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THE RIGHT OF A BUSINESSMAN TO LOWER THE PRICE OF HIS GOODS *

STANLEY D. ROSE †

The present actions being taken to mark the transition from cold to hot war are settling a number of problems and creating a host of others. The direction of our national effort within the economy will shift to production; our normal interest would be in distribution. This shift will not mean that the antitrust laws will be entirely suspended. There remain certain vital functions of protecting whole classes of citizens during the coming years of stress and for that day when once again we return to our new two-cars-for-every-family ideal.[1]

But it cannot be denied that a discussion of lowering prices has taken on an air of unreality. We can only foresee governmental action to place ceilings on all prices, with no floors being contemplated. And yet such a discussion is not without justification. The time to plan for the future is now. The reality of the issues involved is clear now. The controlling judicial decisions are being made now.[2] As we leave the world of the buyer's market,

*The views expressed in this article are personal to the writer.

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1. For instance small business must be protected. For material on what happened to small business in World War II, see *United States v. Economic Concentration and Monopoly*, A Staff Report to the Monopoly Subcommittee of the House Committee on Small Business (1946); *Report of Senator O'Mahoney to the Senate Special Committee on Post-War Economic Policy and Planning*, SEN. Doc. 106, 78th Cong., 1st Sess. (1943). The Celler Subcommittee on the Study of Monopoly Power is preparing to investigate monopolistic practices of industry which may impede military production. Statement of Congressman Celler, August 10, 1950. Section 708(e) of the Defense Production Act of 1950, Public Law No. 774, 81st Cong., 2d Sess. (1950), directs the Attorney General to have the Federal Trade Commission make surveys to determine any factors which may eliminate competition, create monopolies, injure small business, or otherwise promote undue concentration of economic power in the course of the administration of this Act. The Attorney General is to submit to Congress and the President the results of these surveys and is to make such recommendations as he may deem desirable. To implement this provision, President Truman, under date of September 29, 1950, sent a memorandum to all the executive agencies charged with duties in the defense effort. He pointed to the acceleration toward economic concentration in the last war and accordingly urged these agency heads to consult with the Attorney General and the Chairman of the Federal Trade Commission for the purpose of doing everything possible to eliminate "any factors which may tend to suppress competition unduly, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power."

2. The Supreme Court has already heard, as No. 1 on its docket for the October 1950 Term, a reargument of Standard Oil Company v. Federal Trade Commission. This case came before it on appeal from the seventh circuit, 173 F.2d 210 (7th Cir. 1949), and was first argued in January, 1950. [This case was decided on Jan. 8, 1951, 71 Sup. Ct. 240. See discussion in "Postscript," *infra*, pp. 257-59.]

let us look at it and examine some of its problems. It is our world—one in which sellers compete among themselves to fulfill the limitless demands of buyers.

The antitrust laws have been given considerable publicity in recent months.[3] Last spring, Benjamin Fairless, president of the United States Steel Corporation, expressed in colorful language the fear that the confusion created by a "hodge-podge" of antitrust laws had given the business leaders the alternative of going broke or running their businesses from "Atlanta, Sing Sing, Leavenworth or Alcatraz." [4] There are those who express considerable scepticism at this alleged confusion.[5] What is certain is that there are some problems in this field upon which there is a complete divergence of opinion. One of the most important of these areas of doubt concerns the present status of the law governing permissible pricing policies. Benjamin Fairless in the above-quoted speech is reported to have pictured the current situation to be that: If a businessman and his competitor quote the same price on a product, they may be accused of violation of the Sherman Act; if one businessman tries to undersell his competitor by cutting his price, he may be violating the Robinson-Patman Act; if this businessman raises his prices and his competitors do not, he goes out of business; if his competitors do follow his lead and raise their prices, the businessman can stay in business, but he is right back where he started as far as the antitrust laws are concerned, *i.e.*, the Sherman Act may be applicable.[6] In short, it is claimed that the businessman has his choice of price fixing, price discrimination, price leadership, or going out of business.

This picture can be characterized as only a half-truth, but it represents a point of view that is, no doubt, widely held. An effort towards dispelling

3. For example, see the report on Secretary of Commerce Charles Sawyer's demand for a "realistic clarification" of the antitrust laws. N.Y. Times, § 1, p. 55, col. 1 (June 11, 1950).

4. N.Y. Times, p. 37, col. 1 (May 19, 1950).

5. In vetoing S. 1008, the basing point bill passed by the 81st Congress, President Truman said: "I recognize that businessmen have been concerned lest they be penalized for perfectly sensible and appropriate competitive action. I believe their concern is unwarranted." SEN. Doc. No. 184, 81st Cong., 2d Sess. 4 (1950). Prof. Milton Handler testifying before the Celler Committee said: "I think there is a tendency to exaggerate the uncertainties of the antitrust laws." *Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 7905*, 81 Cong., 2d Sess., Serial No. 14, pt. 5, p. 6 (1950). With reference to pricing problems, "It is hard to escape the suspicion that those who hope to profit by confusion, or who are opposed to the policy of the law, are cultivating some of the confusion." LOEVINGER, THE LAW OF FREE ENTERPRISE 134 (1949). Herbert A. Bergson, former Assistant Attorney General in charge of the Antitrust Division, characterized claims of a chaotic state of mind among businessmen over the law governing pricing policies as having some basis in "some muddy thinking on the matter." *Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. Res. 241*, 80th Cong., 2d Sess. 100 (1948). But he did not question the existence of the confusion. *Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 236*, 81st Cong., 1st Sess. 81 (1949).

6. *Supra*, note 4. This alleged dilemma was voiced shortly after the passage of the Robinson-Patman Act in Gordon, *Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3*, 22 A.B.A.J. 593, 594 (1936).

apparent uncertainty should be worth the trouble. An incredible volume of literature has already appeared discussing the various aspects of the general problems here involved, particularly those arising under the Robinson-Patman Act. Something may be gained, however, by confining attention to the narrow point of the present law applicable to a businessman who lowers his prices.

It may come as a surprise to realize that under certain circumstances a businessman who lowers some or all of his prices will be subject to criminal sanctions as well as civil penalties. These circumstances will be examined with some care insofar as they arise out of the federal laws. The state laws on these matters will not be considered in this article.[7] Following a consideration on the criminal side, the civil statutes which govern the businessman who would lower his prices will be reviewed. Emphasis will, of course, be placed upon the Robinson-Patman Act, which directed particular attention to price discriminations. Discriminations are types of price differences resulting from lowering prices to one or some customers and not to others.[8]

Since no one denies the existence of wide divergences of opinion on these laws, any discussion in this field should examine this purported confusion, and that will be done following the survey of the pertinent statutory law. This article will proceed on the premise that what is really at issue is not differing views on what the law is but on what it ought to be. If this premise is true, then it is necessary to examine the bases of these varying approaches to desirable legislation, for what is at stake ultimately is an attitude towards the nature of competition. If the fundamentals can thus be stated clearly, it will then be possible to test a given argument pragmatically. If, as can be maintained, there is a direct relation between the clarity of an idea and an understanding of its consequences, a fruitful task will be performed by laying bare the consequences of holding a given position towards a given pricing policy.

The Criminal Statutes

There are at least four statutes that under certain circumstances make it a crime to lower the price of the goods one is selling.[9] All four of these laws make the crime a misdemeanor and fix the punishment at $5,000 fine,

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7. See Note, *Sales Below Cost Prohibitions: Private Price Fixing under State Law*, 57 YALE L.J. 391 (1948); Thatcher, *The Constitutionality of the Unfair Practices Acts*, 30 MINN. L. REV. 559 (1946). Note that the Miller-Tydings Act will restrain a businessman from lowering his retail prices, if they have been fixed by a valid State Fair Trade law.

8. "A discrimination is no more than an unjustified difference." LOEVINGER, THE LAW OF FREE ENTERPRISE 139 (1949).

9. Robinson-Patman Act § 3, 49 STAT. 1526 (1936), 15 U.S.C.A. § 13a (1941); Sherman Act § 1, 26 STAT. 209 (1890), 15 U.S.C.A. § 1 (1941); Wilson Tariff Act § 73, 28 STAT. 570 (1894), 15 U.S.C.A. § 8 (1941); Revenue Act of 1916 § 803, 39 STAT. 798 (1916), 15 U.S.C.A. § 72 (1941) (the Anti-Dumping law).

or a year in jail, or both.[10] Only two of these will be here discussed in any detail.

Section 3 of the Robinson-Patman Act makes it a crime for any person (1) to be a party to any sale which to his knowledge discriminates against competitors of the purchaser "in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity"; (2) to sell goods in any part of the United States at prices lower than those exacted by the same person elsewhere in the United States where the purpose of the lower price is to destroy competition or to eliminate a competitor in that part of the United States; or (3) to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The provision was introduced into the Robinson-Patman Bill as the Borah-Van Nuys Amendment and was added to the final bill with almost no discussion.[11] The wording of the provision came almost verbatim from a 1935 amendment to the Canadian Criminal Code.[12]

The Canadian statute grew out of the work of a governmental committee appointed in July of 1934. The committee's report, submitted a year later,[13] shows its intellectual origins in the depression following 1929. According to this report, the most obvious features of the Canadian economy at that time were the shrinking markets for the sale of goods within Canada. The decline in consumption was creating fierce struggles for what markets were left. And it was becoming clear that, if nothing were done, the mass buyers and sellers were going to be the only survivors. Experience was disproving "the tragic delusion" [14] that automatic forces would adjust prices to the variations in supply and demand. The mass sellers were able to maintain their prices both by limiting production and also, if they wished, by entering selected

10. The most recent jail sentence imposed under the Sherman Act was in United States v. Harry F. Stern, Crim. 15466 (E.D. Pa. 1950). Two of the defendants were fined $1500 and sentenced to six months imprisonment. The jail sentence was suspended and defendants were placed on probation for two years (May 15, 1950).

11. Senator Borah gave three reasons for his amendment: (1) This was an affirmative provision outlawing these practices rather than one dependent upon the discretion of the Federal Trade Commission or some other bureau. (2) It removed the necessity for a small merchant to complain to the Federal Trade Commission in Washington. He could now institute criminal proceedings in his own district. (3) It was an additional deterrent against engaging in the condemned practices. 80 CONG. REC. 6346 (1936).

12. Section 498A of the Criminal Code. Statutes of Canada, 1935, 25 & 26 GEO. V, c. 56, § 9. The dividends of cooperatives were specifically excepted from the operation of this law. For a criticism of this statute made prior to the introduction of Senator Borah's amendment, see McAllister, *Government and Some Problems of the Market Place*, 21 IOWA L. REV. 305, 321 (1936).

13. REPORT OF THE ROYAL COMMISSION ON PRICE SPREADS (Ottawa, 1935).

14. *Id.* at 9.

territories and undercutting all competitors so drastically that local competition was extinguished.[15]

On the other hand, the report continued, the mass buyer was dominating the distribution field by the exaction of trade and quantity discounts. The Commission flatly said that "discrimination in price can only be justified if it represents lower costs in distribution, but if such discrimination is due only to superior bargaining power of large buyers, it may be condemned as not socially advantageous and, more narrowly, as a form of unfair competition." [16]

This Canadian Report recommended the formation of a Federal Trade and Industry Commission. One of this commission's primary duties would be to regulate unfair trade practices. This would, of course, pose the problem of finding a test for unfairness. The Report expressed an unwillingness to be definitive on this point but there were two practices that should be completely prohibited: "We refer specifically to (1) discriminatory discounts, rebates and allowances, (2) territorial price discrimination and predatory price cutting." [17]

These recommendations were adopted in the form of an amendment to the criminal code. This legislation was tested almost immediately after its passage by the Governor-General of Canada, who requested the Supreme Court of Canada to give its opinion on the question: "Is Section 498A of the Criminal Code . . . ultra vires of the Parliament of Canada?" The problem arose at the instigation of the provinces, who contended that this legislation was an encroachment, under the Canadian federal system, upon the jurisdiction of the provincial governments.

The Canadian Supreme Court found this act within the power of the Parliament at Ottawa.[18] It held that this act was what it purported to be: a true criminal statute prohibiting acts against the public interest. Two dissenting opinions struck at the substance of the statute holding that the subject-matter did not belong in a criminal code. It was pointed out that the infliction of punishment in the interest of the public was the test of a crime. This statute under discussion did not, however, punish for the benefit of the public. It had in view only the protection of the individual competitors of certain vendors. This dissent suggested that the logical sanction would be to

15. In speaking of sales "below cost," the Commission defined such sales as "below . . . the total cost which a conservative accounting system would allocate to those goods." *Id.* at 7.

16. *Id.* at 226. Among the trade practices condemned was the use of loss leaders. The Report defined "leaders" as terms which "have, as yet, received no exact definition, but are understood broadly to mean merchandise featured or sold at prices easily distinguished as being less than customary prices." *Id.* at 228.

17. *Id.* at 270.

18. In the Matter of a Reference as to Whether the Parliament of Canada Had Legislative Jurisdiction to Enact Section 498A of the Criminal Code, Being Chapter 56 of the Statutes of Canada, 1935, [1936] Can. Sup. Ct. 363, [1936] 3 D.L.R. 593, 66 Can. Crim. Cas. 161.

award damages to any such aggrieved competitor. The other dissenting opinion pointed out that a crime was being created that had no requirement of any intent. This was said to lend force to the contentions of the provinces that an economic policy for a particular class of persons was here being enacted, that the statute was not a true crime, and, finally, that its addition to the criminal code was a colorable attempt upon the part of Parliament to encroach on the legislative authority of the provinces.

