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THE SECOND ATTACK ON PRICE DISCRIMINATION: THE ROBINSON-PATMAN ACT

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The Robinson-Patman Act, passed in the closing days of the last Congress,¹ has aroused a storm of protest and discussion among the business men and lawyers since the day of its passage.² The sweeping changes in traditional business methods

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1. The act was passed by the House on June 15, 1936, by the Senate on June 18, 1936; and was signed by the President and became effective on June 19, 1936. 49 Stat. 1426, 15 U. S. C. A. sec. 13 et seq.

2. Business Week for June 20, 1936, page 13, says: "From hundreds of trade association offices throughout the country this week, issued analyses and interpretations of the Patman-Robinson anti-price-discrimination measure, suggestions and warnings couched in language that left little doubt of the widespread alterations which the enactment of this amendment to the Clayton Act will effect in marketing operations." The newspapers have reported numerous trade association meetings and conferences of business men called to discuss the effect of this legislation. See *Kansas City Times*, Oct. 4, 1936, p. 5. The act has been widely discussed in the various trade journals. See *Northwestern Miller*, July 29, 1936, p. 277, August 26, 1936, p. 541, and Sept. 9, 1936, p. 693. And there have already been various legal discussions of the act published. See Gordon, *Robinson-Patman Anti-Discrimination Act (1936)* 22 A. B. A. Journal 593; Robertson, *The Robinson-Patman Act (Nov. 1936)* 14 *Fortune Mag.* 96; Note, 50 *Harv. L. Rev.* 106 (1936); Gaskill, *Report on the Price Discrimination Law* (Kiplinger Washington Agency). The last mentioned book is the most pretentious publication on this subject up to the present, but from a legal point of view it seems the least competent comment thus far made. Thus on page 61 appears the following, in reference to proceedings for violation of the act: "To all questions which may be put to either challenged party by any one, all he has to say is 'I decline to answer on the ground that my answer might incriminate me.' And having made this answer there is no power on earth which can compel him to answer questions about his conduct." This is precisely wrong. An individual cannot be prosecuted under the anti-trust laws for any transaction concerning which he produces evidence (15 U. S. C. A. sec. 32); and because of this immunity, an individual may be forced to testify, regardless of possible incrimination, concerning violations of the anti-trust laws; or he may be imprisoned for contempt for failure to testify when subpoenaed. *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 371, 50 L. ed. 652

which appear to be threatened by an enforcement of this law,³ the alacrity with which the Federal Trade Commission is instituting proceedings under it,⁴ together with the confusion as to its meaning caused by a lack of authoritative definition of many of its terms together with the unprecedented awkwardness with which the law has been drafted, may justify some of the furor. However, a study of the law with regard for merely its legal significance should do much to reassure lawyers and business men that this law is not the beginning of a social revolution.

Price discrimination in interstate commerce has been under the ban of law for over twenty-two years. The first attack upon price discrimination by the federal government was made with the passage of the Clayton Act⁵ in 1914. At that time it was generally felt that the Sherman Act, particularly after the "rule of reason" had been read into it by judicial construction, was inadequate for the purpose of curbing monopolies.⁶ Conse-

(1906); *Baush Mach. Tool Co. v. Aluminum Co. of America*, 63 F. (2d) 778 (C. C. A. 2, 1933).

3. The opinion of most business men is indicated by the quotation in note 2, *supra*. One commentator expresses himself more strongly. He says that as to the effect of the act, predictions vary. "The mildest is that it will eventually disturb and change the buying and selling practices of all manufacturers, jobbers and merchants, large and small. . . . Again . . . the Act is seen as giving the coup de grace to traditional wholesale, jobbing, and retail methods of distribution, shaken as they already are by chain-store competition; Whatever may be thought of these varied prophecies and interpretations, this much is clear: apart from recent familiar legislation which has been condemned by the Supreme Court, the present Act, in any view, represents the most far-reaching encroachment upon 'liberty of contract', and upon the right to control and use private property, that has yet been attempted in this country." Robertson, *The Robinson-Patman Act* (Nov. 1936) 14 *Fortune Mag.* 96.

4. At the date of writing (December 15, 1936) the Federal Trade Commission had issued ten complaints against nineteen respondents under this act.

5. Act of Oct. 15, 1914, chap. 323, 38 Stat. 730 et seq., 15 U. S. C. A. sec. 12 et seq.

6. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572, 64 L. ed. 993 (1920), Brandeis, J., dissenting, at page 432 et seq.; "In 1890 Congress passed the Sherman Law. . . . Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of its investigations into the petroleum industry, the tobacco industry, the steel industry and the farm implement industry. . . . And in 1911 this court rendered its decision in *Standard Oil Co. v. United States*, 221 U. S. 1, and in *United States v. American Tobacco Co.*, 221 U. S. 106. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. . . . The latter view prevailed in the Sixty-Third Congress. The Clayton Act (October 15, 1914, c. 323, 38 Stat. 730) was framed largely with a view to making more effective the remedies given by the Sherman Law."

quently the Clayton Act was passed for the purpose of preventing monopolies through the prohibition of certain specific trade practices, which⁷ were thought to lead to their creation. Price discrimination between buyers was one of the trade practices thus prohibited. By Section 2 of the Clayton Act it was unlawful to discriminate in price between purchasers of commodities where 1) one of the transactions involved was in interstate commerce and the goods were not intended for export; 2) the discrimination related to commodities of like grade, quality, and quantity; 3) the effect of the discrimination was either to substantially lessen competition or tend to create a monopoly in any line of commerce; the section further providing that it was not discriminatory; 4) to make due allowance for differences in the cost of selling or transporting; 5) to select customers in bona fide transactions; and 6) to allow differences in price in good faith to meet competition.⁸

The provision of the Clayton Act requiring a discriminatory difference to relate to sales of like quantity was, for many years,

7. *Standard Co. v. Magrane-Houston Co.*, 258 U. S. 346, 42 S. Ct. 360, 66 L. ed. 753 (1922), at pp. 355-6: "The Clayton Act, as its title and the history of its enactment disclose, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890. . . . The Clayton Act sought to reach the agreements embraced within its sphere in their incipency, and in the section under consideration to determine their legality by specific tests of its own. . . ." *Standard Oil Co. v. Federal Trade Commission*, 282 Fed. 81 (C. C. A. 3, 1922) aff'd. 261 U. S. 463, 43 S. Ct. 450, 67 L. ed. 746 (1923) at page 86: "The Clayton Act, which is a part of the scheme of laws against unlawful restraints and monopolies, does not wait for its operation until monopolies have been created and restraints of trade established, but seeks to reach them in their incipency and stop their growth."

8. Section 2 of the Clayton Act, 15 U. S. C. A. sec. 13, reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, 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."

one of the largest loopholes of the law. Unimportant differences in the quantity of sales were made the basis for large differences in price, and preferred customers were allowed disproportionately large discounts for quantity purchases.⁹ However, it was obvious that this was merely a method for the evasion of the law, and in recent proceedings before the Federal Trade Commission it was finally stated in unequivocal terms that this practice was unlawful, and that quantity discounts were justified under the law only where they were reasonably related to a difference in cost resulting from the quantity of the sale.¹⁰

Since the anti-trust acts were designed to protect competition,¹¹ price discrimination was made unlawful only if it had the effect "substantially to lessen competition or tend to create a monopoly in any line of commerce." While the courts have not always been meticulous in distinguishing between these two effects, discrimination has been held unlawful where it appeared likely either to eliminate an individual competitor,¹² or to promote a monopoly.¹³ The discrimination was unlawful if the pro-

9. See *Final Report of the Federal Trade Commission on Chain Store Investigation*, Sen. Doc. 4, 74th Cong., 1st Sess., 1935, p. 24 et seq.

10. *Re Goodyear Tire and Rubber Co.*, F. T. C. No. 2116 (1936) (now pending on appeal to the Circuit Court of Appeals for the Sixth Circuit.)

11. *American Column Co. v. United States*, 237 U. S. 377, 42 S. Ct. 114, 66 L. ed. 284, 21 A. L. R. 1093 (1921), at page 400: "It has been repeatedly held by this court that the purpose of the statute (Sherman Anti-Trust Act) is to maintain free competition in interstate commerce. . . ." *Oxford Varnish Co. v. Ault & Wiborg Co.*, 83 Fed. (2d) 764 (C. C. A. 6, 1936), at page 767: "The clear purpose of the Clayton Act (38 Stat. 730) is to preserve legitimate competition. . . ." Donovan, *Need for Revision of Anti-Trust Laws* (1936) 22 A. B. A. Journal 797, "The Sherman Law embodies the principle of competition upon which our American civilization was largely built."

