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ANTITRUST ACTIONS IN BUYER-SELLER RELATIONSHIPS SINCE 1950

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The Federal antitrust laws are considered by many practicing attorneys, and by most laymen, to be a maze of complications beyond their comprehension. Although most lawyers prefer to consider the antitrust practice as a field reserved for a Wall Street or Washington specialist, there is an application of the antitrust laws which should be familiar to every attorney engaged in the general practice. This involves the area of buyer-seller relations. Almost every lawyer, except those engaged in the highly specialized types of practice, has merchants—either retail or wholesale—among his clients, many of whom at one time or another will need his services in determining their status in relation to the antitrust laws. The purpose of this article is to consider some of the problems faced by these clients and to discuss the actions of the Courts, the Attorney General's office, and the Federal Trade Commission since 1950 with relation to them.

To understand the antitrust laws properly, and to prevent them from being a labyrinth from which there is no return once one enters, one must think of these individual acts of Congress as evolutionary generations of a broad program. The first generation, of course, was the Sherman Act of 1890,[1] which was a brief and concise statement of the basic policy of Congress which made illegal all contracts in restraint of trade and made the creation of a monopoly a criminal act. The second generation gave us the Federal Trade Commission Act of 1914[2] and the Clayton Act of 1914.[3] The first of these 1914 Acts created the Federal Trade Commission and established the principle of dealing with unfair trade and antitrust practices by administrative law through regulatory commissions. The Clayton Act had three purposes: (1) to plug loopholes found in the Sherman Act, (2) to provide labor and agriculture with the first great exemptions from the all-inclusive language of the Sherman Act, and (3) to give the newly-formed Fed-

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1 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1952).
2 38 STAT. 717 (1914), 15 U.S.C. §§ 41-51 (1952).
3 38 STAT. 730 (1914), 15 U.S.C. §§ 12-27, 44 (1952).

eral Trade Commission concurrent powers with the Attorney General's office over certain enforcement actions in the antitrust field. In so doing, the Clayton Act established a pattern carried into the next generation of antitrust laws which was the practice of collecting together into one law a number of motley and unrelated subjects. The third generation was represented by the Robinson-Patman Act of 1936[4] which is again a collection of somewhat unrelated amendments to the Clayton Act. The Robinson-Patman Act generally has been described as "The Anti-Chain Store Law" and is particularly directed at the buying and selling practices of sellers with multiple outlets.[5] The fourth generation of the antitrust laws might be said to be found in the Celler-Kefauver Act of 1950,[6] but concerns a subject not considered here as it does not deal with the buyer-seller relationship.

I—THE RIGHT OF A SELLER TO SELECT HIS CUSTOMER

Section 2 of the Clayton Act, contrary to the wishes of the classical economists, preserved for sellers the common law right to select their own customers.[7] The historic *Cream of Wheat* case[8] represents the typical interpretation of the legal view to the effect that a trader may reject the order of a proposed buyer for any reason which appeals to him—or for no reason at all. The supporters of this view, however, have recognized that there are several exceptions to this legal right.

The first of these exceptions is found in the public utility cases. Here the general theory is that the holder of the public utility franchise contracts away this legal right when he accepts the benefits of the monopolistic franchise.[9] A second exception is seen in the cases where conspiracy to refuse to serve a common buyer is found among several sellers; and the theory in such cases is that this consists of an illegal contract in restraint of trade in violation of Section 1 of the Sherman Act.[10] A third exception—found in most of the states north of the Mason-Dixon line—takes away

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4 49 STAT. 1526 (1936), 15 U.S.C. §§ 13, 21a (1952).

5 An excellent treatment of the details of the operation of this Act is given in AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (Rev. ed. 1953). Copies of this publication may be obtained for $2.50 by addressing the Director, Committee on Continuing Legal Education, 133 South 36th Street, Philadelphia 4, Pennsylvania.

6 64 STAT. 1125 (1950), 15 U.S.C. §§ 18, 21 (1952).

7 The section provides, in part, " . . . That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

8 Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915).