The Privy Council in London upheld the Canadian Supreme Court.[19] This high court of the Commonwealth held that there is no criterion for wrongness other than the intention of the Parliament to prohibit in the public interest acts or omissions by making them criminal. The courts will not narrow such power of Parliament nor will they suspect the motives of the legislative body in passing any legislation.

These particular objections to a criminal statute will probably not be raised in any new attack upon section 3 of the Robinson-Patman Act. The right of Congress to legislate on economic matters in this fashion is now well established. We also have a long history of crimes requiring no special mental element.[20] The most likely objection—indeed, it has already been made—will be raised in the form of a claim that the statute is so vague and indefinite that it does not provide a readily ascertainable standard of guilt such that reasonable men could determine the propriety of a given course of action. This lack of standard will be claimed to deprive a defendant of due process of law in violation of the Fifth and Sixth Amendments. Numerous criminal statutes have been attacked on these grounds. Certainly a sufficient variety of results have emerged from the courts to make an ordinary mortal wary of pontificating on this score.[21]

Criminal statutes, both state and federal, dealing with the regulation of trade and commerce have not been immune from these diverse results. The case of greatest comfort to the opponents of section 3 is *Fairmont Creamery Co. v. Minnesota*.[22] Mr. Justice McReynolds, writing for the Court, found unconstitutional a Minnesota statute, passed in 1923, which

19. Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 368 (P.C.), [1937] 1 D.L.R. 688, 67 Can. Crim. Cas. 193.

20. See Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933); FREUND, THE POLICE POWER 21-22 (1904).

21. See opposing results cited in Gorin v. United States 312 U.S. 19, 27 nn.12, 13, 61 Sup. Ct. 617, 85 L. Ed. 1144 (1941). Recent cases are Winters v. New York, 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840 (state statute overthrown); United States v. Petrillo, 332 U.S. 1, 67 Sup. Ct. 1538, 91 L. Ed. 1877 (1947) (statute upheld). In speaking of section 3, a distinguished writer has said that "at first glance the section would appear to be unconstitutional." Apparently his reason was that the criminality of any discount (so he read the act) was too great an interference with business. McLaughlin, *The Courts and the Robinson-Patman Act. Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410, 417 (1937).

22. 274 U.S. 1, 47 Sup. Ct. 506, 71 L. Ed. 893 (1927) (Justices Holmes, Brandeis and Stone dissenting). For a criticism of this opinion, see McAllister, *Government and Some Problems of the Market Place*, 21 IOWA L. REV. 305, 315 n.22 (1936).

made it a criminal offense to discriminate in price, except for differences in cost, among different sections of the state. The company indicted had bought butterfat in different parts of the state at different prices. At the trial the company claimed that prices customarily varied in different parts of the state but this evidence was excluded and the company was found guilty. The Supreme Court in reversing the conviction said:

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction."[23]

The effect of this purpose, the Court said, was to limit the company's normal conduct of business and amounted to fixing the price at which the company could buy. All these results pointed to the statute's being an unwarranted interference with the company's liberty of contract, which was made particularly bad by virtue of there being no necessary connection between the alleged evil and what was being prohibited.

This approach to constitutional problems, particularly where they relate to economic matters, went out of fashion about 1936, but that will not deter those who will be testing section 3 from making this a leading precedent. A better case for argument before the present court would probably be *United States v. Cohen Grocery Co.*[24] In that case an attack was made on the provision of the Food Control Act of 1917[25] which made it a criminal offense to make unjust or unreasonable charges in handling necessaries or to combine or conspire "to exact excessive prices for any necessaries." Chief Justice White wrote the opinion, which voided the statute because it established no ascertainable standard of guilt. A similar wording involving the Colorado Anti-Trust Law of 1913 came before the court in 1927. The Act forbade, as a crime, a conspiracy to restrain trade, increase prices, or limit competition. But to this was added a proviso to the effect that it would not be deemed unlawful to conduct operations of this nature "at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed." On the authority of the *Cohen Grocery* case, Chief Justice Taft wrote the Court's unanimous opinion that this "exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused," and the statute was accordingly declared to be violative of the Fourteenth Amendment.[26]

The test for upholding these statutes is, as pointed out, whether or not a reasonable man would know what was the wrong forbidden by the statute. With specific reference to antitrust cases, the rule of reason was declared to

23. 274 U.S. at 8.
24. 255 U.S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516 (1921).
25. 40 STAT. 277 (1917), *as amended*, 41 STAT. 298 (1919).
26. Cline v. Frink Dairy Co., 274 U.S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146 (1927).

be the guide in determining civil violations of the Sherman Act in the 1911 *Standard Oil* case.[27] This rule was attacked as being too vague for a criminal statute, but Justice Holmes rejected this argument.[28] He pointed out that it was not at all uncommon to have criminal statutes rest upon the judgment exercised by the person to be charged. Clearly the courts have a selection of cases to use for a holding either way on section 3.

Section 3 of the Robinson-Patman Act has been introduced to the courts on several occasions.[29] Only one case has been found, however, which was brought by the Government and here the provision has had its one test—and the result was favorable to its constitutionality.[30]

In this case, *United States v. Bowman Dairy Co.*, the Government alleged that the dairy company sold processed milk to Chicago retailers, including A&P. The company was charged with entering into a contract with A&P by the terms of which Bowman agreed to pay A&P "a secret lump sum rebate, discount, and allowance of $50,000 and a continuing, secret percentage rebate, discount, and allowance of 11 percent of Bowman's sales price" on all purchases made by A&P. These rebates were allegedly not available to other purchasers. This arrangement, it was charged, was a violation of section 3 of the Robinson-Patman Act.

The defendant moved to dismiss the indictment on the ground that section 3 was vague and indefinite and, therefore, violative of the Fifth and Sixth Amendments. The issue was argued both orally and by extensive briefs. The court overruled the motion to dismiss.[31]

The Government, in its opposition to the motion to dismiss, first pointed out that the pertinent portion of the provision did not have reference to all discounts or published discounts but only applied to those rebates, discounts or allowances which were not available to other purchasers. Those discounts which were available to all, whether discriminatory or not, were not covered by this provision.[32] In short, as Senator Borah pointed out, the provision

27. United States v. Standard Oil Co., 221 U.S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911).

28. Nash v. United States, 229 U.S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232 (1913). A state statute that made crimes of acts "reasonably calculated" to fix prices or which would "tend" to accomplish this result was upheld in Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417 (1909).

29. The section was attacked as vague and uncertain in a treble damage suit. Louisiana Farmers' Protective Union v. Great Atlantic & Pacific Tea Co., 40 F. Supp. 897, 916-17 (E.D. Ark. 1941). The point was not passed upon in the District Court or on the appeal in this case. 131 F.2d 419 (8th Cir. 1942). The appellate court did say that there was opinion contrary to this claim of vagueness. *Id.* at 422. Actions under section 3 of the Robinson-Patman act must be brought by the Department of Justice. The jurisdiction of the Federal Trade Commission is limited to the issuance of cease-and-desist orders.

30. United States v. Bowman Dairy, Cr. 48, Cr. 361 (N.D. Ill., indictment filed July 30, 1948). Note that only the first portion of section 3 is involved in this case.

31. April 13, 1949. The case is still pending.

32. For instance, the American Can Company's quantity discount arrangement was available to all but was actually accessible to only a few. See Russellville Canning Co. v. American Can Co., 87 F. Supp. 484 (W.D. Ark. 1949). Note that the first clause of section 3 makes no reference to any discriminations in price.

struck at secret rebates and, therefore, the word "knowingly" was the word to be stressed as expressing the criminal intent.[33]

The provision does not outlaw discounts. In fact, it expressly countenances quantity discounts by making the failure to make available the same discount for a sale of like quantity a necessary part of the cause of action. One writer fixed upon this part of the clause as being a point which would deprive the entire clause of any effect. By slight variances of quantities, it was felt that the intention of the provision could be evaded.[34]

Whether or not these uncertainties of interpretation bother the Department of Justice is not known by the present writer. It is true that, so far as has been discovered, the Department has brought only one case under this section. But a likely reason for not using this provision is that the same results, and more, seem to be obtainable under the Sherman Act.[35] Sections 1 and 2 of the Sherman Act brand as crimes contracts or conspiracies to create unreasonable restraints of trade or attempts to create monopolies. As pointed out above, *Nash v. United States* upheld the validity of these statutes in making such acts crimes.[36]

The use of the Sherman Act against local price cutting had its start in a civil case against the Oil Trust which had resulted in 1911 in the dissolution of the Standard Oil Company.[37] Among the unlawful practices engaged in by the Trust was local price cutting. In the original petition,[38] the Government had charged that the defendant oil companies themselves or through bogus independent companies had cut prices below the costs both of their competing independents and of themselves. This practice when prolonged had the inevitable effect of destroying the independents. Then, the petition charged, the defendant "as soon as the competition was removed immediately raised the prices in said community." Further, it was alleged that "when

33. 80 CONG. REC. 6346-47 (1936).

34. TEEGARDEN, ANALYSIS OF PROVISIONS OF ROBINSON-PATMAN ACT 19 (1936). H. B. Teegarden was General Counsel of the United States Wholesale Grocers' Ass'n, which drafted the original Patman Bill. See note 70 *infra*.

35. "Sometimes I doubt whether we ever needed the Robinson-Patman law, with all its elusive uncertainty. I have thought that the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured." Judge Lindley, in United States v. New York Great Atlantic and Pacific Tea Co., 67 F. Supp. 626, 676 (E.D. Ill. 1946).

36. See note 28 *supra*.

37. United States v. Standard Oil Co., 221 U.S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911). The Powder Trust was also in the courts in 1911. The combination had been formed to prevent unnecessary loss due to "ill-regulated or unauthorized competition." A board of trade was the executive committee of the combination. Under the basic agreement "it was provided that any party to the agreement who should suffer excessive loss by an overt act of the board of trade—as by the reduction of a price at a place in treatment of a 'local disturbance of trade'—should receive such compensation for the damage sustained by it as might be recommended by the board of trade and agreed to at a general meeting." United States v. E. I. duPont de Nemours & Co., 188 Fed. 127, 138 (C.C. Del. 1911).

38. United States v. Standard Oil Co. of New Jersey, Eq. 5371, Sec. XXIII (C.C.E.D. Mo., filed Nov. 15, 1906).

the competition was inactive and ineffective . . . the prices have been exorbitant and unreasonably high." Two ideas are here involved: (1) ruinous price cutting to destroy competition and (2) the concurrent garnering of monopolistic prices elsewhere. The trial court restated this portion of the complaint so that the Government was said to have alleged that the defendants "sold their products at times and places where there was competition below remunerative prices, and recouped their losses by selling such products at high prices at other times and places." [39] It is this recoupment then that should be looked for when local price cutting is charged, for it is the surest indication of an intent to throw economic power into a local market.[40]

A splendid example of the modern technique in recoupment is in the recent criminal case against A&P which was decided in favor of the Government.[41] This grocery chain was engaged in a variety of buying and selling activities in addition to its retail operations. Its wholly owned commission house, ACCO, became the main thread in the structure created to put it, as a chain, at a competitive advantage. By exacting special discounts and allowances from sellers to it, by taking brokerage commissions from such sellers, by selling to competitors at a profit, and by other predatory activities, the headquarters of the company secured a large revenue. If all the retail stores then only broke even, this headquarters income assured a profit to the chain. This profit was greater as the volume of retail business became greater. Founded on this assured income, the company's policy then became to get volume in sales regardless of gross profit. This increased volume would cut unit costs and, when secured, would drive competitors out of business. The gross profits of each store were taken care of by an appropriate allocation by headquarters of profits gained from A&P's other activities and by the subsidization by other stores or other divisions.[42] This recoupment, using profits obtained elsewhere by predatory means, is equivalent to an extra force being thrown into the fray which no legally operating competitor can repel. The rules of lawful competition rule out this form of subsidization in our market places.

The circuit court of appeals, in affirming the conviction,[43] pointed out that the issues in the case were over the predatory methods by which A&P accumulated its profits and allowances. As an example of A&P's use of these

39. United States v. Standard Oil Co. of New Jersey, 173 Fed. 177, 190 (C.C.E.D. Mo. 1909). In December, 1904, the price of one type of illuminating oil varied from 7.7 cents per gallon in Delaware to 16.4 cents in Nevada. JONES, THE TRUST PROBLEM IN THE UNITED STATES 78 (1924).

40. See Muller & Co. v. Federal Trade Commission, 142 F.2d 511 (6th Cir. 1944); National Nut Co. v. Kelling Nut Co., 61 F. Supp. 76 (N.D. Ill. 1945).

41. United States v. New York Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946).

42. *Id.* at 667-68.