12. *Sidney Morris & Co. v. National Ass'n of Stationers*, 40 F. (2d) 620 (C. C. A. 7, 1930), at page 625: "The elimination of plaintiff as a competitor in this line of commerce would necessarily tend to a certain extent to create a monopoly and also to substantially lessen competition." *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. (2d) 234 (C. C. A. 2, 1929) cert. den., 279 U. S. 858, 49 S. Ct. 353, 73 L. ed. 999 (1929) at page 237: "If this competition, resulting in such loss, continued, it is fair to assume that the appellee could not continue in business, and its elimination as a competitor was certain. Thus the appellant's discrimination will substantially lessen competition."

13. *Standard Co. v. Magrane Houston Co.*, supra, note 6, at page 356: "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create a monopoly. . . . But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual

hibited effect appeared in any line of commerce, regardless of whether it was one in which the seller or the buyer was engaged.¹⁴

By showing a discrimination that included the first four conditions enumerated above, a *prima facie* case of violation of the Clayton Act was made out.¹⁵ The burden was then upon the defendant to go forward with the evidence either disproving the evidence of the other side, or bringing the discrimination within the justification of one of the last three conditions. Thus, differences in cost, the selection of customers, and the meeting of competition, were affirmative defenses upon which the defendant bore the burden of proof.¹⁶

However, this burden of proof was not a heavy one, since the claim of such a defense was easy to set up, whereas the evidence to disprove it was generally unavailable to the opposing party. Thus, because of the ease with which a charge of price discrimination could be justified as a meeting of competition, or as a quantity discount, and because of the great difficulty of showing the effect necessary to tinge the discrimination with illegality, proceedings under the act, whether begun by the Federal Trade Commission or by a private litigant, were very rare, and seldom successful.¹⁷ As a result, the practices which the Clayton Act was designed to prevent flourished under it. Large buyers such as chain stores and mail order houses used the advantage given them by the volume of their sales to force sellers and manufac-

tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

14. *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 49 S. Ct. 112, 73 L. ed. 311 (1929), overruling on this point *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774 (C. C. A. 2, 1923), cert. den. 262 U. S. 759, 43 S. Ct. 705, 67 L. ed. 1219 (1923); and *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733 (C. C. A. 2, 1924) cert. den., 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468 (1924).

15. *Gibson Canning Co. v. American Can Co.*, 1 F. Supp. 242 (D. C. Ill., 1932) and cases cited in footnote 16.

16. *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7, 1930); *Hansen Packing Co. v. Armour & Co.*, (D. C. N. Y., 1936) 16 F. Supp. 784; see *Sidney Morris & Co. v. Nat'l Ass'n of Stationers*, 40 F. (2d) 620, 625 (C. C. A., 7, 1930) and cases cited in footnote 14, *supra*.

17. In the twenty-two years since the enactment of the Clayton Act only seventeen suits have been instituted under the price discrimination section, and in only six of these has a violation of the section been established. Considering the wide scope of the law, and the tremendous breadth of its purpose, this is indeed a remarkable record.

turers to grant them discriminations in the form of disproportionate quantity discounts, fake brokerage payments, or advertising allowances which were unavailable to other customers.¹⁸

I

The Robinson-Patman Act was the second attack by Congress upon these practices,¹⁹ and was designed to put teeth into Section 2 of the Clayton Act.²⁰ The seeds of this amendment were planted by the report rendered to the Senate by the Federal Trade Commission on chain stores,²¹ and were tenderly nurtured by the interested groups. Although it originated as anti-chain store legislation, regard for constitutional inhibitions against class legislation gave it a general character. It is very doubtful whether the implications of the law were fully realized by either its supporters and opponents, or by the legislators.²²

18. See *Final Report of the Federal Trade Commission on Chain Stores*, Sen. Doc. No. 4, 74th Cong., 1st Sess., 1935, at pps. 24, 61 and 62; see also footnote 20, *infra*.

19. Much recent legislation, such as the National Industrial Recovery Act and the Guffey Coal Act, has attempted to fix prices, and so has necessarily prevented price discrimination. But this result has been merely incidental to the primary purpose of such legislation, which is actually promulgated on a theory quite the contrary of the anti-trust legislation. See Terborgh, *Price Control Devices in N. R. A. Codes* (1934, Brookings Institution).

20. Sen. Rep. No. 1502, 74th Cong., 2nd Sess. (1936); H. R. Rep. No. 2287, 74th Cong., 2nd Sess. (1936). See, *Business Week*, June 13, 1936, at page 13: "Briefly the bill would require a seller to extend to all customers who buy from him the same quantities the same net prices on goods of the same kind and quality, unless differentials in discounts can be justified on the basis of different selling, transportation, or manufacturing costs. In its general aspects this is the same objective which was written into the existing Clayton Act 22 years ago. But the broad provisions of the Clayton Act have proved unenforceable; the big mass distributors have been able to secure discounts, commissions, and allowances on their bulk orders which old-line middlemen have contended were tantamount to price discriminations against them and their customers. This situation led to the pending Patman amendment, which seeks to define price discrimination on more detailed and narrow grounds and to couch the prohibitions against it in much more emphatic and realistic language."

21. Sen. Doc. 4, 74th Cong., 1st Sess., 1935.

22. Thus Senator Van Nuys thought that the Act allowed the meeting of competition as a defense under any proceeding brought under any section. 80 Cong. Rec. 10017 (1936). While the conference managers of the House of Representatives thought that no such defense existed and that evidence that the discrimination was made to meet competition was admissible only in proceedings before the Federal Trade Commission. *Conference Report and Statement of the Managers on the Part of the House* (1936) 80 Cong. Rec. 9410-9411. See also the conflicting testimony as to the effect of the law given at the committee hearings. *Hearings Before a Subcom-*

The new act contains two sections which deal with price discrimination.²³ Section 1 of the Robinson-Patman Act is an amendment of Section 2 of the Clayton Act,²⁴ while Section 3 of the Robinson-Patman Act is a completely new law on the subject invoking criminal penalties for its enforcement.²⁵ Subdivision (a) of Section 1²⁶ forbids price discrimination between purchasers in the sale of commodities where:

mittee of the Senate Committee on the Judiciary, 74th Cong. 2nd. Sess., on S. 4147 (March 24th and 25th, 1936), and Hearings Before a Subcommittee in the House of Rep. Committee on the Judiciary, 74th Cong. 2nd Sess. on H. R. 4995, H. R. 8442, and H. R. 10486. (February 3, 4, 5, and 7th, 1936).

23. The Robinson-Patman Act consists of four sections. Sections 1 and 3 deal with price discrimination and will be dealt with in detail in the body of this article and in the other footnotes. Section 2 of the act provides that nothing contained in the act "shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2" of the Clayton Act; and that proceedings now pending under the Clayton Act may be continued and modified to include investigations of possible violations of the act as now amended. The principal purpose in the enactment of this section was to preserve the voluminous proceedings of the Commission in the case of *Re Goodyear Tire and Rubber Co.*, *supra*, note 10. 80 Cong. Rec. 8436 (1936).

Section four of the acts provides: "Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." The purpose and effect of this section is apparent from a reading of it. Neither of these two sections is considered elsewhere in this article.

24. This is clear from the enacting clause of the Robinson-Patman Act which provides as follows: "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 as amended (15 U. S. C., sec. 13), and for other purposes."

Thus the first section of the Robinson-Patman Act is designated "Sec. 2" and is set off from the other sections by quotation marks. However throughout this article this section will be referred to as Section 1 and all references to Section 2 of the Clayton Act will be to that section as it was prior to this amendment. Because this section of the act is an amendment of the Clayton Act all the general provisions of that law apply to it. See notes 27, and 83-87, *infra*.

25. See notes 19, 21, and 22 for a discussion of the history of this section. See notes 90 to 100 and the text thereto for a discussion of the provisions of section 3.

26. Subdivision (a) of Section 1 of the Act reads as follows:

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to

1) one of the transactions involved is in interstate commerce,²⁷ and the goods are not intended for export;

lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which 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: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, 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 so fixed and established: *and provided further*, 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: *and provided further*, 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 the goods concerned."

27. By requiring that only one of the transactions need be in interstate commerce, Congress clearly intended the act also to apply to intrastate transactions which, when considered in relation to interstate transactions, result in discrimination. There is some question as to the constitutionality of this provision of the law. Congress apparently relied upon the doctrine of the Shreveport Rate Case (Houston and Texas Ry., v. United States, 234 U. S. 342, 34 S. Ct. 833, 48 L. ed. 1341 (1914) to sustain its power over such intrastate transactions. See Sen. Rep. No. 1502, 74th Cong., 2nd Sess. (1936); H. R. Rep. No. 2287, 74th Cong., 2nd Sess. (1936); H. R. Rep. No. 2951, 74th Cong., 2nd Sess. (1936); and 80 Cong. Rec. 9559. The constitutional questions raised by this law are beyond the scope of this article. For a suggestive popular treatment of the constitutionality of various provisions of the act, see, Robertson, The Robinson-Patman Act (Nov., 1936) 14 Fortune Mag. 96.