9 United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897).

10 FTC v. Raymond Bros.-Clark Co., 263 U.S. 565, 30 A.L.R. 1114 (1924).

from a seller the right to refuse to serve a buyer because of race, color, religion, or previous conditions of servitude.[11]

An interesting development concerning the conspiracy exception to the general rule is found in the *Theatre Enterprises* case.[12] This case involved the familiar problem of first-run movies and suburban movie houses. The plaintiff operated a suburban theatre and sought treble damages from several motion picture distributing agencies under Section 4, and injunctive relief under Section 16 of the Clayton Act. He charged a conspiracy among the defendants, none of whom would allow the plaintiff to have first-run movies for his suburban movie house at the same time as they were shown downtown. Apparently, at the trial of the case, all the plaintiff could prove was that the defendants followed a parallel business practice on this point. The jury held for the defendants, and this was affirmed by the Fourth Circuit Court of Appeals,[13] and by the Supreme Court. The Supreme Court drew a fine line of demarcation between conspiracies and parallel business behavior. More than parallel business behavior must be shown before the Court will find an agreement or conspiracy to exist. Thus we observe that even conscious parallelism will not supplant the conspiracy requirement of the Clayton Act. It is quite apparent that further extensions of this doctrine will render difficult, if not impossible, future success of antitrust officers in preventing conspiracies in this field. The degree of proof required to show the actual agreement needed to support the conspiracy charge may be an insurmountable hurdle for the Attorney General's office and the Federal Trade Commission.

The exclusive dealership is another facet of the right to select one's customers that has received recent attention by the courts. In *Nelson Radio and Supply Co. v. Motorola*,[14] the Fifth Circuit Court of Appeals refused the plaintiff treble damages on the theory that all the plaintiff proved was that the defendant had refused to give him a franchise. The Court said that there was a difference between refusing to deal with a buyer and the execution of a contract which prevents one from dealing with another. This decision would indicate that if a seller contracts with one buyer in such a way that the seller can no longer deal with a second buyer, then the second buyer would be entitled to relief, but he must establish this contract by evidence over and above a mere refusal to deal on the part of the seller.

A contract to take the entire production of a plant was considered by the Circuit Court of Appeals for the Seventh Circuit in

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[11] IOWA CODE § 735.1 (1954); OHIO REV. CODE § 2901.35 (ANDERSON'S DESK ED. 1953).

[12] Theatre Enterprises v. Paramount Film Distributing Corp., —— U.S. ——, 74 S.Ct. 257 (1954).

[13] 201 F.2d 306 (4th Cir. 1953).

[14] 200 F.2d 911 (5th Cir. 1952).

Fargo Glass & Paint Co. v. Globe American Corporation.[15] Here the court interjected a modified "rule of reason" into this controversy. It found that such agreements do not violate anti-monopoly laws unless the effect and purpose of the contract is such.[16] Thus, one must look to the circumstances and conditions under which the contract was made, including the relationship of the parties, their relations with the product, and its relation to the public. This same approach to the problem was taken by the Second Circuit Court of Appeals in a case involving an attempt to break up the exclusive dealing arrangements for certain coin-operated automatic washers in metropolitan New York City.[17] There the Court found that exclusive dealerships are not, of themselves, wrong. Prior to their dissolution, there must be shown to exist some unreasonable economic basis or some undue restraint of trade over and above the maintenance of a constant source of supply for the distributors. The Federal Trade Commission has also recognized this concept in a recent opinion wherein it criticized its own Trial Examiner for excluding evidence of the actual competitive effect of the exclusive dealing arrangement.[18] The Commission said that this evidence should have been admitted, as the exclusive dealing arrangement could not be found to be violative of the law without a finding of a lessening of competition or a tendency to create a monopoly.

II—TYING-IN ARRANGEMENTS[19]

Section 3 of the Clayton Act prohibited tying-in contracts along with exclusive dealing arrangements when the effect is to substantially lessen competition or tends to create a monopoly.[20] This legislation resulted from decisions such as that in the *A. B. Dick* case[21] where tying-in arrangements were upheld prior to the passage of the Clayton Act.

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[15] 201 F.2d 534 (7th Cir. 1953).

[16] This same principle is discussed in considerable detail in an annotation in 83 A.L.R. 1173.

[17] Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir. 1953).

[18] FTC NEWS SUMMARY No. 20, Dec. 21, 1953, re FTC Docket No. 5822.

[19] A tying or tying-in contract "is a contract of sale or lease by which the seller or lessor binds the buyer or lessee, in return for the privilege of getting a certain good, to purchase or rent other articles." KOONTZ, GOVERNMENT CONTROL OF BUSINESS 457 (1941). In the typical tying contract, A, the seller or lessor of a device of which he has a monopoly (usually through patents), permits another, B, to buy or lease that device only if B will purchase from A B's requirements of some unpatented competitively traded product which must be used with the monopolized device.

[20] The section provides "That it shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[21] Henry v. A. B. Dick Co., 224 U.S. 1, Ann. Cas. 1913D 880 (1912).