43. United States v. New York Great Atlantic & Pacific Tea Co., 173 F.2d 79 (7th Cir. 1949).

illegally gained profits, the then Judge Minton (then on the court of appeals) pointed to the manipulation of the gross profit among divisions and individual stores. And further, Judge Minton said: "When the gross profit rate is reduced in Area X, it is an almost irresistible conclusion that A&P had the power to compensate for any possible decline in net profits by raising the gross profit rate and retail prices in Area Y, where it was in a competitive position to do so." [44]

When A&P sells to its customers at differing prices in different locations, it makes itself possibly subject to the second clause in section 3 of the Robinson-Patman Act, which forbids it "to sell . . . goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States." There may be some question as to the area covered by "elsewhere," but all that is needed is a price difference for a stated purpose. The purposes stated are clearly those instrumental in creating a monopoly. The technique required is that of local price cutting. Hence, again recoupment would be a sure-fire indication of intent.

The process of ruinous price cutting plus recoupment from elsewhere is a prima facie case of an attempt to create either a monopoly or an unreasonable restraint of trade. It is a policy which can only be adopted by a powerful corporation operating on an extensive territorial basis. If a large company is said to engage in ruinous price cutting or the *Standard Oil* case is said to hold that such price cutting is illegal, it should be recognized that the facts invariably show recoupment. Such a showing is sufficient to demonstrate the illegal intent.[45] Recoupment is simply the high-price side of a price discrimination.

This stress upon recoupment is made because, barring a statute, within a local market, price cutting, however drastic, is not wrongful.[46] A local dealer who cuts his prices in his one store will give his local neighbor a cause of action only if he acts in his price cutting with a "disinterested malevolence," that is,

44. *Id.* at 87. In the civil suit brought against A&P, United States v. New York Great Atlantic & Pacific Tea Co., Civ. No. 52-139 (S.D.N.Y., filed Sept. 15, 1949), paragraph 23 of the complaints charges that the defendants have combined and conspired, in violation of sections 1 and 2 of the Sherman Act: "E. To expand retail sales by eliminating competitors... (2) By selling below their cost of doing business in selected retail areas and recouping such losses by selling at higher prices in less competitive retail areas. . . (5) By selecting local areas throughout the United States wherein defendants sell at retail below their cost of doing business at retail and below their prices in other retail areas until the desired percentage occupation of such selected retail markets is achieved, using income from other retail areas and from Acco and their manufacturing subsidiaries, as well as from the savings accruing from discriminatory buying practices to offset the losses or reductions in profits incident to such selected area price cutting."

45. See Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929).

46. RESTATEMENT, TORTS § 709, comment *a* (1938). Price wars are part of the American scene. To shake Italy out of its high-profit—low-volume business philosophy, the E.C.A. chief in Italy, is reported to have said that what Italy needs is "a good-old-fashioned price war." N.Y. Times, § 3, p. 7, col. 1 (June 18, 1950).

if his sole purpose is to eliminate his competitor as an individual.[47] There are sound reasons for this distinction.

The above argument is not intended to minimize those cases in which there has been proved to exist a deliberate practice of ruinous price cutting with the avowed purpose of driving out competitors [48] for the purpose of creating a monopoly. In the early part of this century there were numerous such cases arising under the Sherman Act. At the time the general technique seemed to involve such devices as fighting brands,[49] fighting ships,[50] and other "fighting propositions," [51] and, most ingenious of all, bogus independent companies [52] whose sole purpose was to destroy competition.

The Sherman Act, in its opposition to local price cutting, appears to regard as limited in space a particular market where a buyer and a seller meet.

47. Mr. Justice Holmes in American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 356, 41 Sup. Ct. 499, 65 L. Ed. 983 (1921), used this phrase in discussing the motivation that may make a lawful act unlawful. It was similarly used by Judge Cardozo in Nann v. Ramist, 255 N.Y. 307, 319, 174 N.E. 690, 695, 73 A.L.R. 669 (1931). If there is no malice in business competition, there is no injury. HOLMES, THE COMMON LAW 144-45 (1881).

48. See HENDERSON, THE FEDERAL TRADE COMMISSION 247 *et seq.* (1925).

49. See DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890-JANUARY 1, 1918 454 (1918) (hereinafter cited as "DECREES AND JUDGMENTS") for the consent decree (filed June 2, 1914) in United States v. American Thread Co., Eq. 312 (N.J. 1914) which enjoined the defendant as follows:

"(g) From using in the United States what are known in the trade and referred to in the petition herein as 'fighting brands,' hereby defined to be brands which are devised or revived and used for the purpose of being offered principally to customers of competitors at cut prices, that is to say, at prices lower or on terms more favorable than the price or terms asked by the seller for substantially the same thread under different brands or trade names.

"(h) From employing in the United States what are referred to in the petition herein as 'flying squadrons,' hereby defined to be special forces of salesmen who do not, as their principal business, handle the brands commonly offered for sale by the manufacturer or selling agency or solicit orders from the trade generally, but handle principally 'fighting brands,' or solicit principally from customers of competitors with a view of securing their trade.

"(m) From selling or offering to sell in the United States sewing thread of any kind below the cost of production or at prices which, after allowing for cost of transportation and differences in prices and terms on account of differences in grade, quality or quantity sold, are lower than the prices charged in other parts of the United States with the intent of thereby obtaining a monopoly or destroying or injuring the business of another in sewing thread, or in preventing another from engaging in such trade or business; but nothing in this paragraph contained shall prevent the defendant corporations from offering for sale or selling sewing thread in any part of the United States at prices or on terms as low as any of their bona fide competitors are then and there offering, nor from offering or making different prices, terms, or conditions to different classes of customers."

50. On "fighting ships" see Thomsen v. Cayser, 243 U.S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597 (1917). The use of a "fighting ship" was forbidden by statute in 1916, 39 STAT. 733 (1916). The Act defined the term to mean "a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade."

51. The classic discussion of these buccaneering methods is STEVENS, UNFAIR COMPETITION, 10 *et seq.* (1917). See gumdrops being used as a "fighting proposition" in United States v. Corn Products Refining Co., 234 Fed. 964, 983 (S.D.N.Y. 1916).

52. See Learned Hand on this subject in United States v. Corn Products Refining Co., 234 Fed. 964, 982 (S.D.N.Y. 1916). In the final judgment in the *Corn Products* case, the test for price-cutting was held to be the securing of a profit lower than the industry had ever experienced, less than a fair profit, and less than a sufficient return to induce capital to embark in the business. DECREES AND JUDGMENTS 445.

Within that space all sellers must compete as self-contained units. If this is the rule, the small and efficient native seller can compete with the national but clumsy seller. And the local buyer has his choice of the most efficient, and, presumably, the cheapest seller. But, no matter how efficient the small business may be, it cannot survive if the national organization can, and does, order its local branch to drive competitors out of business regardless of losses, when such a company is secure in its knowledge that losses in one area will be counterbalanced by profits in another. Localizing the competition in this manner protects the small businessman by making business efficiency the test of survival. When a national company engages in local price cutting, the criterion for fixing prices is not local production costs, so that local productive efficiency would be no defense in the battle for customers.[53] This state of affairs was, as pointed out, ruled out by the early antitrust cases.

Outlawing local price cutting protects the local, the independent and the small businessman. It denies the necessary validity of the alleged paradox that the inevitable result of competition is monopoly. This oft-repeated maxim should be given a passing glance. Some businessmen may reproach the Antitrust Division for mothering these little fellows, urging that they ought to be made to stand on their own feet. The idea is that if a man cannot compete with the big companies, the public interest demands that he be extinguished. Basic to such views are the convictions that the big fellow is not only more efficient, as a whole and in all his units, but is also a good clean fighter. Neither of these tenets is sustainable. The optimum size of a business in a given industry is a subject of much acrimonious debate.[54] The only certainty is that the biggest is not necessarily the best. As for the big fellow as a competitor, the simplest statement seems to be that hardly a major company in the country ever reached any degree of prominence without engaging in predatory practices which led it into trouble with one or more of the antitrust laws. Both political parties [55] and judges of all reputations [56] have supported governmental action against the methods used by big business to extinguish competition. Businesses have not had greatness thrust upon them; they have

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53. STEVENS, UNFAIR COMPETITION, 10 *et seq.* (1917). Stevens defines local price cutting as involving recoupment.

54. RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED AND SMALL BUSINESS (TNEC Monograph 13, 1941); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1291 (1948). See PATMAN, THE ROBINSON-PATMAN ACT 35 (1938).

55. Arthur M. Schlesinger, Jr. makes an interesting contrast between Theodore Roosevelt's New Nationalism and Wilson's New Freedom. The former urged the expansion of Government powers so as to convert the giant business consolidations into a force for the public welfare. Roosevelt did not believe that the aim of trust-busting was to set back the clock and restore cut-throat competition. Today we can see that the logical result would have been some form of collectivism. To Wilson, bigness was a curse. The Government should not get any bigger. Business should be reduced to small units and made to compete. The Government should not run business. SCHLESINGER, THE VITAL CENTER, 177 *et seq.* (1949).

56. For instance, see Fletcher, *Mr. Justice McReynolds—An Appreciation*, 2 VAND. L. REV. 35 (1948).

achieved it, but all too frequently by methods that caused a public revulsion and consequent legislation intended to control their use of such methods.

So far as can be discerned, the premises upon which Sherman Act cases are based are relatively simple. They have none of the trappings of a text upon economic theory. The objective is to keep "markets free to all upon a competitive basis." [57] To this end, predatory practices were outlawed "when they are part of a scheme to stifle competition and to obtain control of an industry." [58] This essential intent is easily recognizable. When it exists, there is no great difficulty in proving it. It may manifest itself, for instance, as section 3 of the Robinson-Patman Act states, in selling goods at unreasonably low prices; in selling goods in one part of the United States at a lower price than in others; or, finally, with the buyer's or seller's knowledge,[59] in discriminating against competitors by secret rebates and other allowances "in respect of a sale of goods, of like grade, quality, and quantity."

But businessmen and other commentators complain that other antitrust laws, such as section 3 of the Robinson-Patman Act, which they say prohibits all quantity discounts, are not so simple in their premises and actually subvert the normal and customary methods of doing business.[60] The response to such a complaint must be that there is no vested right to continue to do what is normal and customary when to do so might tend to create a monopoly or unreasonably restrain trade. And that is what the sponsors of the Robinson-Patman Act thought was happening because of these discounts. That, as we saw, was what the Canadian Commission thought was happening. The fault then, if there be one, lies not with the Act but with the factual basis of its original sponsors. The Act, in thoroughgoing fashion, outlaws the very practices which the Act's proponents intended to outlaw. The legislators of the mid-thirties were zealously working to restore competition into our society. They had a slightly different idea as to the content of competition from that which is generally prevalent today. Before considering this content, however, it will be desirable to consider the civil statutes which may affect the businessman who would like to lower the price of his goods.

To conclude this section, a businessman may run afoul of the penal sections of the federal antitrust laws when he lowers the price of some or

57. "The theory of the anti-trust laws in their modern orientation is that, in the absence of adequate governmental control upon a monopolistic basis, the influence of government should be exercised to keep the markets free to all upon a competitive basis." McLaughlin, *Legal Control of Competitive Methods*, 21 Iowa L. Rev. 274, 302 (1936).

58. Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 215-16 (1939). Prof. Handler says that these practices violate the Sherman Act only when this intent is present.

59. If this knowledge is present as the statute requires, the scienter required for the Sherman Act is inferable. If this knowledge is present it will be presumed that the party charged intended the consequences of his acts. Such consequences will be of sufficient import to have justified the Government prosecution, *i.e.*, probably what would have been needed for a Sherman Act charge.

60. For instance, see Legis., *The Robinson-Patman Act: Some Prospective Problems of Construction and Constitutionality*, 50 Harv. L. Rev. 106, 118 (1936).

all of his goods under some fairly well-defined circumstances. An essential part of the test for criminality will be the intent with which the acts are done, that is, whether prices are lowered (1) pursuant to a contract to restrain trade unreasonably, (2) to create a monopoly, (3) to eliminate a competitor, or (4) to destroy competition. Ordinary competitive pressures eliminate the weak but the result is not to destroy competition, because the ranks are immediately filled with eager and hopeful new competitors.[61] The process is distinguishable from the ruthless assault upon a lone competitor using the practices specifically outlawed by the antitrust laws—the use of unreasonably low prices, of secret discounts, rebates, and allowances, and of discriminations in price among areas of the United States. The average businessman will recognize his own intentions and will accept the responsibility for the consequences of the methods he uses. He should not blame his dislike of these consequences on "confusion in the antitrust laws."

THE CIVIL STATUTES

The businessman who lowers his prices may also be subject to civil suit under several statutes. The two most important of these are the Sherman Act and the Robinson-Patman Act. The cause of action in the Sherman Act is based on a contract or conspiracy in unreasonable restraint of trade or an attempt to create a monopoly. The problems that arise under this statute have already been discussed when considering this Act as a criminal statute. In determining whether a criminal or a civil action will be brought under the Sherman Act, an important factor is the type of relief deemed necessary and appropriate. Usually, of course, both actions are brought. For the narrow subject in view here, no further discussion of the Sherman Act is necessary. This section will concentrate on the Robinson-Patman Act as a deterrent to any businessman who contemplates any price reductions.

Section 2 of the Robinson-Patman Act,[62] in so many words, forbids the reduction of one's prices except under specified conditions. The background of this Act ought to be considered because recent judicial decisions under section 2(b) of the statute have made the Act apparently more regulatory in its effect than even the Supreme Court had previously indicated in some of its dicta.