In this connection it should be noted that there is some conflict among the various provisions of the law as to the fields of commerce to which they apply. Thus subdivision (a) applies in certain cases to interstate transactions but does not apply to sales for export. The remaining subdivisions of that section do not apply to any intrastate transactions but because they are part of the Clayton Act and because "commerce" as used in that law is defined to include foreign commerce (38 Stat. 730, 15 U. S. C. A. sec. 12) those subdivisions relate to sales made in the course of such commerce. Section 3 of the act (see *infra*, note 93) is not part of the Clayton Act, consequently if a literal interpretation were given to it, it would apply to all commerce, intrastate and interstate alike and of course would then be unconstitutional. It seems likely that this section will be limited in its application to interstate commerce.

2) the discrimination relates to commodities²⁸ of like grade and quality;²⁹

3) the effect of the discrimination may be (a) substantially to lessen competition, (b) to tend to create a monopoly,³⁰ or (c) to injure, destroy, or prevent competition³¹ with either the buyer or the seller or the customers of either of them; and *provided that*:

1) due allowance for differences in cost resulting from differing methods or quantities of sale is not prohibited;³²

2) selection of customers in good faith is not prohibited;³³

3) price changes merely reflecting changes in market conditions are not prohibited;³⁴ and,

4) price differentials granted in good faith merely to meet competition are not prohibited.³⁵

The terms used in the new act which are the same as those used in the former law, will undoubtedly be given the same definitions. Since this subdivision is substantially a reenactment of Section 2 of the Clayton Act, no new difficulties are presented as to most of the terms used.³⁶ Indeed, confusion rather than clear-

28. The Act applies only to sales of commodities; it does not apply to contracts of employment or service. Thus in *Fleetway Inc. v. Public Service Interstate Transp. Co.*, 72 F. (2d) 761 (C. C. A. 3, 1934) cert. den., 293 U. S. 626, 55 S. Ct. 347, 79 L. ed. 713 (1935) in which it was held that Section 2 of the Clayton Act did not apply to contracts for the carrying of passengers by hire, it was said, "The section prevents discrimination in price between different purchasers of commodities which are sold for use, consumption or resale within the United States, etc. This clearly refers to a commodity such as merchandise, and has no reference to transportation of passengers by busses." See also *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S. 436, 442, 40 S. Ct. 385, 64 L. ed. 649 (1920).

29. Where goods are not identical, the question of what constitutes "like grade and quality" will be a question of fact. For a discussion of the factors to be considered see text to note 39.

30. This phrase and the one preceding it have been defined in several cases under the Clayton Act, so that their scope, if not their precise definition, is not open to serious question. See *supra*, notes 12 & 13. Cf. *Gordon, Robinson-Patman Anti-Discrimination Act (1936)* 22 A. B. A. Journal 593.

31. For a discussion of the extent to which this is intended to prevent an injury to competition see note 12 and text thereto.

32. For discussion see *infra*, notes 52 to 53, and text thereto.

33. For discussion see *infra*, notes 55 to 62, and text thereto.

34. For discussion see p. 173 et seq., *infra*.

35. The preceding six conditions are merely restatements of express provisions in the law. The seventh condition is a statement merely of the author's own conclusion, which is based on inference and is not altogether free from doubt. For discussion see *infra*, notes 73 to 75, and text thereto.

36. The only important phrase which appears in this subdivision which is not in the previous law, is the phrase "to injure, destroy, or prevent competition."

ness is likely to result by attempting to render *a priori* definitions of terms that are essentially questions of fact rather than of law. Thus the questions of what constitutes a "due allowance" for the difference in cost resulting from the difference in quantity of a sale can be answered only in the general language of good business practice and fair dealing. Ordinarily this must remain a question for the jury. However such indefiniteness is not without precedent, for, after several hundred years, no more adequate definition of negligence has been given.

Two concepts are essential to a clear understanding of the nature of this law—discrimination and competition. Discrimination is a quality of the relationship existing between two sales with differing prices. No transaction can be discriminatory *per se*, for discrimination exists only when there is a certain relationship existing between two or more transactions. Furthermore this relationship must be more than a mere difference, for it must be a difference so substantial as to be unfair under all of the circumstances.³⁷ Probably the act does not prohibit what Mr. Justice Holmes has called the "small dishonesties of trade."³⁸ The concept of discrimination seems to be that required by prevailing ideas of business morality based upon the accepted *laissez faire* economic philosophy.

Closely associated with the concept of discrimination is the provision requiring that the discrimination should relate to commodities of like grade and quality. Indeed, on purely *a priori* grounds, it is apparent that before there can be a difference there must be a basic similarity, in terms of which the difference derives its character. Lacking a similarity in the goods that were the subject matter of the sales, the definition of discrimination would become exceedingly difficult. Consequently, it may be asserted that under this act there are not two separate questions, one as to discrimination and one as to similarity of goods, but

37. As Congressman Utterback said in explaining this bill to the house, "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 entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other." 80 Cong. Rec. 9559 (1936). See *United States v. Wells Fargo Express Co.*, 161 Fed. 606, 610 (C. C., Ill., 1908).

38. See *Nash v. United States*, 229 U. S. 373, 378, 33 S. Ct. 780, 57 L. ed. 1233 (1913).

that in every case the single question is whether or not there has been a discrimination as to like grades and qualities.³⁹

If this analysis be correct, then it follows that the standard for determining similarity and dissimilarity in grade and quality must be a commercial one, just as the standard by which a difference is judged to be a discrimination is commercial. Consequently, goods may be identical from a functional viewpoint, and be of equal value from a scientific viewpoint, and nevertheless be of different grade and quality from a commercial viewpoint, because of a difference in their economic utility. Mere difference in name, design, or notoriety probably will not suffice to distinguish commodities from one another; but a genuine difference in commercial value, even though arising solely from these factors, seems certain to justify a difference in price.

II

As has been pointed out, the purpose of the anti-trust laws is to protect competition,⁴⁰ and therefore the Clayton Act prohibited only that discrimination which tended to lessen competition or create a monopoly. Such discrimination is prohibited also under the Robinson-Patman Act. Even under the former law it was recognized that competition depends upon the existence of competitors; and therefore it was held that the elimination of a competitor was a lessening of competition.⁴¹ The new law carries this proposition a step further by establishing the rule that injury to a competitor is *pro tanto* injury to competition; and accordingly discrimination is unlawful where the effect may be "to injure, destroy, or prevent competition with" (1) the seller, (2) the purchaser, (3) the customers of the seller, or (4) the customers of the purchaser.⁴²

39. It is interesting to note in this connection that Section 2 of the Clayton Act, footnote 8, *supra*, prohibited discrimination in the sale of commodities, and then added a provision that there might be discrimination "on account of difference in the grade, quality, or quantity." On the other hand, the Robinson Patman Act prohibits discrimination as to "commodities of like grade and quality." Cf. *Boss Mfg. Co. v. Payne Glove Co.*, 71 F. (2d) 768 (C. C. A. 8, 1934) cert. den., 293 U. S. 590 (1934).

40. See *supra*, note 11.

41. See *supra*, note 12.

42. Although throughout this article the act is discussed as though it prohibited discrimination with a buyer or his customers, regardless of whether the buyer had knowledge of the discrimination or not, it should be noted that subdivision (a) in express terms refers only to a buyer who *knowingly* receives the benefits of such discrimination. As is pointed out

Of course, it is undoubtedly true that all successful competition is necessarily the impairment of the competitive power of a rival.⁴³ It is vital to an understanding of this law to realize that its purpose is not the blanket protection of competition as such. It prohibits only the use of certain competitive weapons, upon the theory that their unrestrained use leads to conditions which are less desirable than the preservation of that degree of freedom of competition which their employment involves.⁴⁴ In fact it may be said that the act prohibits certain competitive practices be-

in 50 Harv. L. Rev. 106 (1936), at page 108, "A literal construction of the Act yields the result that a discriminating seller, no matter how great the injury to competitors of his purchaser, or of customers of his purchaser, does not violate this section unless the purchaser knows that he is being granted a discriminatory price. Difficulties of proving such knowledge are as great as the ease with which its acquisition may be prevented." This literal construction is so completely contrary to the patent intent of Congress that there is grave doubt that it will be adopted. The intent which the Act as a whole reveals in this respect was that actually held in Congress. 80 Cong. Rec. 9410, Conference Report and Statement of the Managers for the House of Representatives. "The word 'knowingly' appears in the Senate amendment immediately before the words 'receives the benefit of such discrimination.' The House conferees accepted this amendment. Its purpose is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination." It should be recalled that the Supreme Court, in reaching the conclusion that the Sherman Act prohibited only those monopolies which were in unreasonable restraint of trade departed quite as much from the literal terms of that act, to arrive at what it conceived to be the congressional intent, as would be required to effect a similar result in this case.