Although the courts have never interpreted the language of Section 3 of the Clayton Act as making tying-in arrangements illegal *per se*, the Supreme Court approached this concept quite closely in *Standard Oil Co. of California v. U.S.*[22] Here the defendant had entered into exclusive supply contracts with independent dealers in petroleum products and auto accessories in which the dealers agreed to purchase from the Standard Oil Co. all of their requirements of one or more products. There was no question about the fact that the defendant was the largest seller of gasoline in the western states. The District Court found that these contracts violated Section 3 of the Clayton Act as competition was lessened due to the large number of outlets covered. In a 5-4 decision, the Supreme Court upheld the District Court and established the test in such cases to be the effect of the contract on a substantial portion of the commerce instead of an actual demonstration of a lessening of competition. Thus, where competition has been foreclosed by such contracts in a substantial portion of the line of commerce affected, then it can be said, as a matter of law, that competion is lessened even though there is no evidence that competitive activity is, or probably will be, diminished.[23]

The tendency of the Courts to allow one to purge himself from wrong by abandoning an illegal practice is illustrated in this area by the opinion of the Court of Appeals in *White Cap Co. v. Owens-Illinois Glass Co.*[24] Here a patentee was seeking to prevent a patent infringement only to be met by a charge that he was using the patent in violation of Section 3 of the Clayton Act when he required licensees of the patent (which covered can and bottle sealing devices) to buy caps and lids from the patentee. The Court upheld the finding of the Master that the patentee had purged himself by abandoning this practice while the litigation was pending. Thus the Courts have demonstrated that compliance with the antitrust laws is the primary concern of the government—not retribution for past wrongs committed.

Use of the tying-in contract may be lessening, if the views of one prominent industrialist are indicative of the trend. R. H. Collacott, Assistant to the Chairman of the Board, Standard Oil

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[22] 337 U.S. 293 (1949).

[23] In a recent decision the FTC seems to have receded somewhat from the position stated. In *Insto-Gas Corp.*, decided October 6, 1954, and reported in LAW WEEK No. 86, October 12, 1954, the Commission held that tying contracts requiring purchase of all related supplies from a manufacturer's outlets are not illegal per se and that it was necessary to show that the manufacturer occupied a dominant position in its field to establish a violation of Section 3. A brief comment on the case in LAW WEEK suggests that the Commission may have misread the Supreme Court's opinion in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), which suggested that Section 3 is violated when the seller enjoys a monopolistic position in the market for the "tying" product, *or* when a substantial volume of commerce in the "tied" product is restrained.

[24] 203 F.2d 694 (6th Cir. 1953).

Company of Ohio, has indicated that he feels the use of the tying-in sale is being discontinued and is being replaced by a pyramiding upon the buyer of expensive and unwanted services.[25] Thus it would appear that the sellers are changing from a requirement that buyers purchase items not wanted, to a requirement that services of doubtful value to the buyer must be contracted for by buyers from sellers. Although described by Mr. Collacott as being "entirely ethical" and arising from a desire to please the customer, this can only be interpreted as a continuation of the former program in another form, and—most certainly—is to be placed under close surveillance by the Federal Trade Commission.

III—BROKERAGE FEES

This is an area where it is apparent that after a protracted legal fight the Federal Trade Commission and the Attorney General's office have been quite successful in achieving the results desired by Congress. The basic law on this subject is found in Section 2(c) of the Robinson-Patman Act and can be summed up by stating that brokerage fees cannot be charged unless actual services are rendered.[26] The target of the antitrust officers in this field has been the large chain stores and their practice of requiring sellers to sell goods to them through brokerage channels controlled by the chain stores. In this way, the brokerage fees charged by the psuedo-broker were remitted to the chain store and amounted to a further and additional discount.

A typical enforcement proceedings under this section of the Robinson-Patman Act was that considered by the Third Circuit Court of Appeals in the first of the many cases involving the brokerage schemes of The Great Atlantic & Pacific Tea Co. grocery chain.[27] There the Court found the system used by the grocery chain after the enactment of the Robinson-Patman Act to be as much a violation of the law as was the plan used prior to the passage of the law.

However, the A. & P. continued to engage in brokerage practices considered by the Federal Trade Commission to be illegal to the extent that the Attorney General's office was asked to bring criminal charges against the firm. These criminal proceeding resulted in a verdict for the government and fines of $175,000 were

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[25] This was in a speech before a meeting of the Northwestern Ohio Conference of the American Marketing Association, March 25, 1954, at Bowling Green, Ohio.

[26] The section provides "That it shall be unlawful for any person engaged in commerce . . . to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale . . . ."

