coal business involved." See Defendant's Reply Memorandum on the Motion and Cross-Motion for Summary Judgment, pp. 16-17, n.14.

The Supreme Court identified the area of effective competition as at least a seven-state region composed of coal producing districts in West Virginia, Virginia, Kentucky, Tennessee, North Carolina, Alabama, and Georgia (365 U.S. at 333 n.15). The Court noted, however, that coal suitable for Tampa's requirements was also available in Pennsylvania, Ohio, and Illinois (365 U.S. at 333).

One commentator has criticized the Court's acceptance of "the statement in Tampa's brief that the 700 producers were located in certain officially defined coal districts . . . ." *The Supreme Court, 1960 Term,* 75 Harv. L. Rev. 80, 205-06 (1961). Presumably, the sole authority for so locating these coal producers is the statement in the Brief for Petitioner in the Supreme Court, p. 42 n.24. This is a reference to a report of the U.S. Bureau of the Census of Mineral Industries for 1954, followed by the statement: "These 700 producers are located in Districts 1-4, 6-11, and 13. . . . The states included in these districts are principally Alabama, Tennessee, Kentucky, Virginia, West Virginia, Pennsylvania, Ohio, Indiana, and Illinois."

This identification of the market area solely by reference to the producing area is at variance with one method of marketing bituminous coal—the use of a sales agency located in the northeastern seaboard area. *Cf.* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); 1 Whitney, Antitrust Policies 409 (1958). By implementing its own definition of the relevant market in a less than precise manner, the Court has limited the applicability of its announced departure from the prior rule. See Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under The Clayton Act,* in The Supreme Court Review 267, 283-85 (Kurland ed. 1961).

35. 365 U.S. at 334-35.

Handler has put it, "what Mr. Justice Clark . . . did to Standard Stations is as neat a piece of judicial surgery as has been seen in some time."[36]

This view seems overly optimistic. Perhaps it is the surgical reference and its connotation (at least to the nonsurgeon) of precision that is unwarranted. For, like its predecessor doctrine of quantitative substantiality, the new *Tampa Electric* principle leaves room for further clarification. At least two aspects of the *Tampa Electric* opinion heighten the margin of conjecture over the extent to which it has superseded the earlier doctrine.

First, taking the opinion on its narrowest grounds, the rejection of quantitative substantiality is not absolute. Only quantitative substantiality in money terms is dismissed. But even this is qualified by the statement that it is "ordinarily of little consequence."[37] If ordinarily is construed to incorporate the factual pattern of the case, including the buyers' particular needs as a regulated public utility, the *Standard Stations* doctrine may yet reign in the unregulated sector. A second factor in the uncertainty of the scope of the *Tampa Electric* opinion stems from its precise grounds of reversal—the improper definition of the relevant market area of competition.[38] This narrow basis of reversible error may relegate the new list of evidentiary variables to the status of surplus language. For in terms of the Court's definition of the relevant market, the quantum of trade would probably have been insubstantial in terms of the *Standard Stations* doctrine. Finally, the new variables themselves raise independent grounds for conjecture as they are couched in language of broad sweep. Such phrases as "the relative strength of the parties" and "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition," hold limited promise for immediate definition. Moreover, there is danger that a vague standard will lead to a quest for the unsatisfactory certainty of the *Standard Stations* doctrine.[39]

On balance, it is clear that this opinion constitutes Supreme Court dissatisfaction with the *Standard Stations* rule. Yet, the new doctrine has its own congenital limitations.[40] As it stands, the *Tampa Electric* principle in its factual context emerges as an announcement of departure from the inflexibility of the prior rule. This opinion is thus no more than an ex-

36. Handler, *Recent Antitrust Developments*, 71 Yale L.J. 75, 82 (1961).
37. See note 27 *supra*.
38. See note 31 *supra*.
39. See note 11 *supra*.
40. Recent statements, if accurate, underscore one basis for the traditional judicial hostility to a contracting party's allegation of the illegality of the agreement. It has been said that Cyrus Eaton was the moving spirit behind both the Nashville Coal Company and Tampa Electric, respectively the seller and buyer in this case. Further, there is the suggestion of a tangled web of relationships across union-management lines, involving Eaton and John L. Lewis in an attempt to gain control of the bituminous coal industry. See Caldwell & Graham, *The Strange Romance Between John L. Lewis and Cyrus Eaton*, Harpers, Dec. 1961, pp. 25, 28-29, 32.

pression of a preference for a wider perspective in the construction of section 3. It does not entirely supplant the prior doctrine. Quantitative substantiality has not been dismissed from service; it appears merely, with uncertain effect, to have been reduced in rank.