Furthermore, in view of the cases under the Clayton Act holding that a tendency to eliminate an individual competitor was a tendency to substantially lessen competition, see footnote 12, and in view of the fact that such effect was illegal where it appeared in any line of commerce, see footnote 14, the scope of the act would not be seriously limited by the literal interpretation noted above.

43. *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66, 57 L. ed. 164 (1912), at page 160: "All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act, and the ordinary efforts of traders at a single place." See also *Northern Securities Co. v. United States*, 193 U. S. 197, 406, 24 S. Ct. 436, 48 L. ed. 679 (1903); and *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 64 L. R. A. 689 (C. C. A. 8, 1903).

44. *Central Lumber Co. v. South Dakota*, supra, note 42, at page 160: "If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

cause their effectiveness is so very great that their continued existence ultimately leads to the negation of competition itself.⁴⁵ It is thus recognized that the continuance of competition depends upon the existence of a situation in which a continuous reciprocal injury to competitive power can occur. Such a situation can exist only where there are a sufficient number of competitors. The law was enacted because it was thought that the practices prohibited, by destroying competitors, would lead to the destruction of the conditions upon which competition depends.

This law is thus merely another step in the direction in which all anti-trust legislation has moved. The Sherman Act was designed to protect competition merely by prohibiting monopolies generally. The Clayton Act and the Federal Trade Commission Act were intended to prevent certain practices which it was believed led to the growth of monopolies. By making the prohibitions of the Clayton Act more specific, and by forbidding other particular trade practices, the Robinson-Patman Act simply attempts to catch practices with a monopolistic tendency at an earlier stage in their development than previous legislation has done.⁴⁶

Since the concern of the law is not with discrimination *per se*, but only with discrimination which results in an impairment of competitive power, the illegality of the discrimination is made to depend upon its effect within the field of competition. *A fortiori* this would require the proscribed effect to flow from the discriminatory quality of the relationship involved; that is, it would require the discrimination itself to be the proximate cause of the effect upon competition. But such is not the rule to be drawn from the act and from the cases. It is true that a discrimination

45. Donovan, Need for Revision of the Anti-Trust Laws (1936) 22 A. B. A. Journal 797: "We have realized, however, that competition is not a self-operating mechanical concept. We know that it may be carried to extremes. That all competition is not good and that it may produce results dangerous to economic society." Richberg, Need for Revision of the Anti-Trust Laws (1936) 22 A. B. A. Journal 804: "An unregulated system of competition paradoxically produces at once the monopolistic seeds of its own destruction. . . . We can hardly question the conclusion that without some form of anti-monopoly laws the eventual outcome of trade and industrial operations in serving the major essential needs of a modern community would be the concentration of control in organizations of such size and economic strength that effective competition would become impossible to inaugurate or to maintain."

46. See *supra*, notes 6, 7 and 20.

is unlawful if, as a result of its character, there is an injury to competition. But a discrimination is also illegal, even though the injury is not the result of its discriminatory character, if the injury is caused by either of the transactions which are involved in the discrimination.

If the injury resulting from a discriminatory sale is to the competitive power of one of the customers of the seller, then it is clear that it is the discriminatory character of the relationship that causes injury to competition. Thus if a manufacturer sells the same commodity to different competing customers at prices which discriminate against one, it is clear that the competitive power of the less favored customer is injured; and it is equally clear that the injury is the direct result of the discrimination in price against him and in favor of his competitor.

However, if in this case, the two customers were not in competition, there would be no injury to competition in respect to them. Nevertheless the discrimination would be illegal if, as a result of the cheaper price granted to the favored customer, a competitor of the manufacturer were deprived of a customer, since injury to competition with the manufacturer would then result. The injury in this latter case, however, would result not from the discriminatory character of the relationship between the two sales, but would result from the price involved in only one of the transactions. Thus the transaction here involved would be illegal because the lower price deprived a competitor of the manufacturer of a customer and because the price happened—quite fortuitously—also to be discriminatory.

The latter situation is illustrated by the case of *Porto Rican American Tobacco Co. v. American Tobacco Co.*⁴⁷ In that case, the Porto Rican Company sought to enjoin the American Company from violating Section 2 of the Clayton Act. The two companies were engaged in competition in the sale of their cigarettes in Porto Rico. The American company inaugurated a price war by selling its cigarettes at less than cost in Porto Rico. As an incidental result, purchasers of the American company's cigarettes in the United States were required to pay much higher prices than its purchasers in Porto Rico. Thus there was dis-

⁴⁷ 30 F. (2d) 234 (C. C. A. 2, 1929), cert. den., 279 U. S. 858, 49 S. Ct. 353, 73 L. ed. 999 (1929).

crimination in respect to these two classes of purchasers. The court, in affirming a decree in favor of the plaintiff, said, "This (price cutting) establishes an unjust discrimination made between customers. . . . If this competition, resulting in such loss, continued, it is fair to assume that the appellee could not continue in business, and its elimination as a competitor was certain. Thus the appellant's discrimination will substantially lessen competition."⁴⁸

In the foregoing case, it was not the discrimination which tended to lessen competition in cigarettes in Porto Rico, it was the price cutting by the American company. The fact that this price cutting resulted also in discrimination was purely adventitious, as regards the lessening of competition. However it was the discriminatory character of the price cutting sales which brought them within the ambit of Section 2 of the Clayton Act, since that act did not directly prohibit price cutting.⁴⁹ If the American Tobacco Company had been selling cigarettes in Porto Rico alone, there would have been no discrimination, hence no violation of law, and no illegality regardless of the price cutting. Thus the always difficult question of legal causation is further complicated by the variety of its possible aspects under this law.

III

Functional discounts appear to be permissible under this law by virtue of the fact that price differentials which do not injure competition are lawful, as well as by the provision that the seller may reflect in the price, due allowance for differences in cost arising from various methods of sale. Thus a price variance between two purchasers may be legal if one of them is a wholesaler and the other a retailer either because there is no injury to competition,⁵⁰ or because the cost of selling to the wholesaler

48. At page 237.

49. However price cutting as a weapon for the achievement of monopoly has been condemned in cases arising under the Sherman Act. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. ed. 619 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632, 55 L. ed. 663 (1911). Such price cutting for the purpose of eliminating a competitor is specifically prohibited by Section 3 of the Robinson-Patman Act. See *infra*, note 93.

50. Thus in *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F. (2d) 415 (C. C. A. 6, 1925), the court held that selling spark plugs to an automobile manufacturer at a cheaper price than such goods were sold to retailers was not a discrimination in violation of the Clayton Act since it

is less as a result of the performance by the wholesaler of functions, such as warehousing, not performed by the retailer.⁵¹ However, three possible situations must be distinguished. First, where there is no competition between the wholesaler or any of his customers and the retailer, there can be no lessening of competition, and so a discrimination will not be illegal in any event. Second, where there is competition between the customers of the wholesaler and the retailer, the discrimination will be illegal only if it is so great as to give an unfair competitive advantage to the competitor of the retailer who purchases from the wholesaler. It should also be noted that since injury to competition is an element of the offense, and therefore must be established by the plaintiff, the burden of showing that an alleged functional discount is not a true one, and so injures competition, will be upon the plaintiff, in these two situations. The third possible situation is that where the discount allowed to the wholesaler merely reflects a reasonable allowance for functions actually performed which effect a saving to the seller, in which case the discount is lawful regardless of its effect upon competition. Consequently, it may be said that differentiations between buyers who perform different functions in the distributive scheme will ordinarily be lawful because not injuring competition, and in every case they can be justified where they merely reflect the saving to the seller resulting from the functions performed by the buyers.

From the foregoing discussion it is clear that a plaintiff, in a civil suit for injunction or treble damages for violation of subdivision (a) of Section 1 of the Act, will establish a prima facie case by showing:

- 1) That there has been a discrimination between purchasers in sales of commodities of like grade and quality;
- 2) That one of the sales was in interstate commerce, and the goods were not intended for export; and,

did not tend to lessen competition. Similarly in *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571 (D. C. N. Y., 1919) the plaintiffs brought an action at law charging that the defendants violated the Clayton Act by discriminating in price between manufacturers of automobiles and dealers in the sale of supplies. The court sustained a demurrer to the complaint, saying, at page 574: "There is apparently no competition between the manufacturers of tires and the dealers, nor is it alleged that any exists. The differentiation in price would not therefore substantially lessen competition."

51. Of course, either or both of the factors mentioned may be present in any particular case.

3) That the discrimination, or one of the sales, resulted in injury to competition with the seller, the purchaser, or the customers of either, or in a tendency to monopoly. With this much established, the person charged with violation of the law can escape liability only by establishing one of the defenses allowed by the law, or by disproving the plaintiff's case. The burden of proving the existence of such justifying circumstances is upon the party seeking to take advantage of them.