[27] Great Atlantic & Pacific Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939).

assessed against the grocery chain.[28] These fines were affirmed by the Court of Appeals in 1949.[29]

Apparently, however, this fact did not deter the A. & P. from again engaging in brokerage transactions believed by the government to be illegal. Accordingly, a civil suit was subsequently instituted by the Attorney General's office in Federal District Court in New York City. This suit came to a successful conclusion for the government with the entry in court on Janury 19, 1954 of a consent judgment against A. & P. and its nine affiliated corporations. In consenting to this judgment, the A. & P. agreed to give up the wholesaling and brokerage business as it agreed that so long as it engaged in retailing, it will neither act as buying agent nor broker for the outside trade nor will it sell any food to the outside trade, except salvage, etc. In announcing this decision to the public, Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division, stated that this decree was ". . . so framed as to harness A. & P.'s buying power so that it can't be misused. At the same time, the decree will not interfere with any economies derived from efficient operation in conformity with law. . . ."[30]

Another recent decision of the courts relating to brokerage fees concerned the I. G. A. grocery chain.[31] Here the grocery chain had formed a distributing company which received commissions from jobbers who sold products to I. G. A. members. The Court upheld a cease and desist order of the Federal Trade Commission and ruled that intermediaries acting on behalf of, or under control of, buyers may not receive brokerage commissions upon the purchases of such buyers.

It thus becomes apparent that the Federal Trade Commission and the Attorney General's office insist upon adherence to this provision of the Robinson-Patman Act, and have been successful to date in this field. They have won approval by the Courts for their interpretation of the law to the effect that brokerage fees cannot be charged where no services are rendered, and that where the broker is under the control of the buyer, there arises a presumption that no services are rendered. It would, however, seem that if the buyers can satisfy the government that some services were actually performed over and above mere incidental services, then the brokerage fees would be allowable under the law.

At the time the Second Session of the Eighty-third Congress adjourned, there were pending before the Congress two bills touching upon this trade practice.[32] Both bills recite that their purpose

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

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

[30] JUSTICE DEPARTMENT Press Release, Jan. 19, 1954.

[31] Independent Grocers Alliance Distributing Co. v. FTC, 203 F.2d 941 (7th Cir. 1953).

[32] H.R. 7198 and S. 2604, 83d Congress, 2d Session (1953).

is to amend Section 2(c) since that Section has allowed a monopoly to be formed for food brokers in the distribution channel by denying the independent distributor his right to earn brokerage, thus impairing his ability to compete with integrated competitors. The bills propose "that nothing in this subsection shall apply to, or prevent payments of, compensation or brokerage for brokerage service rendered (but not including price discrimination under guise of brokerage), for the person making such payment by and paid to" brokers controlled by independent distributors, a central organization of a group of independent distributors, or a cooperative distributor controlled by independent retailers. The bills then define an independent retailer as one with not more than eleven retail units. While the provisions of the bill seem to be merely explanatory of the present provisions of the law and a relaxation of the dogmatic prohibition now contained therein, it is probably this relaxation which caused Congressman Wright Patman (Democrat, Texas) to include them in a list of eight bills pending before Congress which he declared, if passed, would weaken and destroy the intent of the Robinson-Patman Act.[33]

IV—ADVERTISING AND PROMOTIONAL ALLOWANCES

The granting of allowances to buyers for advertising and promotional purposes is the subject matter of Sections 2(d)[34] and 2(e)[35] of the Robinson-Patman Act. There is no doubt that these provisions are concerned with the entire field of advertising (newspapers, magazines, radio, television, window displays, handbills, direct mail, etc.) and the furnishing of demonstrators. Generally speaking, the law provides that all such allowances must be granted to small as well as large buyers "on proportionally equal terms".

Early in 1954, the Federal Trade Commission reported a very significant decision relating to the advertising and promotional program of perhaps the greatest users of such programs, the "big three" of the soap industry—Lever Bros., Proctor & Gamble, and Colgate-Palmolive-Peet.[36] The full Federal Trade Commission

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[33] This was in a speech before the Annual Convention of the National Association of Retail Grocers, June 13, 1954, at Washington, D. C.

[34] The section provides "That it shall be unlawful for any person engaged in commerce . . . to pay or contract for the payment of anything . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers . . . ."

[35] The section provides "That it shall be unlawful for any person to discriminate . . . by contracting to furnish or furnishing . . . any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms."

[36] FTC NEWS SUMMARY No. 22, Jan. 11, 1954, re Docket Nos. 5585, 5586 and 5587.

affirmed the ruling of a Hearing Examiner who had dismissed the complaints as the evidence failed to support the charges that the advertising allowances offered by the three companies did not comply with the "proportionately equal" requirement of the law. The Commission stated that the law does not require a comprehensive advertising plan to be tailored so that every feature thereof is available to every customer. Under this ruling, a plan complies with the law if it is honest in its purpose, and fair and reasonable in its application. In this particular case, the Federal Trade Commission placed its stamp of approval on the soap companies' plans since the payments made (or allowances granted) were for services actually rendered and since there was a fair and reasonable relationship between the amount of the allowance and the extent of the services rendered.