II. Actions for Treble Damages—Private Actions Under Public Law

The Clayton Act[41] is unique insofar as it provides for a private cause of action in a federal court, thereby adding the pressure of private suits to the Government's enforcement program. Under section 4 of the Clayton Act, any person "injured in his business or property by reason of anything forbidden in the antitrust laws," is entitled to recover "threefold the damages by him sustained," plus costs including a reasonable attorney's fee.[42] Ordinarily, the private suit is brought subsequent to the victory of the Government against the defendant so that the private suitor can, under section 5 of the Clayton Act, ease his burden of proving the antitrust violation by docketing a copy of the Government's judgment or decree. With the proof of the public injury thus minimized, the bulk of treble damage actions are suits concerned with the measure of plaintiff's damages.[43]

As under other branches of the law, the successful treble damages plaintiff must prove that his injury and resultant damages were caused by the unlawful acts of the defendant. In suits against Sherman Act violators, recovery rests upon linking the loss of sales revenues and customer patronage with the illegal acts of the violator. By comparison, this problem of establishing the causal relationship between the plaintiff's injury and the violator's conduct is more complicated in cases based on a violation of section 2 of the Clayton Act. For here the plaintiff must prove that his losses are due to the defendant's granting of a discriminatory price differential which favors only his competitors. This increases the difficulty of proving the causal connection because the violator's act is not one directly

41. Section 7 of the Sherman Act as amended by section 4 of the Clayton Act provides as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendaut resides or is found or has an agent, without respect to the amonnt in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 Stat. 210 (1890), 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

42. *Ibid.*

43. Section 5 (a) provides in part: "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Providcd, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . ." 38 Stat. 731 (1914), 15 U.S.C. § 16 (1958).

against the plaintiff; the injury stems from the conduct of another, the competitor more favorably treated by the defendant.[44]

In *Kidd v. Esso Standard Oil Co.*,[45] the Court of Appeals for the Sixth Circuit considered an appeal by a filling station operator who had lost his suit for treble damages against his distributor-oil company alleging a violation of section 2 of the Clayton Act as amended.[46] Below, the plaintiff-appellant's case had foundered on the issue of causation. The jury found that although the plaintiff was in competition with the favored competitors, and that the defendant's grant of a discount of a fraction of a cent per gallon to his competitors was discriminatory within the meaning of the statute, he had suffered no damages as "the direct and proximate result of the violation by the defendant of Section 13(b)."[47]

In affirming, the court of appeals followed settled doctrine in finding a fatal deficiency in the lack of any evidence of the actual lowering of prices by the favored competitors, or any evidence tending to show the loss of customers or profits by the plaintiff. The appellate court reiterated the familiar principle that the plaintiff's right to recovery is limited to such damages as can be proven with reasonable certainty by the evidence, and that speculative, remote, or uncertain damages are not allowed.

III. TRADE NAMES UNDER TENNESSEE LAW

In *McDonald v. Julian*,[48] the Court of Appeals for the Middle Section of

44. Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 393-94 (1954); see also Comment, 61 YALE L.J. 1010, 1022 (1950); Donovan & Irvine, *Proof of Damages Under the Antitrust Law*, 88 U. PA. L. REV. 511 (1940); Bigelow v. Radio Pictures, Inc., 327 U.S. 251 (1946); American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951); Amerİcan Can Co. v. Bruce's Juices Inc., 187 F.2d 919 (5th Cir. 1951), *rehearing denied*, 190 F.2d 73 (5th Cir. 1951), *petition for cert. dismissed*, 342 U.S. 875 (1951); see also Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1 (1956).