IV

The most important affirmative defense under this law is contained in the provision that permits differentials in price which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities of sale. This does not require a seller to reflect in the price all the savings resulting to him from the particular circumstances of each sale,⁵² although it allows him to do so. In this provision Congress has adopted the very reasonable interpretation put upon the Clayton Act by the Federal Trade Commission, that quantity discounts must bear some reasonable relationship to the differences in cost resulting from the varying quantities of the sales.⁵³ This proviso enables one charged with violation of

52. Sen. Rep. No. 1502, 74th Cong., 2nd Sess., (1936) 5; H. R. Rep. No. 2287, 74th Cong., 2nd Sess., (1936) 6.

53. See *supra*, note 10. The question of the extent of the differentials which are permissible under this provision will ordinarily be one of fact. It was not the intent of Congress that this provision should justify a seller in relieving any purchaser from a share of the general overhead. Sen. Rep. No. 1502, 74th Cong., 2nd Sess. (1936) 6. "It [this provision] is designed, in short, to leave the test of a permissible differential upon the question; if the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same?" See also H. R. Rep. No. 2287, 74th Cong., 2nd Sess. (1936). The foregoing construction would appear to be too broad. Since the question of what constitutes a due allowance for difference in cost is one of fact its solution will probably be arrived at by the application of proper accounting methods to the facts of each case. Consequently the effect of this provision seems to be that attributed to it by Mr. Utterback, one of the House Managers, who said, "It is through this clause that the bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution in return for depriving him of the right to crush his efficient smaller competitors with the power and resources of mere size. There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible. They apply . . . as between purchasers in equal quantities, for example, where

the law to justify discriminatory sales not only by showing that the differential allowed was the result of a proper quantity discount, but also that it reflected any saving to the seller resulting from other factors in the sale.

Also under the present law the Federal Trade Commission is authorized to establish quantity limits for each commodity, beyond which due allowances for savings resulting from the quantity of sales will not be permitted. Such quantity limits may be established only after a hearing to all interested parties, and a finding that differentials resulting from savings, through sales of quantities beyond such limits, would be "unjustly discriminatory or promotive of monopoly in any line of commerce," because the prospective purchasers beyond such quantities are so few.⁵⁴ This provision is not operative until action has been taken by the Commission; and by its own terms, the effect of this provision will be limited to a few large purchasers.

The several provisions of subdivision (a) of Section 1 of this law also allow one charged with violation of it to justify the discrimination by showing that it resulted from the selection in good faith of customers, or that it resulted from a price change made to meet changing market conditions. The right to select customers, where exercised in good faith, also existed under the former law,⁵⁵ and it was held under it that this right allowed a

one takes multiple store-delivery, and the other single warehouse delivery, with consequent savings in trucking or other delivery costs to the seller, that saving may be expressed in a price differential.

"Or where one customer orders from hand to mouth during the rush of the season, compelling the employment of more expensive overtime labor in order to fill his orders; while another orders far in advance, permitting the manufacturer to use cheaper off-season labor, with the elimination of overtime, or perhaps to buy his raw materials at cheaper off-season prices, So also where a manufacturer or merchant sells to some customer through traveling-salesman solicitation, to others across the counter, and to others by mail order from catalog, price differentials may be made to reflect the differing costs of such varying methods of sale."

54. The constitutionality of this provision has been seriously questioned upon the ground that it constitutes an improper delegation of legislative power. *Gordon, Robinson-Patman Anti-Discrimination Act (1936)* 22 A. B. A. Journal 593, 596; 50 Harv. L. Rev. 106, 111 (1936) as well as upon the ground that it exceeds the commerce power. *Robertson, The Robinson-Patman Act (Nov., 1936)* 14 Fortune Mag. 96, 166.

55. *Federal Trade Commission v. Beech Nut Packing Co.*, (1922) 257 U. S. 419, 42 S. Ct. 159, 66 L. ed. 299 (1922); *United States v. Colgate & Co.*, 250 U. S. 300, 39 S. Ct. 465, 63 L. ed. 992 (1919); *Great A. & P. Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2, 1915); *Green v. Victor Talking Machine Co.*, 24 F. (2d) 378 (C. C. A. 2, 1928), cert. den., 278

seller to refuse to grant a co-operative association of retailers the same discount that he did a single wholesaler, although the terms of both sales and the quantities sold were substantially identical in the two cases. Thus in *Mennen Co. v. Federal Trade Commission*,⁵⁶ the Mennen Company was charged with price discrimination in violation of Section 2 of the Clayton Act because it refused to allow the same discount to co-operative associations of retailers that it granted to individual wholesalers, although the conditions under which the two purchasers bought were identical.

The court disposed of that branch of the case by holding that Section 2 of the Clayton Act prohibited only discrimination which tended to monopoly, or which injured competition with the seller, and that there was no showing of either effect in the case before it. However, the court then proceeded to a discussion of the right to select customers as a justification of discrimination resulting from functional discounts. Reasoning on the analogy of those cases which hold that the mere refusal to sell to a purchaser who fails to maintain prices is not a violation of the Sherman Act,⁵⁷ the court announced that a similar right to select customers existed under Section 2 of the Clayton Act, and that since the right to refuse to sell at all existed, it followed that the seller could refuse to sell save on such terms as he might choose. If he chose to treat one purchaser as a retailer and another as a wholesaler, and vary the discounts allowed to each accordingly, that was his privilege, and nothing could be done about it under the Clayton Act.⁵⁸ Of course the next step in such

U. S. 602, 49 S. Ct. 9, 73 L. ed. 530 (1928). In the Cream of Wheat case, *supra*, it was said, at page 48-9: "We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. . . . Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

56. 288 Fed. 774 (C. C. A. 2, 1923) cert. den., 262 U. S. 759, 43 S. Ct. 705, 67 L. ed. 1219 (1923).

57. Federal Trade Com'n v. Beech Nut Packing Co., and United States v. Colgate & Co., *supra*, note 55.

58. Mennen case, *supra*, note 56. at page 730.

reasoning is that the right to refuse to sell permits a vendor to refuse to sell except in a discriminatory manner. The result of this "logic" obviously is a nullification of this whole law by the right to select customers.⁵⁹

In *National Biscuit Co. v. Federal Trade Commission*⁶⁰ the right of a seller to grant a discount to a chain store where a similar discount was not allowed to a co-operative association of retailers, although the two sales were in other respects identical, was sustained by the court upon the ground that neither a substantial lessening of competition nor a tendency to monopoly resulted. It was held, following the Mennen case (supra), that Section 2 of the Clayton Act did not protect competition with purchasers of the discriminatory seller. The allowance of the functional discount by the National Biscuit Company to the wholesaler, and its refusal to the co-operative association of retailers was approved by the court. If it can be said that the holding in the above cases is limited to the rule that Section 2 of the Clayton Act did not protect competition with the purchasers from a discriminating seller, they have been overruled by the Supreme Court and merit no further attention.⁶¹ However, it is possible that they will be invoked to support the position that the right to select customers, which is granted by the Robinson-Patman Act, carries with it the right to grant functional discounts regardless of the effect. It has been noted above that such a rule can be arrived at only by a process of arid deduction to which legal propositions will not submit, and that its establishment would result in the complete emasculation of the statute. Consequently it may be concluded that the right to refuse to sell will not justify a discrimanatory seller in selling upon whatever terms he chooses.⁶²

59. Cf. McAllister, Sales Policies and Price Discrimination Under the Clayton Act (1932) 41 Yale L. J. 518.

60. 299 Fed. 733 (C. C. A. 2, 1924), cert. den., 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468 (1924).

61. See note 14.

62. That this conclusion is correct, and that the reasoning of the courts in the Mennen and National Biscuit Co. cases is fallacious in this regard, is shown by the cases under the Sherman Act holding that the right to refuse to sell includes only the right to refuse to treat, and does not include the right to refuse to sell except upon terms violative of the Act. *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. ed. 684 (1927); *United States v. A. Schrader's Son Inc.*, 252 U. S. 85, 40 S. Ct. 251, 64 L. ed. 471 (1920); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. ed. 502 (1911).

Another defense to a price change otherwise discriminatory is that such a change was made in response to changing marketing conditions. It should be noted that this defense is available only where it is alleged that the discrimination results from price changes from time to time. It is of no avail in a case where the discrimination results from varying prices to competing purchasers at the same time. Of course it is clear that a discrimination could very well result from a rapid variance in prices during a relatively short period. Consequently unless the justification that such changes were made to meet marketing conditions can be established, a seller can change his prices from time to time only after giving adequate notice to the trade in general that such change will be made.