In May of 1928, the Senate, by resolution, ordered the Federal Trade Commission to make an investigation of chain stores for the purpose of ascertaining "how far the rapid increase in the chain-store system of distribu-

61. Local price cutting may produce competition also. For the early experience of the Standard Oil Company in trying to charge all the traffic would bear. See NOURSE AND DRURY, INDUSTRIAL PRICE POLICIES AND ECONOMIC PROGRESS 159 *et seq.* (1938). For a more recent similar mistake, see American Tobacco Co. v. United States, 328 U.S. 781, 66 Sup. Ct. 1125, 90 L. Ed. 1575 (1946).

62. 49 STAT. 1526 (1936), 15 U.S.C.A. § 13(a) (1941). See generally Legis., *The Legality of Discrimination under the Robinson-Patman Act*, 36 COL. L. REV. 1285 (1936).

tion is based upon actual savings in costs of management and operation and how far upon quantity prices available only to chain-store distributors or any class of them." [63] The Federal Trade Commission worked on this project for the next six years. During this period it issued 33 documents relating to this central theme. The Commission's Final Report on its investigation was submitted to Congress in December of 1934.[64]

The Commission found that in 1929 chains had accounted for 20 percent of the total of all retail distribution.[65] The chief advantage enjoyed by chain stores lay in the lower selling prices they were able to offer their customers. These lower prices were brought about principally by the use of loss leaders and by the fact that the chains bought at prices much lower than independent wholesalers and retailers were able to secure. This latter situation was due to the many special discounts and allowances granted to chains.[66] The Commission concluded that "to the extent that chain stores consistently undersell independents we may expect a steady trend toward final chain-store supremacy and dominance in distribution which is apparently uncheckable."[67] The main recommendations of the Commission were with respect to tightening the law against mergers, that is, section 7 of the Clayton Act, so as to prevent the further formation of chains. As for special discounts, the Commission merely suggested a provision to read: "It shall be unlawful for any person engaged in commerce . . . either directly or indirectly to discriminate unfairly or unjustly in price between different purchasers of commodities." [68]

This was hardly satisfactory to chain-store opponents. Congressman Wright Patman of Texas introduced a bill that was more directly aimed at these discounts.[69] This is the bill alleged to have been drafted by the United

63. Sen. Res. 224, 70th Cong., 1st Sess., 69 Cong. Rec. 7857 (1928).

64. *Final Report on the Chain-Store Investigation*, SEN. DOC. No. 4, 74th Cong., 1st Sess. (1934).

65. *Id.* at 4-5.

66. *Id.* at 85. Although decided after the passage of the Robinson-Patman Act, Goodyear Tire and Rubber Co. v. Federal Trade Commission, 101 F.2d 620 (6th Cir. 1939), held that quantity discounts given without relation to costs were permissible under Section 2 of the original Clayton Act. In National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733 (2d Cir. 1924), *cert. denied*, 266 U.S. 613, 45 Sup. Ct. 95, 69 L. Ed. 468 (1924), quantity discounts to a chain were upheld and it was deemed not to be unfair competition to refuse to give a quantity discount to a group of independent retailers who had pooled their orders.

67. *Id.* at 86-87. As an example of the criticisms directed at this report see McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEM. PROB. 334 (1937). "Integration of functions rather than large buying power is the principal source of chain store economies." *Id.* at 343.

68. *Id.* at 96-97. A bill was introduced to effectuate this recommendation. H.R. 4995, 74th Cong., 1st Sess., 79 CONG. REC. 1202 (1935). Concerning this recommendation, the Commission made the following remarks: "The Commission recommended . . . a broad prohibition of unfair and unjust discriminations, and thus made it a judicial rather than a legislative matter. This would also facilitate a constitutional test of the question whether discrimination may be prohibited which is in good faith to meet competition. At the same time, it was suggested that even discriminations justifiable on account of quantity or cost of selling might, nevertheless, in the long run lead to monopoly." ANN. REP. FTC 33 (1935).

69. H.R. 8442, 74th Cong., 1st Sess. (introduced June 11, 1935), 79 CONG. REC. 9081 (1935).

States Wholesale Grocers' Association.[70] The next move was to get some drama into an anti-chain movement. This was achieved by the investigation of a "superlobby" of chains and big retailers allegedly attempting to influence Congressional legislation. The House had ordered this investigation in April of 1935.[71] Wright Patman was subsequently made chairman of the committee making the investigation. In June the scope of the hearings pursuant to this resolution was expanded by a resolution "to investigate the trade practices of individuals, partnerships, and corporations engaged in big-scale buying and selling of articles at wholesale or retail, and their associations." [72] This latter resolution set the tenor of the hearings that opened a few days later.[73] The committee issued a report dealing only with its conclusions concerning the American Retail Federation.[74] The report said there would be subsequent legislative recommendations. There was no printed report on any suggested legislation. Wright Patman says there was a 1500-page report following these hearings embodying these recommendations.[75] This report does not appear to be publicly available, but it is well to recall that Patman had, before the hearings, already introduced his bill which was passed in the next session.

This bit of history is necessary to recall those now almost forgotten days in the midst of the depression following 1929. It looked in those years as though we were going to have an operating economy that simply did not include millions of our citizens. The elimination of the middle-class seemed imminent. If what was then done seems desperate or unsound today, one should recall how different was the world of 1935-36. The gross national product in 1935 was 72.2 billion dollars.[76] For the second quarter of 1950, our economy was producing goods and services at the rate of 270 billion dollars a year.[77] If our outlook on economics has changed, this fourfold increase in the rate of national production is not the least of the responsible factors. And it is true that our attitude towards competition during this period has had some variations. In a sickly buyer's market, sharing the work and wealth might make sense. But when demand is unquenchable, as now, this attitude toughens and there is a reciprocating feeling that every seller ought to be able to reach every market and that every buyer ought to be able to deal with any seller who can satisfy the buyer's needs. The significance of

70. *Hearings before a House Special Committee to Investigate the American Retail Federation*, 74th Cong., 1st Sess., I, 398 (1935) [Hereinafter cited as "*Hearings on American Retail Federation* (1935)"]. See on this point Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140, 143 *et seq.* (1936). Congressman Patman is reported to have said that H. B. Teegarden wrote the bill. *Id.* at 143 n.21.

71. H.R. Res. 203, 74th Cong., 1st Sess., 79 CONG. REC. 6338 (1935).

72. H.R. Res. 239, 74th Cong., 1st Sess., 79 CONG. REC. 8646-47 (1935).

73. See *Hearings on American Retail Federation*, 4 vols. (1935).

74. H.R. REP. No. 2373, 74th Cong., 2d Sess. (1936).

75. PATMAN, THE ROBINSON-PATMAN ACT 267 (1938).

76. NATIONAL INCOME, SUPPLEMENT TO SURVEY OF CURRENT BUSINESS 14 (Dept. of Commerce, July 1947).

77. N.Y. Times, p. 1, col. 2 (August 15, 1950).

what are really two philosophies of competition will be developed more fully later. Here it is important to remember that, with no personal animosity, this was anti-chain legislation. If today this is hard to take, the difficulty is that legislation of another era is still on the books. The legislation was recognized for what it was at the time of the passage and its premises were severely attacked at that time.[78]

In view of this history, therefore, it will aid immeasurably in understanding the Robinson-Patman Act to bear this one theme in mind: This Act was intended to prevent the mass buyer from asking or receiving any discounts, that is, lower prices, other than those justified by cost savings.[79] Section 2(f) of the Act says just this. Section 2(a) also forbids the giving of discounts; 2(c) strikes at fictitious commissions or other forms of compensations in connection with sales to any purchaser; 2(d) outlaws disproportionate gifts to customers; and 2(e) forbids discriminatory services being granted to purchasers.

The use of the Robinson-Patman Act, however, has probably been greater against large sellers than against mass buyers; that is, more cases have been brought attacking the giving than the receiving of lower prices. This shift is accountable for some of the present confusion over the law. Nevertheless, the courts have adhered to the literal language of the statute. The confusion that many businessmen are currently expressing as being inherent in our antitrust laws would seem largely to be founded upon their unwillingness to believe that the Robinson-Patman Act and its current judicial status actually express the law of the land. They are confusing what they believe should be the law with what is actually the law. That there is a strong position for their side is indisputable. But that position, as will be shown, is not entirely the governing law at this writing.

The types of discounts permissible under the Act are only of incidental concern here. But it is here necessary to look carefully at the cause of action created by section 2(a) of the statute. According to this provision, it is

78. "What we actually have before us is a camouflaged anti-chain-store act, sponsored by one wholesale grocers' association, calculated to check competition at a crucial point rather than to promote it, and concerned with the holding back of one class of buyers instead of the protection of all buyers against the effects of lessened competition or of monopoly . . . the 'amendment' . . . assumes a philosophy directly opposed to the assumptions of the Clayton Act." Learned and Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137, 137-38 (1937). See also Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store*, 15 HARV. BUS. REV. 62 (1936); McAllister, *Price Control by Law in the United States: A Survey*, 4 LAW & CONTEMP. PROB. 273, 290 (1937). The Act "represents a raid by selfish interests attempting to uphold obsolescent and inefficient methods of distribution against the chief contribution of the current generation toward making the purchasing power of the masses effective." McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410, 413 (1937).

79. That differences in costs are the only economically justifiable basis for price differences is literally the theme of Congressman Patman's book, THE ROBINSON-PATMAN ACT (1938). See especially pp. 5, 38, 47.

unlawful for a person engaged in commerce (1) to discriminate in price, (2) between different purchasers (3) of commodities of like grade and quality (4) where either purchase involved is in commerce (5) where such commodities are sold for use, consumption, or resale within the United States, the District of Columbia, or any territory or possession of the United States, and (6) "where the effect of such discrimination may be [80] 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 the customers of either of them." [81]

This provision embodied two amendments to section 2 of the original Clayton Act.[82] The clause was added: "where either or any of the purchases involved in such discrimination are in commerce." But most important, the "effects" clause as quoted above is a significant expansion of the original act. As passed in 1914, the Act said simply: "where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce." These additional words in the new statute were added advisedly and it seems well to recall the reason, since we find persons like Commissioner Lowell Mason [83] and other writers [84] today drawing a distinction between "injury to competition" and "injury to competitors."

It is almost certain that the sponsors of the Robinson-Patman Act had it in mind that no *competitor* should be injured by any one giving or receiving

80. The meaning of "may be" has been a source of considerable discussion. Under the original section 2 of the Clayton Act, it was held that the clause pointed to an intention of cutting off discriminations in their incipiency, *i.e.*, discriminations are illegal if they "may" have the stated effect. Standard Fashion Co. v. Magrane Houston Co., 258 U.S. 346, 356-57, 42 Sup. Ct. 360, 66 L. Ed. 653 (1922). This, of course, was not too helpful. Following the passage of the Robinson-Patman Act, it was held that "may be" indicates a "reasonable possibility." Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 742, 65 Sup. Ct. 961, 89 L. Ed. 1320 (1945). This was affirmed in Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 46-47, 68 Sup. Ct. 822, 92 L. Ed. 1196 (1948). In the Morton Salt case, Mr. Justice Jackson dissented (Frankfurter concurring), 334 U.S. at 55, on the ground that "reasonable possibility" was an incorrect test; it should be "reasonable probability." Unless this were so, any discount would fall that tbe Commission saw fit to attack. S. 1008 of the 81st Cong., 2d Sess. adopted this view. President Truman vetoed the bill. On this matter of the change in the meaning of "may be," he said that the bill would change the text from "could be," as had been hitherto accepted by the courts, to "would be." This was such a change that the courts might require proof of actual damage before finding a discrimination. This, the President said, "might jeopardize the Commission's ability to stop unfair discrimination." SEN. DOC. No. 184, 81st Cong., 2d Sess. 3 (1950).

81. For the meaning of a number of the terms in this provision, see Note, *Judicial Decisions on the Definitional Structure of the Robinson-Patman Act,* 18 GEO. WASH. L. REV. 212 (1950); Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936,* 46 MICH. L. REV. 450 (1948).

82. 38 STAT. 730 (1914).

83. In his dissent from the Federal Trade Commission's order in the matter of Standard Oil Co., 43 F.T.C. 56, 65 (1946).

84. See Simon, *The Fantasy of the Phrase "Injury to Competition,"* 15 LAW & CONTEMP. PROB. 258 (1950). This writer takes a not uncommon view that the end result of successful competition must be to drive competitors out of business. Throughout his article he speaks of "hard" rivalry and "vigorous" competition. It is not clear whether he believes this is the theory of our economy that is being blighted by the Robinson-Patman Act or whether the Act is being misinterpreted.

discriminatory prices. A competitor may not be injured even if the injury occurs when the discriminating party lowers his prices, in good faith, to meet competition.[85] In short, an injury to a competitor is also an injury to competition.[86] The Senate Committee Report on the Act said that the original Clayton Act had been "too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." [87] The House Committee Report echoed this sentiment in similar language.[88]

Since its passage, commentators have sneered at the ambiguity of the Robinson-Patman Act. One does not have to read very far along before questions begin to come to mind. One of the most important of these doubtful points is the first part of section 2(b). This section states that upon proof being made that there has been a discrimination in force, "the burden of rebutting the prima facie case thus made" shall be upon the person charged. What is the prima facie case? The cause of action was broken down above into six parts. How many of these must be proven by a plaintiff in order to established a prima facie case?