The Federal Trade Commission has thus, in losing its case against the soap companies, provided a guide for use of all buyers and sellers under these provisions of the Act. Sellers may offer, and buyers may accept, allowances in form of discounts for newspaper ads, erection of window displays, distribution of handbills and direct mailing, etc., with a much clearer understanding of their rights and obligations under the Act. The requirement of a "proportionately equal" basis in the Act means that opportunity to participate must be offered to all. The opportunity must be available to all, not the practical application of the allowance. The mere fact that every retailer does not care to purchase the quantity sufficient to make the size of display required to qualify for the allowance, the mere fact that he does not feel he will sell sufficient of the product to pay for the size of newspaper ads necessary to gain the larger allowance, or the mere fact that he does not believe in the effectiveness of direct mail advertising, does not mean that these allowances are not "proportionately" available to him. In short, the allowance for advertising and promotional programs meets the requirements of the Act if it is one which the retailer *could* participate in if he desired to do so.

V—FIXING QUANTITY LIMITS

Section 2(a) of the Robinson-Patman Act, in strengthening Section 2 of the Clayton Act, vested in the Federal Trade Commission a right to hold hearings, to make studies of industries and to fix quantity limits above which sellers cannot give quantity discounts.[37] This gives the Commission power to determine, after

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[37] § 2(a) of the Robinson-Patman Act provides " . . . That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits . . . where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those fixed or established . . . ."

complying with certain administrative procedures, at what point a quantity discount ceases to be cost justified in any particular industry.

Apparently because of inadequate funds and personnel, the Federal Trade Commission has only once undertaken its responsibilities under this provision of the law. On December 13, 1951, after lengthy hearings, the Federal Trade Commission issued such an Order affecting the replacement rubber tire and tube industry.[38] Under this Order, sellers in the industry, after April 7, 1952, were prohibited from giving discounts for quantity purchases over and above 20,000 lbs., or approximately one carload. Nineteen tire manufacturers and thirty-five large dealers immediately filed suit in the Federal District Court in Washington, D. C., asking an injunction restraining the Federal Trade Commission from carrying out the provisions of this Order.[39] The plaintiffs charged that the enforcement of the Federal Trade Commission's Order would do them irreparable injury and that this injury was such that they could not proceed with current manufacturing and sales plans until the Order was lifted. The litigation has not as yet been disposed of on its merits and is currently in process of trial. There have, however, been preliminary Court opinions on the procedural aspects of the case. The District Court dismissed the petition on the theory that the plaintiffs had an adequate remedy at law—to resist prosecution for violation of the Order—and that thus equitable relief was not available.[40] The Court of Appeals for the District of Columbia reversed this decision holding that the allegations of damage were sufficient to allow the District Court to hear the matter on its merits and to decide for the plaintiffs, if their allegations are sustained by evidence.[41]

It is apparent that the authority to fix quantity limits vested in the Federal Trade Commission under Section 2(a) has been sparingly used by the Commission. The effect upon the buyer and seller relationship of an active program in this area could be tremendous. The use of this power by the Commission in determining in advance the status of cost justification of discounts offered for quantity purchases would undoubtedly prevent many sellers from becoming involved in expensive litigation under the provision of Section 2(b) prohibiting discounts which are not cost justified and which substantially lessen competition or tend to create a monopoly. Likewise, it would serve as a preventive to deter buyers from placing themselves in a position where they might be charged under Section 2(f) with inducing or receiving a price discrimination.

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[38] 16 CODE FED. REGS. § 310.1 (pocket part, 1949 ed.) (FTC Quantity Limit Rule 203-1).

[39] The B. F. Goodrich Co. v. FTC, Civil Action No. 922-52 *et seq.*

[40] Unreported memorandum opinion of District Court for District of Columbia, filed Nov. 25, 1952, in the case cited in the preceding footnote.

[41] The B. F. Goodrich Co. v. FTC, Docket No. 11644, unreported opinion of Court of Appeals for the District of Columbia, filed July 16, 1953.

VI—INDUCING OR RECEIVING A DISCRIMINATORY PRICE

Another provision of the Robinson-Patman Act which increased the power of the Federal Trade Commission to cope with the buying pressure of the large chain stores was the provision in Section 2(f) of a prohibition against one knowingly inducing or receiving a discriminatory price.[42] Thus, there came for the first time into the antitrust and trade practice laws, a prohibition that is addressed specifically to the pressures exerted by powerful *buyers.* This provision of the Act was directed against the practice of large buyers who force (upon threat of refusal to handle their products) sellers to make greater discounts and allowances available to them.