An interesting question arises as to whether or not the Act prohibits the making of long-term contracts for sale at a given price, in a case where sales pursuant to the contract are made at a lower price than subsequent sales which in other respects are identical. In such a case even though the lower price of the contract sales could not be justified upon one of the grounds mentioned above, it seems clear that sales made under it would not be illegal in respect to subsequent sales if, at the time the contract was made, the contract itself was not discriminatory. In other words, if the seller under such a contract, at the time it was entered into, made available to competitors of the purchaser under the contract similar amounts of the commodity on similar terms as those contained in the contract, the contract itself would not be discriminatory, and consequently subsequent sales made under it would not be illegal.

V

In considering the effect of the act upon existing contracts to sell, a very nice problem is presented. Cases under both the Clayton and the Sherman Act hold that Congress has the power to invalidate pre-existing contracts in conflict with their provisions.⁶³ Therefore if sales made under pre-existing contracts are

63. *Elliott Mach. Co. v. Center*, 227 Fed. 124 (D. C. Mich., 1915); *United States v. United Shoe Mach. Co.*, 227 Fed. 509 (D. C. Mo. 1915); *Motion Picture Patents Co. v. Universal Film Co.*, 235 Fed. 398 (C. C. A. 2, 1916), *aff'd* 243 U. S. 502, 37 S. Ct. 416, 61 L. ed. 871 (1917); *United States v. Southern Pacific Co.*, 259 U. S. 214, 42 S. Ct. 496, 66 L. ed. 907 (1922); *cf.*, *Louisville & N. R. R. v. Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 L. ed.

discriminatory in respect to other sales now being made, and one of the prohibited effects follows, it would seem that the contracts would be invalidated by the new Act, and the sales made pursuant thereto would be declared illegal. However if the reasoning above is correct, sales made pursuant to long term contracts are not discriminatory if the contracts as a whole are not discriminatory at the time of their formation. From this it follows that sales made under contracts antedating the Act are not illegal unless the contracts themselves were discriminatory at the time of their consummation. But by what standard shall such discrimination be judged, the standard then existing, or the standard now established? In view of the decisions under the other anti-trust laws it is probable that the standard set up by the new law will be applied even to pre-existing contracts.⁶⁴

VI

One of the most keenly mooted questions arising under the law is whether or not it prohibits the basing point method of pricing. The "basing point system"⁶⁵ is used to describe that

297 (1911); *New York Central R. R. v. United States*, 212 U. S. 500, 29 S. Ct. 309, 53 L. ed. 624 (1909); *contra*, *United States v. United Shoe Mach. Co.*, 264 Fed. 138 (D. C. Mo., 1920).

64. In *Louisville & N. R. R. v. Mottley*, *supra*, note 63, the court says at pages 474, 478, and 485, "In our consideration of the case it will be assumed—indeed the parties themselves assume—that the agreement of 1871 was not when made in conflict with the Constitution or laws of the United States. But we must first inquire whether such an agreement, if made after the passage of the original and amendatory commerce acts, would have been valid under those acts. If those acts forbid agreements of that character we must then inquire whether the one in suit can now be enforced simply because it was valid when made. . . . Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions of *existing contracts*, it forbade by broad, explicit words *any* carrier to charge, demand, collect or receive a 'greater or less or *different* compensation' for *any* services. . . . We forebear any further citation of authorities. They are numerous and all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted."

65. For a general discussion of price systems, including the basing-point system, see *Report of the Federal Trade Commission on Price Bases Inquiry*,—The Basing-Point Formula and Cement Prices (March, 1932).

method of pricing wherein prices for a given commodity are quoted f. o. b. a certain point, and the final charge made for the commodity is that f. o. b. price plus the freight from the f. o. b. point to the place of delivery, regardless of the point from which the commodity is shipped. For example, under this system a fabricator of steel in St. Louis is required to pay for steel delivered to him at a price composed of the Pittsburgh f. o. b. price plus the cost of transporting the steel from Pittsburgh to St. Louis, although in fact the steel may have been smeltered in St. Louis. This system of pricing seems clearly discriminatory as there is certainly a differential, not justified by cost to the seller, operating against purchasers requiring delivery at points distant from the basing point.⁶⁶ If a sale in which this cost plus method of price quotation is used results in one of the four prohibited effects, it would almost certainly be unlawful under this act.⁶⁷

On the other hand, it seems reasonably clear that this law does not forbid that system of pricing wherein goods are sold at a uniform delivered price, regardless of point of delivery, merely because in such a case more of the cost of transportation

66. This conclusion is contrary to that reached by other commentators. 50 Harv. L. Rev. 106 (1936); see also 45 Harv. L. Rev. 548 (1932); Gordon, *Robinson-Patman Anti-Discrimination Act (1936)* 22 A. B. A. Journal 593, 594; Robertson, *Robinson-Patman Act (Nov., 1936)* 14 Fortune Mag. 96, 162. These views are based on the fact that a provision defining price as "the amount received by the vendor after deducting actual freight or other cost of transportation, if any, allowed or defrayed by the vendor" was stricken from the bill in conference. 80 Cong. Rec. 8434, 8439. This provision was broad enough to forbid the uniform delivered price system, as well as the basing point system. Agreement to the elimination of this provision was secured because of a desire to allow the uniform delivered price system (1936) 80 Cong. Rec. 8327 et seq., and because of the fact that a separate bill was pending which was specifically directed against the basing point system. 80 Cong. Rec. 8434; *Hearings Before the Senate Committee on Interstate Commerce, 74th Cong., 2nd Sess., on S. 4055 (Mar. 9 to Apr. 10, 1936)* 2. However these considerations cannot prevail against the plain language of the act. *Van Camp & Sons v. American Can. Co.*, footnote 14, supra; see *Standard Co. v. Magrane-Houston Co.*, footnote 7, supra, at page 356.

67. The basing point system was held illegal even under the former act, *Re U. S. Steel Corp.*, 8 F. T. C. 58 (Dec. 1, 1924). This proceeding lasted four years, and resulted in a record of twenty million words. Respondents agreed to comply with the order rather than contest it, although without admitting its validity. Since the termination of this proceeding the use of the basing point system has spread widely and rapidly. *Hearings Before the Senate Committee on Interstate Commerce, 74th Cong., 2nd Sess., on S. 4055, (Mar. 9 to Apr. 10, 1936)* 4. There have been no other proceedings, attacking this system under Section 2 of the Clayton Act.

is paid by the purchaser nearer the point of shipment than is necessary to pay the cost of transportation to himself. Uniform delivered prices are not unlawful under this Act because the Act does not require that the price charged be merely the cost to the seller plus a reasonable profit; it merely requires that no unjustified, or discriminatory, price differentials be charged. Varying costs may justify differences in prices; but varying costs do not *require* differences in prices.⁶⁸

VII

Subdivision (b) of Section 1⁶⁹ refers to proceedings brought before the Federal Trade Commission. It contains two principal provisions: the first that after proof of discrimination in price, the respondent has the burden of rebutting the prima facie case thus made; and second, that in rebutting such a prima facie case, the seller may show that the discriminatory price was made in good faith to meet the equally low price of a competitor. Little difficulty arises as to the first provision. The rule there stated, that matters of justification are affirmative defenses upon which the defendant bears the burden of proof, follows from the decisions under the Clayton Act⁷⁰ as well as from familiar principles of jurisprudence. The need, if any, for that provision arises from the fact that proceedings before the Commission, being administrative in their nature rather than judicial, are not governed by the technical requirements of court procedure.⁷¹

68. See *supra*, note 52.

69. Subdivision (b) of Section 1 reads as follows:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

70. See *supra*, notes 15 and 16.

71. *Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission*, 18 F. (2d) 866 (C. C. A. 8, 1927), cert. den., 275 U. S. 533, 48 S. Ct. 30, 72 L. ed. 411 (1927); *John Bene & Sons v. Federal Trade Commission*, 299 Fed. 466 (C. C. A. 2, 1924); see *Hills Bros. v. Federal Trade Commission*, 9 F. (2d) 481, 484 (C. C. A. 9, 1926); cf. *Spiller v. Atchison, T. & S. F. Ry.*, 253 U. S. 117, 126, 40 S. Ct. 466, 64 L. ed. 810 (1920). In

At least two problems arise in connection with the second provision. In the first place, in its terms it is limited to proceedings brought against a seller, although it is clear that proceedings may be maintained against not only a seller but also against a buyer, or anyone who knowingly induces or receives a discrimination in price.⁷² Will this provision apply in such a case? In the second place, by the literal terms of this provision it applies only to proceedings before the Commission; and it may be argued that since this is the only express provision in the Act which allows a meeting of competition as a justification, and since the former law expressly allowed this defense in all cases whether civil suits for damages or proceedings before the Commission, the omission was intentional, and the defense does not now exist in the case of a civil suit for damages or an injunction.