The prima facie case is simply the establishment of a difference in price paid by two competing purchasers.[89] It matters not whether the plaintiff be the Federal Trade Commission or a private treble damage litigant.[90] Nor

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85. Standard Oil Co. v. Federal Trade Commission, 173 F.2d 210 (7th Cir. 1949). If *A* is to meet *B's* price, *A* may not discriminate to do so. He is expected to lower his price everywhere that he sells to meet *B's* price.

86. LOEVINGER, THE LAW OF FREE ENTERPRISE 140 (1949). "Injury to competition should be defined as injury to the vitality of competition in the market, not as injury to competition between particular designated competitors . . . , even though the power of large buyers is somewhat less drastically reduced by such an interpretation." EDWARDS, MAINTAINING COMPETITION 168 (1949).

87. SEN. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936). Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (2d Cir. 1923), *cert. denied* 262 U.S. 759, 43 Sup. Ct. 705, 67 L. Ed. 1219 (1923), said that original Clayton Act referred only to injury to competitors, not to purchasers from any such competition who might be injured by a discriminatory price. This case was overruled by Van Camp & Sons v. American Can Co., 278 U.S. 245, 49 Sup. Ct. 112, 73 L. Ed. 311 (1929), which held that meaning of phrase "in any line of commerce" was not to restrict the application of Act only to line of discriminating party. Vendees of discriminator were also protected. See also American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899, 51 Sup. Ct. 183, 75 L. Ed. 792 (1931). See McAllister, *Sales Policies and Price Discrimination under the Clayton Act*, 41 YALE L.J. 518 (1932).

88. H.R. REP. No. 2287, 74th Cong., 2d Sess. 8 (1936). See also Senator Logan's remarks in 80 CONG. REC. 3113 (1936) and Congressman Utterback on the same point in 80 CONG. REC. 9417 (1936).

89. Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 45, 68 Sup. Ct. 822, 92 L. Ed. 1196 (1948). The Commission says "a *prima facie* case of a violation of Section 2(a) may be established by proving (1) jurisdiction, (2) goods of like grade and quality, and (3) discrimination in price." Standard Oil Co., 41 F.T.C. 263, 282 (1945).

90. Russellville Canning Co. v. American Can Co., 87 F. Supp. 484 (W.D. Ark. 1949). This seems to be a novel holding. The literal words of the statute do not suggest its possibility. Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140, 165 (1936).

does it make any difference whether the injury is to the seller's competitors,[91] to competing purchasers from the same seller,[92] or to the customers of either such purchaser.[93]

Since the effect of a discrimination might be hard to prove, according to the *Moss* case, "Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result." [94] When the burden thus shifts, the defendant may then rebut the prima facie case thus set up. We shall consider a little later what a defendant can do towards this end. The prima facie case is itself worthy of discussion.

Justice Black in the *Morton Salt* case gave another reason for shifting the burden in this fashion. He pointed out that the statute prohibits any discrimination in price. That discrimination, being proved, the defendant must make the justification under "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." [95]

These two rationales indicate that the "effects" clause is unnecessary to establish the prima facie case. A presumption has been introduced which simply says that when a seller charges two different prices to different purchasers for the same goods it will be presumed that there has been an injury to competition or to a competitor, thereby establishing a cause of action under section 2(a) of the Robinson-Patman Act. There have been complaints that a showing of two different sales prices raises no logical inference of anything and that therefore this presumption is unjustifiable.[96] One case relied upon to support this view is *Tot v. United States.*[97] There, a federal statute created a presumption that a firearm had been shipped in interstate commerce if a person convicted of a crime of violence had one in his possession. The Court, through Justice Roberts, held that there was no rational connection between the two facts of conviction and possession and the presumption. Further, the question of comparative convenience of producing evidence of the ultimate fact arises out of this rational connection, so that if there is no rational connection, it is meaningless to talk of convenience in bringing in evidence.

91. Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F.2d 378 (2d Cir. 1945), *as modified*, 155 F.2d 1016 (2d Cir. 1946).

92. Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 68 Sup. Ct. 822, 92 L. Ed. 1196 (1948).

93. Standard Oil Co. v. Federal Trade Commission, 173 F.2d 210 (7th Cir. 1949). These three groups of persons who have a cause of action for injury are sometimes classified according to degree of competition with relation to discriminating party, i.e., primary line, second line, third line. See Haslett, *supra* note 81, at 454 *et seq.*

94. 148 F.2d at 379.

95. 334 U.S. at 44-45.

96. Austern, *Required Competitive Injury and Permitted Meeting of Competition*, in CCH ROBINSON-PATMAN ACT SYMPOSIUM 63, 72 *et seq.* (1947); Howrey, *The Robinson-Patman Act and a Prima Facie Case*, 37 GEO. L.J. 541 (1949).

97. 319 U.S. 463, 63 Sup. Ct. 1241, 87 L. Ed. 1519 (1943).

It is submitted, however, that the whole history of the Robinson-Patman Act, as heretofore described, shows that the circumstances of the *Tot* case are not applicable to it. The Act grew out of the conviction that discriminations in prices were disrupting the economy.[98] Section 2(a) was designed to prevent such differences. A difference in price became a discrimination when it filled the requirements of the prima facie case.[99] The premise of the proponents of this bill was that a system of a single price available to all competitors was a desirable arrangement[100] and justifications for any variations from such a system were severely limited.

The discrimination having then been demonstrated by the plantiff, the burden of rebutting the case there established then shifts to the defendant. What can a defendant do to effect such a rebuttal? First of all, the defendant can show that the plaintiff has not satisfied the conditions of the prima facie case. For instance, there must be two actual purchases at different prices;[101] a refusal to sell to a prospective purchaser except at a discriminatory price is not enough.[102]

Secondly, the defendant may show that even if there is a discrimination, it may not affect competition because the two purchasers are not in competition. This introduces the concept of functional discounts which the Commission seems to handle more simply than some of the commentators.[103] Differences in price are permissible according to the purchaser's status in the distribution hierarchy. This is recognized in the controversial paragraph 6 of the Federal

98. The Act established the principle that there is a causal relationship between price discrimination and injury to competition. LOEVINGER, THE LAW OF FREE ENTERPRISE 140-41 (1949).

99. "In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which enables them to equal treatment, whereby the difference granted to one casts some burden or disadvantage on the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part f the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the change of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." Congressman Utterback, in 80 CONG. REC. 9416 (1936).

100. See Crowley, *Equal Price Treatment under the Robinson-Patman Act*, 95 U. OF PA. L. REV. 306, 343 (1947).

101. Sorrentino v. Glen-Gery Shale Brick Corp., 46 F. Supp. 709 (E.D. Pa. 1942); A. J. Goodman & Son v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (Mass. 1949).

102. Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939). The statute speaks of purchasers and further provides that "nothing . . . shall prevent persons engaged in selling goods . . . in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." § 2(a).

103. "The easy assumption that a functional class—wholesalers, fabricators, primary distributors—may receive special or discriminatory price treatment because of an historical practice of the trade, or because of the magic of the functional label, is as erroneous as most simple answers to complex problems." Shniderman, *"The Tyranny of Labels"—A Study of Functional Discounts under the Robinson-Patman Act*, 60 HARV. L. REV. 571 (1947). See also Note, *The Robinson-Patman Act in Action*, 46 YALE L.J. 447, 451 (1937).

Trade Commission's modified final order in the *Standard Oil of Indiana* case.[104] This paragraph orders the company to cease and desist "from discriminating . . . in the price of . . . gasoline of like grade and quality as among purchasers: . . .

> "6. By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-consumers of such jobbers of wholesalers, where such jobber or wholesaler resells such gasoline to any of its said retailer customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer."

The Robinson-Patman bill as it came from the House Committee contained a clause that read:

> "(1) That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; *for the purpose of such classification of customers as wholesalers or jobbers, or retailers, the character of the selling of the purchaser and not the buying shall determine the classification,* and any purchaser who, directly or indirectly, through a subsidiary or affiliated concern or broker, does both a wholesale and a resale business shall, irrespective of quantity purchased, be classified (1) as a wholesaler on purchases for sale to retail dealers only, not owned or controlled, directly or indirectly, by the purchaser; and (2) as a retailer on purchases for sale to consumers."[105]

The House report pointed out that this classification of customers was impliedly permitted in the old section 2 of the Clayton Act since it permitted quantity discounts and placed no restrictions upon differentials not affecting general competition. But following the expansion of the effects clause, a specific safeguard was deemed necessary since "such differentials, so long as equal treatment is required within the class, do not give rise to the competitive evils at which the bill is aimed; while to suppress such differentials would produce an unwarranted disturbance of existing habits of trade."[106] Subsequently, the conferees of both Houses, for undisclosed reasons, eliminated

104. 43 F.T.C. 56, 57-58 (1946). The court of appeals modified this paragraph to read thus:

"By selling such gasoline to any jobber or wholesaler at a price lower than the price which respondent charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with the retailer-customers of such jobbers or wholesalers, where such jobber or wholesaler, to the knowledge of the respondent or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances or facilities having the net effect of a reduction in price to the retailer." 173 F.2d 210, 217 (7th Cir. 1949).

105. H.R. REP. No. 2287, 74th Cong., 2d Sess. 1-2 (1936) (italics added). This attempt to classify the chains as retailers was labelled as a "thoroughly unrealistic and unsound limitation which reveals the animus behind the whole measure." McNair, *Marketing Functions and Costs and the Robinson-Patman Act,* 4 LAW & CONTEMP. PROB. 334, 349-50 (1937).

106. H.R. REP. No. 2287, 74th Cong., 2d Sess. 9 (1936).

this provision.[107] But one of the original sponsors of the Act, Congressman Wright Patman, has insisted that the provision is implicitly still in the Act. He declared that the wholesaler performs a necessary and valuable service to our economy and if any manufacturer sells to wholesalers and chains at the same price, there will be an illegal discrimination resulting from the inevitable injury to the customers of the wholesaler.[108] The theory is that the chains are in competition with the wholesalers' customers. The chain is not entitled to a wholesaler's discount on the ground that it performs a wholesaler's function because, as the original bill had said, it is the character of the selling that counts and not the buying.

Thirdly, the defendant may justify his price differences by showing that they make "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." This proviso to section 2(a) opens up the whole field of cost accounting.

In discussing the public policy behind the Sherman Act which makes business efficiency the mediator in competition, it was pointed out that a major premise in the antitrust laws is that business efficiency is the proper test for survival, not economic power. With this premise in mind, costs of running the business are apt to assume large proportions. In legislating on prices, therefore, it was not unnatural to attempt to tie prices to costs.[109] The Robinson-Patman Act did this directly.[110] The reaction to this attempt has not been favorable.[111] Nor has it been of much use to defendants.[112] It

107. H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936).

108. Patman, The Robinson-Patman Act, 61, 165-66 (1938). Loevinger claims the test is the rigid one of quantity discounts being justified only by cost savings. Of course, there is no problem if there is no competition between members of the two classifications. Law of Free Enterprise 149 (1949). Commissioner Mason claims that Congress rejected the whole concept of "pricing by use." 43 F.T.C. 64 (1946).

109. Loevinger suggests that in viewing allegedly unreasonably low prices, the first look will always be at costs, Law of Free Enterprise 144 (1949). Another approach with a similar result is the claim that laws against price discrimination rest "upon the admitted hopelessness of maintaining anything like perfect competition among manufacturers. The effort to control differentials in price to buyers of different classes rests broadly upon an attempt to adjust the prices of manufacturers to what they might be assumed to be if there were price competition among the sellers." Burns, *The Anti-Trust Laws and the Regulations of Price Competition*, 4 Law & Contemp. Prob. 301, 308 (1937).

110. *Supra* note 79. "The Act proceeds on the reasonable theory that the buyer is entitled to no more than the marginal unit cost-saving resulting from that buyer's purchase." Legis., 50 Harv. L. Rev. 106, 110 (1936). "A seller who wishes to avoid trial by the ordeal by cost-accounting, need only confine his price differentials to those that are clearly demonstrable and specifieally allocable to particular sales." Loevinger, The Law of Free Enterprise 147 (1949).

111. Following the enactment of the Robinson-Patman Act, "Trial is to proceed by the ordeal of cost accountancy." Hamilton, *Cost as a Standard for Price*, 4 Law & Contemp. Prob. 321, 323 (1937). "The doctrine that the only fair prices are those which are based on costs . . . is bad economics and impossible accounting." McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 Law & Contemp. Prob. 334, 337 (1937). This latter points out that the entire demand or buying side of price is overlooked by the Act. "Prices fluctuate as a function of demand, within limits set by costs." Note, *The Robinson-Patman Act in Action*, 46 Yale L.J. 447, 482 (1937). This whole burden of justification by cost accounting is "utterly overwhelming and subversive of

was predicted that the passage of the Act would stimulate the development of techniques for allocating particular costs of particular sales.[113] Only an expert should speak as to whether or not this has happened.

Fourthly, the defendant may always justify varying prices under the Robinson-Patman Act by showing that his price changes were "in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." No cases have been discovered which test the furthest limits of this proviso to section 2(a), that is, what is meant by "but not limited to" the enumerated exceptions.