The program of the Federal Trade Commission in the enforcement of this law was a sketchy one until the early 1950's. The effectiveness of the law and the Commission's enforcement program were not tested by the Supreme Court until the summer of 1953, and then with results not entirely satisfactory to the Commission. This case concerned the buying habits of the largest of the operators of candy vending machines, the Automatic Canteen Company of America.[43] The specific charge of the government was that the defendants had knowingly received prices from candy manufacturers which were as much as 33 per cent lower than those quoted to others. In the hearings before the Commission and in the trial of the case, the government took the position that the defense of cost justification, while available to the defendant, had to be pleaded and proved by him affirmatively. Thus the commission did not attempt to show that these price differentials exceeded cost justifications, but took the position that a *prima facie* case of a violation had been established by proof that the buyer received the lower price, well knowing that it was being favored. The Canteen Company entered no evidence of cost justification, and the Federal Trade Commission issued a cease and desist Order[44] which was upheld by the Court of Appeals.[45]

In a 6-3 decision, the Supreme Court reversed the holding of the Court of Appeals and ordered the cease and desist Order dissolved.[46] The majority opinion takes the position that the buyer should not be required to prove that the lower prices given him were justified in cost savings since he does not have the information as to the seller's cost of production, and should not be required to obtain it. Thus, the mere fact that the buyer knew the price to be lower than that offered to others, will not place upon him the

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[42] § 2(f) provides "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discriminatory price which is prohibited by this section."

[43] Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).

[44] 46 F.T.C. 861 (1950).

[45] Automatic Canteen Co. of America v. FTC, 194 F.2d 433 (7th Cir. 1952).

[46] This decision is reviewed in Comment, 39 IOWA L. REV. 377 (1954).

burden of establishing that the prices are cost justified. The burden is upon the Federal Trade Commission to establish that the prices are not cost justified. The dissenting Justices felt that the *prima facie* presumption in actions against sellers under Section 2(b) discussed hereinafter should be carried over into actions against buyers under Section 2(f).

It is not difficult to observe the position in which this decision placed the Federal Trade Commission. It had pending many similar cases and suddenly found the ground shot from beneath it. The result was the early dismissal without prejudice of similar proceedings against such large buyers as the Kroger grocery chain,[47] the Safeway grocery chain,[48] and Sylvania Radio.[49] By these dismissals, the Commission recognized that to prosecute successfully a suit against a buyer under Section 2(f) of the Act, it must show (1) that the price differential was knowingly received, and (2) that at the time it was received the buyer knew that the defense of cost justification was not available to him.

The future of the Commission's program in policing this business practice will not indicate satisfactory results until the Commission develops some means of establishing by its own evidence this knowledge of absence of cost justification on the part of the buyers.

The Commission has established an Advisory Committee on Cost Justification under the chairmanship of Professor H. F. Taggart of the University of Michigan. In creating this Committee, the Chairman of the Federal Trade Commission indicated that the principal function of the Committee would be "to ascertain whether it is feasible for the Commission to develop standards of proof and procedures for costing which can be adopted by the Commission as guides to business enterprises."[50] Subsequently, the Chairman of the Commission again declared that "The main purpose of the study will be to furnish the Commission with information which will enable it to strengthen the administration of the Robinson-Patman Act and obtain wider compliance with its provisions."[51] All the language of these statements is directed toward cost justification from the seller's viewpoint. This writer has confirmed by correspondence with Professor Taggart that it was not the original purpose of the Committee to study other than the seller's problems under Section 2(b). It is respectfully submitted that if the Committee is to carry out its mandate of strengthening the administration of the act, then the scope of its study might well be broadened into this area in an effort to provide the Commission with some sound procedures for successfully prosecuting cases against buyers under Section 2(f).

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[47] FTC Clip Sheet No. 2, July 16, 1953, re Docket No. 5991.
[48] FTC Clip Sheet No. 5, Aug. 6, 1953, re Docket No. 5990.
[49] FTC News Summary No. 22, Jan. 11, 1954, re Docket No. 5728.
[50] FTC Clip Sheet No. 7, Aug. 10, 1953.
[51] FTC News Summary No. 18, Dec. 7, 1953.