However, it is believed that this defense is available in a civil suit for damages or injunction, as well as in commission proceedings against a buyer. An interpretation of the Act denying this right would cast doubt upon its constitutionality,⁷³ and it is of course a well-established canon of construction that an act will not be construed in such a way as to make it invalid if it is reasonably susceptible of any other construction.^{73a} Further, it

John Bene & Sons v. Federal Trade Commission, supra, it is said, at page 471: "The questions suggested by the foregoing references are whether the Commission, in its investigations, is restricted to the taking of legally competent and relevant testimony. We incline to think that it is not by the statute, and, having regard to the exigencies of administrative law, that it should not be so restricted. We are of the opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done. The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to enact the roles of complainant, jury, judge, and counsel."

It was recognized by the sponsors of this law that the provision above referred to was merely a statement of existing law. 80 Cong. Rec. 8442 (1936); see also 80 Cong. Rec. 8452, 8331 (1936).

72. See infra, notes 82 and 83.

73. *Fairmount Creamery Co. v. Minnesota*, 274 U. S. 1, 47 S. Ct. 506, 71 L. ed. 893 (1921); but see *Butterick Co. v. Fed. Trade Commission*, 4 F. (2d) 910 (C. C. A. 2, 1925); cf. *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 76, 57 L. ed. 156 (1912).

73a. In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336, 68 L. ed. 696, 32 A. L. R. 786 (1924), at page 307, Mr. Justice Holmes says, "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408. *United States v. Jin Fuey Moy*, 241 U. S. 394, 401."

seems to have been the intent of Congress that such a defense should be available to all actions instituted under the law.⁷⁴ The chief congressional concern was that the defense should not be allowed to justify the undercutting of the competitor's price.⁷⁵

VIII

Largely because of the Federal Trade Commission's report on chain stores⁷⁶ the feeling was widespread in Congress at the time of the enactment of this law that certain trade practices such as the granting fake brokerage fees⁷⁷ and fictitious advertising allowances were so prevalent and so detrimental to competition that they should be dealt with specifically. Consequently Subdivision (c)⁷⁸ of Section 1 prohibits the payment of brokerage fees by one party to a sale to the other party or anyone under the control of the other party, regardless of the effect of such

74. See H. R. Rep. No. 2287, 74th Cong. 2nd Sess. (1936), 80 Cong. Rec. 8439, 8440, 8446 (1936); cf. 80 Cong. Rec. 9560 and 1017 (1936). But cf. 80 Cong. Rec. 9410-9411 (1936).

75. H. R. Rep. No. 2287, 74th Cong. 2nd Sess. (1936), 80 Cong. Rec. 8446 (1936). It was said that the defense of meeting competition was not available where the competition to be met was itself illegal under this law. 80 Cong. Rec. 9560 (1936). The language of the law allowing this defense does not so limit it. (Supra, note 69). The difficulties in the way of a seller ascertaining whether or not the price of his competitor is an unlawfully discriminatory one are so great that they could seldom if ever be overcome. Further the essence of this defense is that the person seeking to rely upon it meets competition in *good faith*, and this subjective element in the defense is entirely independent of the legality of the competition which it was sought to meet. Consequently there seems to be no reason for believing that the use of the defense is limited to cases where the competition which is met is lawful. The existence and the precise scope of this defense under the Robinson-Patman Act, are shrouded in doubt, but it is believed that the view taken herein is the one that will be taken by the courts in the application of this law.

76. See supra, note 21.

77. For an example of the manner in which this practice is employed, See *Trunz Pork Stores v. Wallace*, 70 F. (2d) 688 (C. C. A. 2, 1934). See also in this connection, Federal Trade Commission, *Final Report on Chain Store Investigation*, supra, note 21, p. 161 and 162.

78. Subdivision (c) of Section 1 of the Act reads as follows:

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such 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 or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

payment, if the sale is in the course of commerce and the fee is not a reasonable one for services actually rendered in connection with the sale. It should be noted that the accepting as well as the granting of such payments is prohibited, and that they are prohibited regardless of whether or not they are discriminatory.

By Subdivision (d),⁷⁹ payment to a customer for promotional or other facilities or services is unlawful unless similar payments are available to competitors of such customers on "proportionately equal terms." Subdivision (e)⁸⁰ makes it illegal for a seller to discriminate between purchasers by furnishing facilities or services to one without making such facilities or services available upon "proportionately equal terms" to all. This last proviso requires such services and facilities to be available to all purchasers, regardless of whether or not they are engaged in competition with the customers to whom the original concession was granted. It is possible, however, that there could be no discrimination unless all the customers were engaged in competition with each other.

The most serious question which these last two provisions raise is as to the meaning of the phrase "proportionately equal terms." The equality referred to can be determined only in accordance with the relative values of services or facilities. The value can be either that to the seller or the value to the purchaser. The general tenor of the law would indicate that the value of such service or facilities to the purchaser should be determina-

79. Subdivision (d) of Section 1 of the Act reads as follows:

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value or to for the benefit of a customer of such person in the course of such commerce 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 proportionally equal terms to all other customers competing in the distribution of such products or commodities."

80. Subdivision (e) of Section 1 of the Act reads as follows:

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, 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 proportionally equal terms."

tive of the question, since its primary concern is the prohibition of discrimination between purchasers, and if the relative value to the purchasers were equal, there would be no discrimination. On the other hand, since these prohibitions of specific trade practices were enacted to eliminate evasive methods of discrimination, it may be urged with great force that the test of equality should be the value to the seller, since if such an allowance merely reflects the value to him, it would be granted in good faith and thus not be within the purview of these provisions. The question cannot be definitely answered by construction of the Act, but if the standard is taken to be the value to the seller, the evils against which the Act is directed could be avoided and legitimate merchandising devices preserved. In light of this patent ambiguity on the face of the Act, resort may be had to proper legislative sources^{80a} and these sustain the view that the equality of the services or facilities granted must depend upon their value to the seller under the circumstances.⁸¹

IX

The last part of section 1 is subdivision (f),⁸² which makes it unlawful "for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." It is clearly both the intent and effect of this section to make the one who receives

80a. See *Duplex Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349 (1921), at page 474: "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge v. Williams*, 3 How. 9, 24; *United States v. Union Pacific R. R. Co.*, 91 U. S. 71, 79; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns v. United States*, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in the course of passage. *Binns v. United States*, *supra*; *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 198-199; *United States v. Coca Cola Co.*, 241 U. S. 265, 281; *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310, 318."

81. Sen. Rep. No. 1502, 74th Cong., 2nd Sess. (1936) 8; H. R. Rep. No. 2287, 74th Cong., 2nd Sess. (1936) 16.

82. Subdivision (f) of Section 1 of the Act reads as follows:

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

a discrimination equally guilty with the one who grants it. However, suppose a buyer, engaged only in intrastate commerce, induces and receives a discrimination in price from a seller engaged also in interstate commerce. The seller is liable to an injured interstate buyer for violation of Subdivision (a). But only Subdivision (f) applies to the buyer, and that prohibits only the receiving of a discrimination by a person engaged in "commerce"—which, of course, means interstate commerce.⁸³ The conclusion appears inevitable that a buyer engaged purely in intrastate commerce who induces or receives a discrimination from a seller who is within the ambit of the act does not violate Section 1 of the Act, although a buyer in interstate commerce who did the same thing would clearly incur liability.

Since Section 1 of the Robinson-Patman Act is to be read as though it had been enacted originally as Section 2 of the Clayton Act, the provisions for enforcement of the Clayton Act are applicable to Section 1 of this Act. Thus the methods by which enforcement of Section 1 may be secured are: (1) proceedings before the Federal Trade Commission;⁸⁴ (2) an injunction suit brought by the federal district attorney;⁸⁵ (3) an injunction suit brought by an aggrieved private party;⁸⁶ and (4) a civil suit for treble damages brought by an aggrieved private party.⁸⁷ Proceedings and jurisdiction will be the same under this law as under the Clayton Act. A civil suit under the anti-trust laws may be brought by any one who has been injured as a result of an unlawful act, and it is not necessary that the plaintiff be one who is specifically mentioned in the law, nor be one who has been directly discriminated against by the acts complained of.⁸⁸ These rules remain the same under the new as under the former law.

83. *Lipson v. Socony-Vacuum Corp.*, 76 F. (2d) 213 (C. C. A. 1, 1935); 38 Stat. 730, 15 U. S. C. A. sec. 12; and *supra*, note 24.

84. 43 Stat. 939, 15 U. S. C. A. sec. 21 (1925).

85. 38 Stat. 736, 15 U. S. C. A. sec. 25 (1914).

86. 38 Stat. 737, 15 U. S. C. A. sec. 26 (1914).

87. 38 Stat. 731, 15 U. S. C. A. sec. 15 (1914).

88. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 27 S. Ct. 65, 51 L. ed. 241 (1906), in which it was held that the plaintiff could recover damages for high prices which he was forced to pay as a result of defendants' unlawful combination in restraint of trade. However to entitle a plaintiff to recover, he must have been personally damaged, *Carbonic Gas Co. v. Pure Carbonic Co.*, 4 F. Supp. 992 (D. C. N. Y., 1933); *Ebeling v. Foster & Kleiser Co.*, 12 F. Supp. 489 (D. C. Wash., 1935), and such damage must be the direct and proximate result of the unlawful act. *Peterson v. Borden Co.*, 50 F. (2d) 644 (C. C. A. 7, 1931). Cf. *supra*, note 47 and text thereto.

X

The Robinson-Patman Act suffers chiefly from a plethora of provisions. In its final form it represents the union of two laws, each designed to cover the whole field. The first section, which imposes only civil liability, was originally the Robinson-Patman bill,⁸⁹ while the third section, which imposes only criminal liability, was originally the Borah-Van Nuys bill.⁹⁰ This latter section is not, as might be expected, merely a provision for the imposition of criminal penalties for the wilful violation of what is essentially a civil law; but it is an entirely different piece of legislation which sets up its own test of unlawful conduct.⁹¹ However it is believed that its scope, with one exception, is no greater than that of the first section;⁹² and in some respects it is undoubtedly narrower. Since this provision is not technically a part of the Clayton Act, there can be no civil liability for its violation, in any event; and the only method by which it may be enforced is by a criminal action for the imposition of the penalties therein provided.

The first part of Section 3⁹³ prohibits participation, by anyone engaged in commerce, in a sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount rebate, or allowance is granted to the purchaser when no similar

89. This section had its genesis in a bill introduced in the House by Mr. Patman as H. R. 8442; a companion bill was introduced into the Senate by Mr. Robinson as S. 3154.

90. Mr. Van Nuys introduced a bill as S. 3835 on January 16, 1936; and Mr. Borah introduced a similar bill as S. 3670 on January 16, 1936. On February 24, 1936, Mr. Borah and Mr. Van Nuys jointly introduced a bill as S. 4171 to supersede their previous separate bills. *Hearings Before a Senate Subcommittee of the Committee on the Judiciary*, 74th Cong., 2nd Sess., on S. 4171, (Mar. 24 & 25, 1936) pps. 1-3.

91. This section is taken almost verbatim from the Canadian Price Discrimination Act. Canadian Stat. 25 & 26, Geo. V, c. 56, s. 9 (1935).

92. See 80 Cong. Rec. 9411, 9561 (1936).

93. Section 3 of the acts reads as follows:

"Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge 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; to sell, or contract 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, or, to sell, or con-

allowance is available at that time to his competitors, in respect of a sale of goods of like grade, quality, and quantity. This provision clearly requires the same elements to render a discrimination unlawful as does Section 1 of the Act.⁹⁴ Thus the transaction must be in commerce, the goods must be of like grade and quality, and since the discrimination must, under Section 3, be against a competitor of the purchaser, there must certainly be a tendency to injure competition. Similarly the justifications that are available to a defendant under Section 1 are available under this provision of Section 3. This provision does not prohibit price discrimination which is the result of varying prices in sales transacted at different times. The question of the amount of time that must elapse between price changes, in order to take them outside of the scope of this provision, will, of course, depend upon the facts of each particular case; but since this provision does not prevent price changes from time to time, discrimination resulting from price changes made to meet changing market conditions is not illegal under it. Nor does it prevent the granting of functional discounts, since in such a case there would be no discrimination between competitors.⁹⁵ Similarly this provision does not prevent a seller from reflecting in the price savings resulting from the particular conditions surrounding a sale, since such a price differential would not be unfair, and hence not discriminatory.⁹⁶ While it is not altogether free from doubt, it would seem that the same considerations, which it was indicated above would lead the court to allow the defense of meeting competition under Section 1,⁹⁷ would apply with even greater force to Section 3.⁹⁸ Although there is also some doubt as to whether or

tract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both."

94. For the elements of an offense, and justifications, under Section 1 see footnote 26 and text following.

95. For a discussion of functional discounts see text following footnote 50. The question of what constitutes a true functional discount under Section 3 is the same as the question arising under Section 1.

96. See *supra*, note 37 and the discussion thereto.

97. See *supra*, notes 73 and 74, and text thereto.

98. *Fairmont Co. v. Minnesota*, *supra*, note 73. The state anti-price discrimination statute held unconstitutional in that case because it did not allow the meeting of competition as a defense, was more nearly similar to Section 3 of this act than it was to Section 1, as it prohibited discrimination

not this provision prohibits a seller from selecting customers in good faith, the better view would appear to be that the seller is not deprived of this right by this provision. It merely requires that no discrimination be made against competitors of a purchaser "in respect to a *sale* of goods . . ." It would seem to follow from the language of this provision that it does not place a common carrier burden upon the seller by requiring him to deal with every available and qualified purchaser, but that it merely requires a seller who does in fact deal with competitors to grant the same terms to all competitors among his customers at a particular time.⁹⁹ Furthermore, since this section imposes a criminal liability, it will be strictly construed; and all the constituent elements of the offense, including knowledge of the discriminatory character of the sale, must be proved beyond a reasonable doubt. Consequently there is little reason to believe that these provisions will be more rigorous in their application than Section 1.

However, in two short, but potentially important, provisions at the end, Section 3 does go beyond Section 1. These provisions prohibit selling goods at a lower price in one part of the country than that exacted by the seller elsewhere within the country, and selling goods "at unreasonably low prices," for the purpose of destroying competition or eliminating a competitor.¹⁰⁰ It is clear that all of the defenses available to a charge of discrimination under Section 1 are available to a charge of price cutting under these provisions. Thus the defense that the price was made in response to changing market conditions, that it was merely the

per se, as does Section 3, and not merely discrimination tending to injure competition, as does Section 1. The sponsors of this section thought that it allowed the meeting of competition as a defense. 80 Cong. Rec. 10017 (1936).

99. This conclusion is not rested solely upon any inherent right to refuse to sell, see footnotes 55 and 62, *supra*, but is based rather upon the view that by the language of this section, it is inapplicable to cases where there has been no sale made.

100. A question arises as to what competition or whose competitors are protected by this section. The competition protected may be that with the seller or the buyer or the customers of either of them, as under Section 1; or it may be that with the buyer, as under the first provisions of Section 3; or it may be with the seller alone. On literal interpretation, the provisions refer to competition in generic terms, and therefore prohibit price-cutting where the purpose is to injure competition anywhere and with anyone. As a practical matter, a seller will ordinarily cut prices only for the purpose of injuring his own competitors.

granting of a quantity discount, that it merely reflected a true functional discount, and that it was made in good faith to meet competition, or to exercise the seller's right to select his own customers, would all be available under these provision of the third section, since the existence of any of these justifying circumstances would negative the wrongful intent, which is an integral part of the offense here prohibited. Furthermore the elements of a discrimination under Section 1 would necessarily be present in any case of local price cutting—since this section likewise applies only to acts in, or affecting, interstate commerce, since the intent to injure competition would undoubtedly tinge the acts with a tendency to injure it, and since prices exacted in one part of the country can be said to be lower than those exacted by the same seller in another part of the country only in relation to goods of the same grade and quality.

The one provision of Section 3 which clearly goes beyond anything contained in Section 1, or for that matter in the previous law, is the prohibition against selling goods "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The standard set up by this provision is not a relative one, such as "discrimination," but is an absolute one, consequently, while the other price provisions of this law apply only where there are two or more transactions by the same seller, this offense may exist by virtue of only one transaction, or series of transactions. What will be unreasonably low prices will, of course, be a question of fact in every case, generally to be decided by the jury. It is not unlikely that the reasonableness of the price may depend somewhat upon the intent with which it was adopted—since intent is the gist of the offense under this provision.

CONCLUSION

It should be apparent from the foregoing discussion that the Robinson-Patman Act, although poorly drafted and carelessly enacted, does not work a sweeping change in that part of the anti-trust law which relates to price discrimination. At most it makes articulate and emphasizes interpretations and developments under the former law. It is true that this act raises some difficulties of interpretation, but these are small in number and not important in scope when they are carefully distinguished from the questions of fact which the law raises, and which of course

no law can settle. It is believed that these ambiguities in the Act will be resolved pursuant to well-established principles of statutory interpretation and that their resolution in this manner will be consistent with the law as a whole and will not mark this legislation as revolutionary. There is no reason to believe that either the courts or the Federal Trade Commission are going to use this law to harass legitimate business enterprises, for in its general purport it merely seeks to accomplish the result which it has been the universal concern of trade associations to achieve throughout the last twenty years. Whether or not the economic theory upon which this law is based is keeping with modern tendencies, or whether it is 75 years behind the times is not a legal question. It is certain, however, that the legislation itself raises no problems that cannot be solved by the use of current legal methods.