There is a continuing claim that there is a fifth justification under the Act for a price discrimination.[114] But unless and until the Supreme Court reverses the decision of the Court of Appeals for the Seventh Circuit in *Standard Oil Co. v. Federal Trade Commission*,[115] the law now stands that it is not a justification for a price discrimination that one has lowered one's price in good faith to meet an equally low price of a competitor, where the effect of such lowering of price would be to injure a competitor of the person receiving the lower price.[116] Even the Supreme Court has, in its dicta, expressed the thought that it was a complete justification.[117] But *Standard Oil Co. v. Federal Trade Commission* is squarely on this point. Mr. Justice Minton,

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legitimate business practice." McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410, 415-16 (1937).

112. See Note, *Cost Accounting Defenses under the Robinson-Patman Act*, 35 ILL. L. REV. 60 (1940).

113. A reading of the Commission's findings in the matter of Standard Oil Company, 41 F.T.C. 56 (1945) will indicate the difficulty facing a defendant. See similarly, Russellville Canning Co. v. American Can Co., 87 F. Supp. 484 (W.D. Ark. 1949). One writer points out that if the defendant fails to justify any cost savings, the Commission must assume that there are none. Adelman, *Antitrust & Upside-Down Cake and Eat It Too*, Fortune 57, 58 (March, 1950).

114. Loevinger's book, *The Law of Free Enterprise*, does not appear to have any references to the *Standard Oil* case. The author does assume that 2(b) permits economic self-defense. *Id.* at 147. One writer felt that it was unlikely that the defense was not absolute, *if properly established*. Shniderman, *"The Tyranny of Labels"—A Study of Functional Discounts under the Robinson-Patman Act*, 60 HARV. L. REV. 571, 572 (1947).

115. 173 F.2d 210 (7th Cir. 1949).

116. Few writers ever doubted that it was or would be held to be a complete justification. One writer who did was Evans, *Anti-Discrimination Act of 1936*, 23 VA. L. REV. 140, 177 (1936). See also the opinion of the general counsel of the U.S. Wholesale Grocers' Assoc., the organization which drafted the bill for Congressman Patman. TEEGARDEN, ANALYSIS OF PROVISIONS OF ROBINSON-PATMAN ACT 12-14 (1936).

117. The most startling example of this is in International Salt Co. v. United States, 332 U.S. 392, 68 Sup. Ct. 12, 92 L. Ed. 20 (1947). The defendant objected to the provision in the final judgment which ordered the company to lease its machines on non-discriminatory terms and conditions on the ground that competitive conditions might require it to lower its prices in some areas in order to compete. The Court rejected this plea, saying:

"Of course, the Clayton Act itself permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower

then a circuit court judge, wrote the opinion that held that it was not such a complete justification. The cosponsor of the Act has said that such a reason was not intended to justify a discrimination, it would only have the effect of mitigating the punishment for such a discrimination.[118] The members of Congress at the time of the passage of the Act understood that the proviso was meant to be procedural only and not substantive.[119] They expected that

price to meet, in good faith, the equally low price of a competitor if the need arose." 332 U.S. at 399.

In Federal Trade Commission v. Staley Manufacturing Co., 324 U.S. 746, 65 Sup. Ct. 971, 89 L. Ed. 1338 (1945), the Court stated that Section 2(b) made the defense "a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination." 324 U.S. at 753. The defense was raised by the defendant, but the Court had no occasion to discuss the effect of its explanation of the Act because it found that good faith could not include the meeting of a competitor's price which was illegally discriminatory. Further the defendant had never lowered its price but had *ab initio* adopted the illegal price of its competitor.

Until the *Standard Oil* case came into public view there was more discussion as to what constituted a good faith lowering of price than there was over whether the price could be lowered at all. See as examples, Moss v. Federal Trade Commission, 148 F.2d 378 (2d Cir. 1945), *as modified,* 155 F.2d 1016 (1946); Crowley, *Equal Price Treatment under the Robinson-Patman Act,* 95 U. of Pa. L. Rev. 306, 343 (1947). The Robinson-Patman Act simply rules out the lowering of one's price, if not part of a general move, for the purpose of securing business regardless of what your competitor's prices may be. If 2(b) is a defense at all, it justifies discriminations only to meet equally low prices of competitors.

118. Patman uses the word "mitigate" three times in as many pages. Patman, The Robinson-Patman Act 39-41 (1938). He also says: "In sum and substance, the provision permits the accused to throw himself upon the mercy of the court." *Id.* at 40. He must have been familiar with the Commission's finding that "competition is the most frequently reported reason for price variation. Some of the chains . . . expressed a broad and unqualified purpose of meeting all competition." Ann. Rep. F.T.C. 40 (1933).

119. Senator Moore offered this clause as an amendment and unquestionably intended it to serve as a complete justification for any discrimination. 80 Cong. Rec. 6435 (1936). The House Conference Report, however, stated that the original bill had been changed to add "a provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission. . . ." H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936). This report declared that the Senate conferees had receded from their support of a provision which read: "That nothing herein contained shall prevent discrimination in price in the same or differing communities made in good faith to meet competition." The reason given was that "this language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act." *Id.* at 6-7. A member of the Committee, Congressman Utterback, later explained what this meant. His example was that of the mass buyer receiving a special discount. He pointed out that it would defeat the whole purpose of the bill to permit such a seller to point to competing low offers because such discounts are in effect commercial bribes to lure favored customers away from competitors. This provision, therefore, "is entirely procedural. It does not determine substantive right, liabilities and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations." 80 Cong. Rec. 9418 (1936). Section 2 of the original Clayton Act clearly made this a complete defense. See Henderson, The Federal Trade Commission 250 (1925). Also Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 236 (2d Cir. 1929). In early final judgments under the Sherman Act where defendants were forbidden to cut prices for purpose of eliminating competition or destroying a competitor, there invariably was a provision permitting the lowering of prices to meet competition. See Decrees and Judgments 203. The Great Lakes Towing Co. was enjoined from "engaging in so-called 'rate wars', or making competitive cuts from its regular schedule of tariff rates . . . except that to meet (but only to meet and not to go below) actual rates made by . . . competitors for the same kind and quality of service . . ." United States v. Great Lakes Towing Co., Eq. 72 (W.D. Ohio, judgment entered Feb. 13, 1915), Decrees and Judgments 256.

this was evidence to be introduced by defendants in extenuation only. Section 2(b) of the Act itself says that such evidence may be introduced to rebut the prima facie case of discrimination. There is no mention that it will justify the discrimination. As indicated above, the prima facie case consists only of the fact of discrimination and does not include the entire cause of action. This entire cause of action cannot be rebutted by this proviso. A rebuttal of this prima facie case shifts the burden back to the plaintiff who may show that in spite of the rebutting evidence, the discrimination may still substantially lessen competition. This is an awkward use of the word "rebuttal," [120] but it is clear that in this connection the word was not intended to mean "justification." [121] Last spring, Congress passed a bill to make the lowering of one's price in good faith to meet competition, a complete justification for a price discrimination.[122] The President vetoed this bill.[123] His reasons for doing so will be discussed below.

If Benjamin Fairless, in the speech quoted at the beginning of this article, had the *Standard Oil* case in mind and had said so, his views would have had more accuracy. He erred in expanding his conclusions to cover all the antitrust laws. But the *Standard Oil* case does, in truth, present to the Supreme Court a dilemma of resounding difficulty and importance.

The case began on November 29, 1940, when the Federal Trade Commission filed complaints against four major oil companies selling gasoline in the Detroit area.[124] Each one of these complaints charged that each of the defendants had sold gasoline at a discriminatory price to jobbers in this area. These purchasers had resold at retail this gasoline at prices which enabled them to divert customers from, and thereby injure, competing retailers who also bought from defendants. In the case of the Gulf and the Texas Company,

120. The rationale must be that only the prima facie case is destroyed by this evidence; not the prima facie case *and* the proof of the effect of the discrimination. If both of these were destroyed you would have a justification, but the statute only permits this type of evidence to destroy the prima facie case. This rationale seems to be the correct one and probably justifies the query as to the value to the defendant of introducing such evidence.

121. The 1936 Report of the Federal Trade Commission to Congress, in explaining the new legislation, said of section 2(b): "The theory of this provision is that the facts which constitute justification are necessarily in the possession of the alleged discriminator." ANN. REP. F.T.C. 14 (1936). Proof of good faith would be such a fact that this sentence indicates would be a justification; the effect of the discrimination is not such a fact.

122. This clause of section 3 of S. 1008, 81st Cong., 2d Sess. read: "That a seller may justify a discrimination by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . except that this shall not make lawful any combination, conspiracy, or collusive agreement; or any monopolistic, oppressive, deceptive, or fraudulent practice."

123. SEN. DOC. No. 184, 81st Cong., 2d Sess. (1950).

124. In the Matter of Standard Oil Company, Dkt. No. 4389; In the Matter of Gulf Refining Company, Dkt. No. 4390; In the Matter of The Texas Company, Dkt. No. 4391; In the Matter of Shell Oil Company, Incorporated, Dkt. No. 4392. Nothing has happened in the latter three cases, presumably pending the final outcome of the *Standard Oil* case.

the person to whom they sold the gasoline at discriminatory prices was the same person. This has all the earmarks of four competing companies trying to get more of a particular type of business in the same area. The court of appeals and the Commission have now said that even if there is such competition among these sellers, prices may not be lowered in this discriminatory fashion to get business because of the injury to other purchasers from each such seller. To assure adherence to this holding, the court of appeals affirmed the Commission's order that wholesalers get wholesaler's discounts; retailers, retailer's discounts; and, a wholesaler-retailer gets discounts in proportion to his sales in each classification. The effect can only be a uniform price at each stage of distribution throughout this area. This effect, as we have seen, was the objective of the sponsors of the Robinson-Patman Act. Whether or not such a single price system is desirable is for the Congress to decide. But this case introduced some unforeseen factors into the picture. The wholesaler-retailers must be watched—and that responsibility was here placed upon the seller. The major oil company, here a defendant, must observe and record the activities of his distributors to ascertain what quantities of gasoline are being sold by them at retail or at wholesale. If any of these distributors gets out of line and uses some of the gasoline he has gotten for a wholesaler's discount to indulge in a little retail price cutting, the oil company is liable for a violation of the Commission's order. The company must react promptly and refuse to sell gasoline to any such obstreperous soul.

And while this decision was being readied for appeal to the Supreme Court, the Department of Justice was preparing a complaint which charged the major oil companies on the west coast with dominating the oil industry there. It was charged that among the methods used by the majors to maintain this position was their strict adherence to agreed-upon wholesale and retail prices "by refusing to sell their gasoline and other refined petroleum products to any wholesale or retail distributor who fails or refuses to follow the prices fixed by them."[125] In the complaint in *United States v. Sun Oil Co.*, the Department attacked the company's exclusive dealings contracts with 10,000 independent service station operators. The complaint charged that the defendant had induced, coerced, and compelled these operators to enter into and to adhere to these contracts "by the following means, among others:

> "(a) By subjecting the activities of said operators to minute and constant inspection, policing, and supervision;
>
> "(b) By maintaining said operators in a condition of disciplined subservience by dominating all phases of the conduct of each operator's business, including his resale prices, his margins of profit, his hours of operation, the number of his employees, . . ."[126]

125. Complaint, United States v. Standard Oil of California, Civ. No. 11584-c, ¶ 70(8)(a), (S.D. Calif., filed May 12, 1950). Two other defendants in this case are Shell Oil Co., Inc. and The Texas Co. Gulf Refining Co. does not operate in this Pacific area.
126. Civ. No. 10483, ¶ 20 (E.D. Pa., filed January 12, 1950).

These two instances, involving pending cases, are presented to show how sharp is the Supreme Court's present dilemma. The same acts are apparently being urged by the Commission and attacked by the Department of Justice. It is said by the Commission that the Robinson-Patman Act permits, and even demands, that control be maintained by the seller over resale prices and that a refusal to sell be used as a means of enforcing such control.[127] But, pursuant to the Sherman Act, complaints have been filed which allege as law violations, the very acts being ordered under the aegis of the Robinson-Patman Act.[128]

In the first oral argument of this case before the Supreme Court, Justice Jackson asked counsel for the Commission whether or not the Court was being asked "to enforce two conflicting legislative policies." He was told that the two laws were consistent.[129] An associate of counsel for the Commission, however, speaking on behalf of a retail gasoline dealers' association, declared that the philosophy of the Robinson-Patman Act is different from that of the Sherman Act.[130] This latter claim appears to be the only completely defensible position. It should follow that if the philosophical underpinnings of the two acts are different, attempts to make them consistent will be correspondingly difficult.

The report of this first oral argument indicated that there was on the Court a general realization of this basic conflict. Justice Black asked counsel what would be the effect of the passage of S. 1008, which was then pending in Congress. Section 3 of that bill would have made the lowering of prices in good faith to meet competition, a complete defense against a charge of discrimination. The Justice was advised that the enactment of that bill into law would reverse the court of appeals.[131] To draw an inference from this question requires a brief statement of the case's path through the Supreme Court. The case was first argued January 9-10, 1950.[132] S. 1008 was passed by the Congress on June 2. It was immediately evident that strong forces were urging the President to veto the bill. The President did not actually return the bill with his veto message until June 16.[133] Meanwhile the Court's term had come to an end on June 5. On that date the case was ordered reargued as No. 1 on next term's docket.[134] The Court's delay may mean nothing but a badly divided court that genuinely desired a reargument. But this is also

127. This should most certainly call for a reconsideration of Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 Sup. Ct. 150, 66 L. Ed. 307 (1922).