VII—DEFENSES IN PRICE DISCRIMINATION CASES

Under the provisions of the Robinson-Patman Act a seller charged with the giving of an illegal price discrimination has at least three defenses preserved for him by the law. The first of these is found in the first "provided" clause of Section 2(a) and is known as the "defense of cost justification".[52] The second is known as the "defense of changing conditions" and is found in the last "provided" clause of Section 2(a).[53] The third defense—and the one that has caused the most litigation—is the "defense of meeting competition" found in Section 2(b) of the Act.[54]

The need for a more accurate method of determining cost justification already has been illustrated in this article in the references to the creation by the Federal Trade Commission of the Taggart Committee.[55] Here the Federal Trade Commission recognizes that there is no hard and fast rule which can be applied in settling questions as to what is, and what is not, to be considered in the costs of manufacture, sale, or delivery. We have already made a recommendation concerning the distinction drawn in cost justification cases like the *Canteen* case where the Court differentiated between the burden of proof in cases involving *sellers* accused of *giving* a discriminatory price, and *buyers* accused of *receiving* one.[56]

The defense of changing conditions is so well understood that it has not been any real source of trouble either for the Federal Trade Commission or for the businessman. Except for a few instances where the Commission has investigated cases involving chronic "going out of business" sales, the enforcement actions have been few.

The "meeting competition in good faith" defense is the defense which has been the greatest source of litigation in recent years. This defense was also included in the first "provided" clause of Section 2 of the Clayton Act,[57] but there the treatment of it was in

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52 This proviso is "That nothing herein contained shall prevent differentials which make only due allowance for difference in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

53 This proviso is "That nothing herein contained shall prevent price changes from time to time where 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 goods concerned."

54 This section states that "Upon proof being made . . . that there has been discrimination . . . , the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged . . . : *Provided, however,* that nothing herein contained shall prevent a seller . . . showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ."

55 These references appear in the preceding section.

56 This recommendation was made in the preceding section.

57 This proviso was "That nothing herein contained shall prevent discrimination in price . . . in the same or different communities made in good faith to meet competition."

language so broad that it was difficult to apply. The Robinson-Patman Act in Section 2(b) strengthened this portion of the Clayton Act by providing that once a price discrimination was shown, there then arose a *prima facie* presumption that it was not cost justified and further provided that this presumption could be overcome by the seller by proving that he gave the discriminatory price in good faith to meet competition. But the burden of proof was on the businessman to rebut the presumption against him.

In an early stage of the current litigation involving the Standard Oil Company of Indiana, the Seventh Circut Court of Appeals was called upon to interpret the legal effect of this defense.[58] The Court found that it was not the intent of Congress to liberalize the use of the defense, but to restrict its use. Thus the Court found this to be not a complete defense, but merely a procedural aid; and while it would serve as a defense if no injury to competition (actual or probable) was shown, that it was not available as a defense in cases where probable or actual injury was shown. This decision was acclaimed by economists as being a step forward in the battle of the government to prevent large corporations from destroying the small independents.[59]

However, the enthusiasm of the economists for the view expressed by the Court of Appeals in the *Standard Oil Company of Indiana* case was short-lived, for the Supreme Court reversed the decision and remanded it for further proceedings under a strong opinion supporting the theory of the completeness of the defense.[60] Here the Court adopted the view that the defense of meeting competition is a complete and absolute defense available to every seller accused of giving a discriminatory price, and that he does not lose this defense even in cases where his pricing policies actually destroy his competitor. Thus, irrespective of actual or potential injury to competition or the tendency to create a monopoly, this defense is available to the seller. It would appear from the opinion of the Supreme Court that it intended to give a literal interpretation to the language used by Congress in Section 2(b) of the Robinson-Patman Act as Congress did not refer to, nor make an exception of, such cases where competition is lessened.

It will be noted that the Supreme Court returned the case for further hearings on the merits and that there has yet been no final decision thereon. The Federal Trade Commission again held a hearing and found that while the defense was available to the Standard Oil Company of Indiana under the Supreme Court's opinion, it had not proved-up on it—in short, the Commission found that the respondent was not in good faith meeting competition.[61] Pro-

[58] Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949).
[59] MUND, GOVERNMENT AND BUSINESS 345 (1950).
[60] Standard Oil Co. v. FTC, 340 U.S. 231 (1951).
[61] Cease and Desist Order, FTC Docket No. 4389, 18 FED. REG. 2619 (1953).

cedurally, this was entirely proper as the good faith of the seller in such cases is a factual issue to be decided by the Commission. Standard Oil Company of Indiana then asked the Seventh Circuit Court of Appeals to set aside the new Order issued by the Federal Trade Commission based on this finding of fact. The Court of Appeals refused to set aside the Order contending that it was without power to review an Order in this fashion as it could not rule on whether an Order should be enforced or set aside.[62] The door was left open, however, for Standard Oil Company of Indiana to appeal to the Court of Appeals on the merits, and it is presumed that such an appeal is in progress.