45. 295 F.2d 497 (6th Cir. 1961).

46. Section 2(a), popularly known as the Robinson-Patman Price Antidiscrimination Act, provides in part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality . . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." 38 Stat. 730 (1914), 15 U.S.C. § 13(a) (1958).

Section 2(b) provides in part: "[N]othing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . ." 38 Stat. 730 (1914), 15 U.S.C. § 13b (1958).

47. 295 F.2d at 498.

48. 348 S.W.2d 749 (Tenn. App. M.S. 1961).

Tennessee had before it the issue of rights to the commercial usage of a surname. Unlike the traditional version of this problem, here the competing claims to "Julian," the complainant's surname, arose in the context of an employment relationship governed by an agreement containing an express provision limiting the employer-partnership's rights in the employee's surname.[49] The complainant, dissatisfied with the mode and extent of the partnership's use of his name, withdrew his services and served timely notice under the agreement in order to terminate the partnership's continued usage. Unable to prevail upon his employers, the complainant filed suit, his original bill requesting a permanent injunction restraining further use of his surname. From that injunction the partners appealed, attacking the jurisdiction of the chancellor below on grounds of failure to meet the jurisdictional amount required under Tennessee Code Annotated section 16-603.

In affirming the chancellor's decree, the court of appeals, finding the injunction amply supported by evidence of violation of a valid contract, addressed itself to the determination of whether the value of the protected rights were within the jurisdictional amount. In affirming, the court found in this record adequate evidence that the value of the complainant's surname was far in excess of the minimum jurisdictional sum.[50] The court of appeals noted, in passing, that this result was congruent with the settled doctrine in Tennessee which provides for injunctive relief to prevent the wrongful use of an individual's surname.[51]

49. The early English cases dealt with competing claims to individual surnames in two groupings. The first involved the rights to a surname arising from the sale of a business. Cruttwell v. Lye, 17 Ves. 334, 34 Eng. Rep. 129 (Ch. 1810); Shackle v. Baker, 14 Ves. 468, 33 Eng. Rep. 600 (Ch. 1808); Williams v. Williams, 2 Swanst. 253, 36 Eng. Rep. 612 (Ch. 1818).

The second and subsequently more important grouping involved the use of the name of an established seller by a newly-entering competitor. Ordinarily the junior competing seller had colorable claim to the identical surname. Croft v. Day, 7 Beav. 84, 49 Eng. Rep. 994 (Rolls 1843); Sykes v. Sykes, 3 B. & C. 541, 107 Eng. Rep. 834 (K.B. 1824); Burgess v. Burgess, 3 DeG, M. & G. 896, 43 Eng. Rep. 351 (Ch. 1853); Turton v. Turton, 42 Ch. D. 128 (1889).

The use of an individual surname in firm and product designation continues as a subject of litigation. See Putnam, *The Deceptive Use of One's Own Name*, 12 HARV. L. REV. 243 (1898); Wigmore, *Justice, Commercial Morality, and the Federal Supreme Court, The Waterman Pen Case*, 10 ILL. L. REV. 178 (1915); See also Hunt Potato Chip Co. v. Hunt, 340 Mass. 371, 164 N.E.2d 335 (1960); Libby, McNeill & Libby v. Libby, 103 F. Supp. 968 (D.C. Mass. 1952); Gillette v. Gillette Safety Razor Co., 65 F.2d 266 (C.C.P.A. 1933).

50. At least two transactions were material. The court noted the testimony by one partner that he executed a $5,000 note upon learning that he would be able to obtain the complainant's name and services. In addition, the court referred to the complainant's compensation for the use of his name and his services as an amount substantially in excess of the minimum jurisdictional amount.

51. Robinson v. Robinson's Inc., 9 Tenn. App. 103 (W.S. 1928); Robinson v. Storm, 103 Tenn. 40, 52 S.W. 880 (1899); M. M. Newcomer Co. v. Newcomer's New Store, 142 Tenn. 108, 217 S.W. 822 (1919).