128. Compare the threats of refusal to sell in the *A&P* case. Adelman, *Antitrust Upside-Down Cake and Eat It Too*, Fortune 57, 58 (March, 1950).

129. 18 U.S.L. WEEK 3210 (1950).

130. *Id.* at 3211. The attorney arguing as amicus was Cyrus Austin, the Commission's original trial attorney in the case.

131. *Id.* at 3209-10.

132. *Id.* at 3209.

133. SEN. Doc. No. 184, 81st Cong., 2d Sess. (1950).

134. 18 U.S.L. WEEK 3337 (1950).

the course of a Court that felt that the court of appeals ought to be affirmed, but did not want to do it. If the Court had decided to reverse the court of appeals, it would have meant nothing to the Court whether or not S. 1008 passed. If S. 1008 passed, it would simply confirm the Court. If S. 1008 had failed to pass the Congress, it would probably have been due to the failure of Congress to reach any agreement over freight absorption and would not signify any special Congressional favoritism towards section 2(b). But an affirmance of the court of appeals would best come after the enactment of S. 1008 into law.

The President's veto destroyed this reed. It might be of interest, if of little profit, to speculate on what happens now. But here again one finds only dilemmas. For instance, Justice Douglas has long been a vigorous supporter of the Sherman Act. He went so far as to dissent in *Standard Oil of California v. United States* [135] because the result of affirming the lower court seemed to him to encourage and to enlarge the oil monopolies. In effect, he was applying the rule of reason to the Clayton Act to prevent such a result. Now he has a real choice. He can deny the plain intent of those who passed this Act or he can encourage the oil monopolies.[136] Surely S. 1008 would have solved this problem for him!

The argument has been made in this article that the intent of Congress when it passed section 2(b) was made clear—*i.e.*, that it did not intend that the lowering of prices in good faith to meet a competitor's prices was to be a complete justification for any discrimination. There are writers who argue that this intent is subject to a different interpretation.[137] Others say that unless 2(b) is a defense, it is of little value to the seller—and then, these same legalists add—therefore, it will probably be interpreted as a defense.[138] Finally, it is said, in order to avoid making the Act unconstitutional, "the courts will not take the same view as the committee, and will construe the Act to mean that the meeting of competition is an absolute defense." [139] Implicit here are mutually exclusive theories of statutory construction which will not be resolved by lay discussion.

135. 337 U.S. 293, 69 Sup. Ct. 1051, 93 L. Ed. 1371 (1949), 3 VAND. L. REV. 156 (1949).

136. The effect of affirmation of the circuit court would be to "increase the already energetic role major refiners play in determining the retail price the consumer must pay." Note, *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 YALE L.J. 158, 162 (1949).

137. One writer says that a complete study indicates "that Congressman Utterback probably understood the proviso as substantive in nature." On the basis of this, he predicted the reversal of the circuit court. Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 477-78 (1948). See also 62 HARV. L. REV. 1249, 1250 (1950). For a claim that the difficulties in making the various parts of the Robinson-Patman Act consistent with one another is eased by making the 2(b) proviso a complete defense, see Dawkins, *Defense Available in Cases of Geographic Price Discriminations*, 37 GEO. L.J. 217, 226, (1949).

138. *E.g.*, Legis., 50 HARV. L. REV. 106, 117 (1936).

139. Gordon, *The Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3*, 22 A.B.A.J. 593, 598 (1936).

This discussion of the most important civil statutes which may affect a businessman who would lower his prices is sufficient to show the very real problems that many companies face today. The key principle of these acts is no discrimination, that is, no lowering of price to one person and not to his competitor who also buys from the same seller. This possible injury to a competitor brought about by discriminatory prices was highlighted by the extended discussion of the *Standard Oil* case. In the light of that case, what a sales manager can do to meet competition, short of a general price reduction, is problematical. This dilemma must now be examined. The sole object is to reveal the existence of two philosophies which have secured statutory footholds. At one point, these two approaches have clashed head-on in such fashion that only Congressional action will untangle them.

THE TWO PHILOSOPHIES OF COMPETITION

In the first oral argument of the *Standard Oil* case before the Supreme Court, Justice Jackson asked counsel for the Commission what the competition consisted of that was being protected by the Robinson-Patman Act. Counsel replied that it was the competition of the retailers who lost customers to those competitors who were given the discriminatory price. But, Justice Jackson protested, isn't that the essence of competition in a capitalist system, that is, that the low-price seller gets the customers? And the Commission's counsel said that it was.[140] The latter question and its answer were stated too broadly. The low-price seller may not always be in a tenable legal position in a capitalistic system, as was shown in the previous discussion of the criminal statutes in this field. On the other hand, under a capitalist system there may be no absolute necessity for laws, even such as the Sherman Act, to provide guidance for the form of competition within that system. The English law governing trade combinations which fix prices and engage in many of the practices that the Sherman Act outlawed has long seemed like unadulterated capitalism.[141] But for sixty years in this country, we have been

140. 18 U.S.L. WEEK 3210 (1950).

141. The trilogy of cases that settled the law of trade combinations were (1) Mongul Steamship Co., Ltd. v. McGregor, Gow & Co., [1892] A.C. 25; (2) Allen v. Flood, [1898] A.C. 1, and (3) Quinn v. Leathem, [1901] A.C. 495. The substantial result was that any techniques were lawful which did not involve intimidation, violence, or malice. Through the years, it was public knowledge that trade combinations were increasing their control over the British economy, but no preventive or remedial action was taken. See Ministry of Reconstruction, *Report of Committee on Trusts*, CMD. 9236 (1919). The only monopolies or unreasonable restraints of trade were those which were against the public interest in that they produced an unreasonable enhancement of prices and the burden of proof is on the one who claims such an effect. Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co. [1913] A.C. 781 (P.C.). See Friedmann, *The Harris Tweed case and Freedom of Trade*, 6 MOD. L. REV. 1 (1942). The Labor Government finally reacted from this tradition and passed the Monopoly and Restrictive Practices (Inquiry and Control) Act, 11 & 12 GEO. 6, c. 66 (1948). This was not a very far-reaching act. It provided only for investigations and reports of fact findings. See Meier, *A Critique of the New British Monopoly Act*, 48 MICH. L. REV. 329 (1950).

gradually imposing more limitations upon businessmen with the avowed objective of maintaining competition in our national business affairs. The antitrust laws have tried to stem the movement toward monopolies.[142] They have struck at restraints of trade that have prevented others from entering the restrained fields or which have oppressed consumers. Increasingly, there has been evidenced an interest in the preservation and protection of the small and the independent businessman. When these particular groups were deemed to be in the most need of aid, they received it. The history of the Robinson-Patman Act, as previously related, reveals the protective nature of this Act.[143] In short, the essence of a capitalist system is not a unity. It has temporal and spatial variations such that one must take cognizance of and, accordingly, qualify any answer to a general question, such as the one Justice Jackson asked.

The essence of competition in a capitalist system is bound up with our conception of the capitalist system. If the Spartan view prevails that only the strong do and should survive,[144] then we may expect open warfare in the marketplace with few legal restrictions on business activities. We left this path in 1890 and England has finally followed us. If the pendulum swings to the other side, the economy is enmeshed in a total effort to secure full employment "by bread and circuses" if necessary. The Roman view [145] that an outside force, not the efforts of its citizens, will preserve the State has its modern application in the intervention of the Government to preserve businesses. It needs no argument to suggest that the Robinson-Patman Act is an offshoot of this attitude. But if today we have swung back from the emergency measures of the Thirties, we have not gone all the way back. We are in the middle road and the lines are not clear.

One of the President's advisers, John D. Clark, has recently spoken out against the philosophy of the Robinson-Patman Act. He questioned whether or not we should continue to temper the wind for the shorn lamb.[146] He was,

142. President Roosevelt is reported to have said that "the minimum regulation businessmen can expect is the preservation of competition." Ashbrook, Book Review, 15 LAW & CONTEMP. PROB. 311, 313 (1950). Congressman Celler recently gave a variant of this: "competition is the least regulation that business can expect." Statement issued June 9, 1950.

143. At the first oral argument in the *Standard Oil* case, Justice Black asked whether it was not true that the Robinson-Patman Act was aimed at a large retailer such as the one whose retail activities precipitated the case. The Commission's counsel agreed that it was. 18 U.S.L. WEEK 3211 (1950). In a foreword to a critical symposium on the Robinson-Patman Act, David Cavers declared that "economic necessity is mothering a new ethic of competition" and further that "under the pressure of depression, this emerging ethic has suddenly gained legal sanction." Cavers, *Foreword*, 4 LAW & CONTEMP. PROB. 271 (1937).

144. FIRST ANNUAL REPORT TO THE PRESIDENT OF THE COUNCIL OF ECONOMIC ADVISERS 10 (1946).

145. *Id.* at 12.

146. "Is it a desirable national policy to tie the hands of the big competitor and thereby make it easier for the small-businessmen to survive? . . . Today, many supporters of the antitrust policy will give hesitant answers. My own is that there is a heavy burden of proof upon him who would temper the storms of competition for the lamb in this manner. He must do more than argue for stability of business. He must make an exceedingly strong case that his proposal will not, by depriving competition of its

in effect, urging a stern view of competition and, at the same time, was expressing disapproval of the trend in this country since the end of the first World War towards a less vigorous view.

The Council of Economic Advisers, of which John D. Clark is a member, has very aptly characterized two possible attitudes towards competition as "hard" and "soft" competition.[147] The Sherman Act was an effort to preserve conditions under which competition was the only permissible result and the impact of such competition upon any particular competitor was not deemed to affect the public interest. The vigorous clash of enterprisers throughout the market is the "hard" competitive way. But in one area after another, pressure has been brought to bear to exempt whole classes of businessmen from the cold blasts of competition. The Miller-Tydings Act [148] permitted manufacturers and retailers to agree on retail price floors. The Webb-Pomerene Act [149] permitted exporters to combine for sales abroad. And the Robinson-Patman Act was passed to protect the small retailers from the full impact that could be exerted by large chains buying as a unit. The Council suggested that what was developing was an " 'ethical competition' which does not differentiate between the stability of the individual firm and the stability of the total economy." [150]

The significance, in practice, of whether the slant of a given statute is in the direction of hard or soft competition may be heightened by examining pricing policies with these views in mind. The preliminary question, then, must be: "What is a price?"

The early drafts of the Robinson-Patman Act defined "price" as: "The amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor." [151] This definition was immediately objected to as an attack upon basing point methods of pricing by the Federal Trade Commission and was eventually stricken from the bill.[152] The suspicion continued, however, that the Commission was trying to make the "mill net realization" the basic price with which to test for all discriminations.[153] The results of having such a definition made into the law

vigor, deny the people those benefits of larger production, lower costs and prices, and improved standard of living which the Sherman Act was designed to promote." *Hearings before the Subcommittee on Study of Monopoly Power of H.R. Committee on the Judiciary*, 81st Cong., 1st Sess., Ser. No. 14, pt. 1, 114 (1949).

147. THIRD ANNUAL REPORT TO THE PRESIDENT OF THE COUNCIL OF ECONOMIC ADVISERS 15 (1948).

148. 50 STAT. 693 (1937), 15 U.S.C.A. § 1 (1941).

149. 40 STAT. 516 (1918), 15 U.S.C.A. § 61 (1941).

150. See note 147 *supra*. For a development of the theme that "nearly everyone favors competition as against monopoly; and nearly everyone wants it limited in the interest of security," see CLARK, ALTERNATIVE TO SERFDOM 61 *et seq.* (1948).

151. H.R. REP. No. 2287, 74th Cong., 2d Sess. 2 (1936).

152. 80 CONG. REC. 8223-4 (1936).

153. See Head, *Validity under the Robinson-Patman Act of a Uniform Delivered Price of One Seller*, 31 MINN. L. REV. 599 (1947). For a critical discussion of F.O.B. mill pricing and the Commission's part in forwarding the concept, see *Study of Federal Trade Commission Pricing Policies*, SEN. DOC. No. 27, 81st Cong., 1st Sess. (1949).

are easily understood. The geographical area in which sales could be made by a given company would be narrowly circumscribed, particularly in the case of heavy articles like steel and cement. A Pittsburgh steel company might be prevented from competing with an Alabama company in Southern markets, regardless of relative efficiencies and only because the company could not discriminate among customers as to freight costs. In short, F.O.B. mill pricing seems like a certain means of protecting local producers from the rigors of competition from outsiders.

Suppose, however, the price we have in mind is the delivered price. This is the price at which a seller makes or offers to make delivery of a commodity to a buyer at any delivery point other than the seller's own place of business.[154] This amount may be equal to (1) less than the mill net, (2) the mill net, (3) the mill net plus some or all of the actual freight, or (4) the mill net plus more than the actual freight.

If the delivered price is less than the mill net, the product is probably being sold at a loss. This, from all that has gone before, is a red flag. Some explanation is necessary and, if history is any guide, it will not be a satisfactory one. If the delivered price is the mill net, this is equivalent to the seller having paid all the freight. The reasons for doing this would probably be the same as for paying only some or none of the freight. They are better discussed together.