Repeated attempts have been made to persuade Congress to legislate more clearly in this area, but Congress has not as yet acted. At the time of adjournment, the Second Session of the Eighty-third Congress had pending before it four bills which, if adopted, would have made the opinion of the Supreme Court (in which the Federal Trade Commission has never fully acquiesced) a part of Section 2(b) of the amended Clayton Act.[63] These bills were included in those denounced by Congressman Patman as tending to weaken and destroy the Robinson-Patman Act.[64]

This writer has noted two interesting situations relating to the procedural aspects of the defenses available to a seller under the Act. The first situation involved a case where (perhaps through oversight) the Federal Trade Commission Order failed to recite that the seller had not qualified under any of the defenses.[65] The respondent contended that this was grounds for setting aside the Commission Order, but the Supreme Court refused to accept this proposition and found that provisions relating to these defenses were necessarily implied in every Federal Trade Commission Order, even though not specifically set out therein. In other words, the defenses are always available to the seller if he wants to plead and prove them. Subsequent to this opinion of the Supreme Court the Commission ruled, in a case involving Cat's Paw Rubber Company, that the respondent seller had not been prejudiced by the omission of reference to the defenses in the Commission Order and was thus not entitled to a new hearing.[66]

The second procedural situation to have recent attention by the Federal Trade Commission involved a case in which the Standard Motor Products Company of New York was accused of giving a price discrimination and it sought to prove good faith meeting of a competitor's price.[67] The respondent found, however,

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62 FTC NEWS SUMMARY No. 25, Feb. 1, 1954, re Docket No. 4389.
63 H.R. 635, H.R. 4170, S. 540, S. 1377, 83d Congress, 2d Session (1954).
64 See footnote 33, *supra.*
65 FTC v. Ruberoid Co., 343 U.S. 470 (1953).
66 Cease and Desist Order, FTC Docket No. 5828, 18 FED. REG. 7670 (1953).
67 FTC NEWS SUMMARY No. 27, Feb. 15, 1954, re Docket No. 5721.

that it did not have records of the competitor's prices which were complete enough to establish the defense, and sought a subpoena reaching the records of the competitor. The Commission recognized the respondent's right to the subpoena, but limited its use to records relevant to price. Apparently, the Commission took the view that a fair and impartial hearing could not be had without the presence of this evidence before the Hearing Examiner, and that thus it gave the support of the Commission's power of subpoena to obtain it. Thus, it is possible for a seller to become involved in proceedings before the Commission even though he himself has not been charged. It seems apparent, however, that continued abuse of this right, such as to unduly harass competitors, will only lead to curtailment of the use of the powers.

JURISDICTION OVER FOREIGN CORPORATIONS—THE EFFECT OF A SINGLE ACT

Will a foreign corporation subject itself to jurisdiction by a single act or transaction within a state? Generally the courts have said that one act is not sufficient,[1] but that the corporation must be "doing business"[2] sufficiently by its activities to have consented to jurisdiction,[3] or it must be present within the state.[4] However, in view of recent developments [5] it now may be possible for a court to find jurisdiction over a foreign corporation because of one act.

The recent famous case of *International Shoe Co. v. Washington* [6] appeared to apply a new test to find jurisdiction: if the foreign corporation is not present within the territory of the forum,

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[1] *See* Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233, 238 (1st Cir. 1953) (breach of warranty and negligence); Edgewater Realty Co. v. Tennessee Coal, Iron & R. R. Co., 49 F.Supp. 807, 810 (D. Md. 1943) (breach of contract); Hunau v. Northern Region Supply Corp., 262 Fed. 181, 183 (S.D. N.Y. 1920) (breach of contract).

[2] "Doing business" as used in this article refers to those activities that render a foreign corporation suable in another state. It does not refer to "doing business" used in another sense, i.e., to test whether the foreign corporation is subject to regulatory statutes or subject to taxation.

[3] Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1908); Lafayette Ins. Co. v. French, 18 How. 404 (U.S. 1855).

[4] Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1916); Myers Motors, Inc. v. Kaiser-Frazer Sales Corp., 80 F.Supp. 18 (D. Minn. 1948); Dahl v. Collette, 202 Minn. 544, 279 N.W. 561 (1938); Yedwab v. M. A. Richards Corp., 137 N.J.L. 448, 60 A.2d 310 (Sup. Ct. 1948).

[5] See Comment, 37 CORNELL L. Q. 458 (1952).

[6] 326 U. S. 310 (1945).