If the delivered price is greater than the sum of the mill net and the actual freight, the buyer is paying for "phantom freight." This method of pricing was outlawed in *Corn Products Refining Co. v. Federal Trade Commission*.[155] The defendant company had two plants, one in Chicago and the other in Kansas City. Regardless of from which plant glucose was shipped, the buyer paid the Chicago mill price plus the cost of freight from Chicago. Thus, a buyer of glucose in Kansas City bought his product in Kansas City and had added to it the cost of shipping from Chicago, from which it had not been shipped. Naturally the buyer in Chicago paid no freight. This discrimination, based merely on location and having no relation to costs, was in clear violation of section 2(a) of the Robinson-Patman Act.

Suppose, now, that the delivered price is the mill net plus some or all of the actual freight costs. Let us assume that the seller of his own free will can determine how much of his freight he will include in his delivered price. If the seller has such an option, he can "absorb freight."[156] A seller will

154. S. 1008, 81st Cong., 2d Sess. § 4B (1950).
155. 324 U.S. 726, 65 Sup. Ct. 313, 89 L. Ed. 569 (1945).
156. "The term 'absorb freight' shall mean to establish for any commodity at any delivery point a delivered price which, although as high as or higher than the seller's price for the same commodity at the point from which such commodity is shipped, is lower than the sum of the seller's price for such commodity at such point of shipment plus the actual cost to the seller for transportation of such commodity from such point of shipment to the delivery point or the average cost of transportation to the seller." SEN. Doc. No. 184, 81st Cong., 2d Sess. 5 (1950).

have this freedom only when operating as an individual. If he arrives at his method of pricing as a result of a conspiracy, his pricing system will be declared illegal.[157] There is alleged to be an effort under way on the part of the Commission to prevent identical pricing systems from arising even without an overt agreement.[158] But the legal and economic aspects of these pricing systems are of secondary interest here.[159] What is of importance here is that if a seller can bear some, all, or none of the freight costs in fixing his delivered price, he can, if he wishes, enter any market in the country and compete with any other seller.

This ability to enter any market in the country is the basis of the fight over freight absorption. The opponents of the legislation argued that freight absorption was a prime factor in retarding the development of the South, the West and New England.[160] The proponents of the measure naturally said it would encourage competition by increasing the number of competitors.[161] This is a vivid illustration of the contrast noticed previously between "injury to competitors" and "injury to competition." Freight absorption may undoubtedly injure competitors. The question is whether it necessarily injures competition. The former Assistant Attorney General in charge of Antitrust testified in favor of permitting freight absorption if the pricing method does not arise out of a conspiracy.[162] This is deemed to be in accordance with the Sherman

157. This is the one certain result of Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 Sup. Ct. 733, 92 L. Ed. 1009 (1948). See Note, *The* Cement *Decision and Basing-Point Pricing Systems*, 2 VAND. L. REV. 63 (1948).

158. Kittelle and Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 15 LAW & CONTEMP. PROB. 227 (1950); Wright, *Collusion and Parallel Action in Delivered Price Systems*, 37 GEO. L.J. 201 (1949).

159. To sample a field of fabulous volume see FETTER, THE MASQUERADE OF MONOPOLY (1931); MACHLUP, THE BASING-POINT SYSTEM (1949); Stocking, *The Economics of Basing-Point Pricing*, 15 LAW & CONTEMP. PROB. 159 (1950); Sheehy, *The Legal and Factual Content of Recent Geographic Pricing Cases*, 37 GEO. L.J. 183 (1949). It should be noted that if "price" means "delivered price" and the delivered price is everywhere identical, there is no discriminatory price which violates the Robinson-Patman Act. Corwin Edwards notes that the law's view of a discrimination is narrower than the economist's view in that the law strikes at discriminatory differences only and not at discriminatory uniformities. EDWARDS, MAINTAINING COMPETITION 164-65, n.9.

160. See, for the technique, Johnson, *The Restrictive Incidence of Basing Point Pricing on Regional Development*, 37 GEO. L.J. 149 (1949); and for the politics, Latham, *The Politics of Basing Point Legislation*, 15 LAW & CONTEMPT. PROB. 272 (1950).

161. These are by no means all the issues involved in the basing point controversy. Probably the main objection to such pricing systems is that regardless of the case of penetration of markets made possible by such systems, prices are everywhere identical. Professor Stocking succinctly discusses four objections to the basing point pricing policies: (1) basing point system makes for higher prices, (2) basing point system makes for higher costs, (3) basing point pricing has meant an uneconomical use of resources, and (4) basing point pricing has retarded expansion of low-cost facilities. Stocking, *The Economics of Basing Point Pricing*, 15 LAW & CONTEMPT. PROB. 158, 172 *et seq.* (1950). See also Note, *Basing-Point Pricing and Antitrust Policy*, 55 YALE L.J. 558 (1946). It is true that if *A* can enter a market and compete with *B*, the local producer, *A* could also enter the market and keep *B* from appearing on the scene unless *B*'s initial costs were lower than *A*'s.

162. Testimony of Herbert A. Bergson, *Hearings Before a Subcommittee of Sen. Interstate and Foreign Commerce on S. 236*, 81st Cong., 1st Sess. 77 (1949). Section 5 of the litigated Final Judgment in United States v. American Can Co., 87 F. Supp. 18 (N.D. Calif. 1950) reads: "Defendant is hereby enjoined and restrained from publishing,

Act. The most vigorous supporters of the Robinson-Patman Act are opposed to the practice.[163] This is not to pin labels on anyone because as yet the lines are not that clearly drawn.[164] But whatever the ultimate intent, the particular stand is clearly discernible in terms of hard and soft competition, with respect to a particular situation, that is, in terms of how much and how vigorous competition is really desired.

The question of the form of competition for our economy is not entirely resolved at the moment of the present writing. President Truman vetoed S. 1008 last spring. This bill would have legalized freight absorption. The President's reason for vetoing the bill was that this particular bill did not clarify the situation any because conflicting interpretations were already evident prior to its passage in Congress. Apparently what is needed is a case before the Supreme Court squarely presenting the issue of whether an individual seller, with no taint of conspiracy, can absorb freight. Any opinion on the subject must be personal. The divergence of opinion arising out of the previous cases in this field, as, for instance, the *Cement* case, has been astounding.

This same S. 1008 would have made it a full justification for any price discrimination if a seller lowered his price in good faith to meet the equally low price of a competitor. The issue again is the same as it was in the discussion on prices: How much competition is desirable? For those who want competing sellers in every market, this provision must be the law.[165] For those who do not and are satisfied with uniform prices over broad areas with no effort directed at all to price competition, the court of appeal's opinion in the *Standard Oil* case is satisfactory. This latter class of persons would be included among those whom the President cited as believing that the passage of S. 1008 would nullify the Robinson-Patman Act.[166]

printing, quoting or charging prices for containers on any basis other than (a) f.o.b. at the actual place of manufacture or origin of shipment of said products, or (b) on a basis which at destination at no time shall be higher than the f.o.b. price at the actual place of manufacture or origin of shipment of said products plus actual transportation and other delivery charges, with every purchaser having an option to purchase f.o.b. at the actual place of manufacture or origin of shipment of said products, and an option to determine the mode of transportation." For a similar provision in a consent decree see section IV(f) of United States v. Allegheny Ludlum Co., Civ. 45-83 (N.Y., judgment entered Oct. 25, 1948).

163. For instance, one such supporter sees no distinction in principle between phantom freight and freight absorption. Wooden, *The Concept of Unlawful Discrimination as it Applies to Geographic Price Differences*, 37 GEO. L.J. 166 (1949).

164. Senator Kefauver, always a staunch supporter of the antitrust laws, was opposed to S. 1008.

165. "It seems to be in harmony with the competitive tradition that new competitors may quote prices to get a foothold in a particular market and introduce their product without running the risk of violating the law by quoting something less than identical prices." Herbert A. Bergson, former Assistant Attorney-General in charge of the Antitrust Division in *Hearings Before a Subcommittee of the Sen. Committee on Interstate and Foreign Commerce* on S. 236, 81st Cong., 1st Sess. 77 (1949).

166. SEN. Doc. No. 184, 81st Cong., 2d Sess. 2 (1950). A foreign interpretation of the President's veto said that three types of objections were decisive in favor of vetoing

These illustrations with respect to the meaning of "price" have been presented to show how they reflect a difference in attitude towards competition. That these differences reflect a difference in kind and not a mere variation in degree is demonstrated by the head-on collision of the two philosophies in the *Standard Oil* case. The forces supporting each view seem to be evenly balanced, if the President's veto of S. 1008 is any indication. As pointed out in the opening of this article, the present international situation has rendered an immediate resolution of the problem probably unnecessary. But, if we do return once again to even the peacetime of the last five years, we shall have to settle in favor of one of these approaches to the guidance of our economy. Let us hope that not too much time elapses before this debate begins again.[167]

POSTSCRIPT

On January 8, 1951, the Supreme Court handed down its opinion in the case of *Standard Oil Company v. Federal Trade Commission*.[168] Mr. Justice Burton delivered the opinion for the court. Mr. Justice Reed wrote the dissenting opinion, which was concurred in by the Chief Justice and Justice Black. Justice Minton did not participate in the case.

After stating the facts in the case and determining that the requisite interstate commerce was present for the court's jurisdiction, Justice Burton stated that the issue of this case was whether or not the Robinson-Patman Act had so changed the Clayton Act that evidence of a good faith lowering of one's price to meet competition was no longer material nor, even if such evidence was accepted, would have established a complete defense to the charge of unlawful discrimination. Justice Burton concluded, for the majority of the Court, that such a change had not been effectuated by the Robinson-Patman Act. By a reading of the words of the statute, he equated sections 2(a) and 2(b) of the Act and decided that matters that were a full justification in

S. 1008: The claim that the bill (1) would weaken the antitrust laws, (2) would weaken protection for the small businessman under the Robinson-Patman Act, and (3) would suppress industrialization of the South by permitting distant suppliers to wipe out local competitors. THE ECONOMIST 1388-89 (June 24, 1950).

167. On October 9, 1950, the *Standard Oil* case was reargued before the Supreme Court. The questions from the bench were similar to those asked by the justices last January with the addition of Justice Jackson's query made to each of the contending counsel that if this proviso in section 2(b) did not permit Standard to lower its prices in good faith to meet competition, what did the words of that section mean. Standard's counsel said that if the court of appeal's interpretation was correct, then the words had no meaning for Standard. Thereupon, Justice Burton asked Standard's counsel what the Robinson-Patman Act had done to the similar words of the Clayton Act. He pointed out that the lowering of one's price in good faith to meet competition was a complete defense under the Clayton Act. The congressional committee had expressed an intention to change this (see *supra* note 119) and now, Justice Burton asked, was it Standard's claim that no change had been made. Standard's counsel said that it was.

168. 71 Sup. Ct. 240.

section 2(a) were also intended to carry over into 2(b) for a similar complete defense. He further felt that the Court's opinion in both the *Corn Products Refining* case and the *Staley* case indicated that the Supreme Court had previously regarded as material the evidence here excluded. He held that the Court's position had been that if good faith had been established in these cases, it would have constituted a complete defense. His third reason for holding section 2(b) to be a complete defense is "there has been a widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor." In support of this "understanding" the Justice cites among other witnesses the former Assistant Attorney General in charge of the Antitrust Division, who, as we have seen, leads the forces under the Sherman Act flag. He concludes this argument by saying that "We see no reason to depart now from that interpretation." And following this, in a footnote, he shrugs off all argument to the contrary which might be derived from the legislative history of the Robinson-Patman Act.

The fourth argument in support of the majority's position is the necessity for upholding competition. Justice Burton states that there is no necessity here to "reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts." He said there was no evidence that Congress sought by the Robinson-Patman Act, to force a seller "to choose only between ruinously having its prices to all customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." And so the Court adopted what it assumed was a realistic view of competition and concluded that "Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor."

The Court therefore revised the judgment of the court of appeals and remanded the case to that court with instructions to remand it to the Commission so that the Commission might make findings in conformity with the opinion here being expressed. This apparently calls for the Commission now to hold hearing to determine whether or not Standard had lowered its prices *in good faith* to meet competition.

The dissenting opinion took sharp issue with Justice Burton's opinion on the simple ground that the interpretation of the Robinson-Patman Act by the majority of the Court meant simply that no real change had been brought about by the 1936 amendment to the Clayton Act. The dissenting opinion also held that such a holding was contrary to the intention of the congressmen as expressed throughout the legislative history of the Robinson-

Patman Act. Justice Reed quotes extensively from the committee reports and from the Congressional Record to show that a radical change was contemplated in the section of the Clayton Act here at issue. Justice Reed points to the very wording of the amendment itself to show that this section had been singled out for exceptional treatment. As Justice Reed said: "Unless it is believed that this change of position was fortuitous, it can be inferred that Congress meant to curtail the defense of meeting competition when it banished this proviso from the substantive division to the procedure," *i.e.,* from 2(a) to 2(b).

Justice Reed then examined the supposed authority of the *Corn Products* and *Staley* cases and points out that the net effect of those cases was that whatever was meant by good faith in the statute, the pricing techniques established by the defendants in both of those cases could not under any interpretation be regarded as pricing systems established in good faith to meet competition.

A reading of the two opinions in this case will affirm the existence of the court's dilemma outlined previously in this article. A temporary resolution of the problem has been made; but it can hardly be said to be either definitive or satisfactory.