

is immoderate and unreasonable.¹³ This was thought, on the basis of *Dix v. Martin*, to be the Missouri rule.¹⁴ Indiana formerly held¹⁵ that, where the injuries were inflicted *malo animo* and the acts were abhorrent to the family relation, an action would lie. It has repudiated this view.¹⁶ In *Wells v. Wells*,¹⁷ the same court that decided *Dix v. Martin* and the instant case allowed a parent to recover against a minor child declaring the public policy of the state to be settled by *Dix v. Martin*. The instant case appears inconsistent with that decision.

Legal writers have expressed the opinion that the broad general rule should be limited in its application to instances in which the reasons on which it is based apply. It has been suggested that the parent be granted a qualified privilege in respect to parental discipline and control and to the conduct of the domestic establishment.¹⁸ He would be liable, not for mere errors of judgment, but for injuries caused by acts manifestly outside the parental relation or in excess of his authority. Thus the child would be allowed to recover damages where it is admitted, by the criminal law at least, that he was wronged.

W. B. W.

TRADE REGULATION—ROBINSON-PATMAN ACT—BROKERAGE FEES—[Federal].—A purchasing agency furnished marketing information and other purchasing services to over 300 subscribing wholesalers for a monthly stipend. The agency also made purchases for its subscribers at their request, passing on to them the brokerage commissions collected from sellers.¹ Brokerage commissions thus received by 86 per cent of the subscribers amounted to less than the amount paid by them for the services under the contract with the purchasing agency. The facilities of the agency enabled sellers to find buyers without employing brokers to reach these customers. The Federal Trade Commission issued an order² to the subscribing buyers, the purchasing agency, and the sellers to desist from payment or receipt of brokerage fees in violation of Section 2(c) of the Robinson-Patman Act.³

13. *Clasen v. Pruhs* (1903) 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112.

14. *Note* (1923) 31 A. L. R. 1157, 1161.

15. *Treschman v. Treschman* (1901) 28 Ind. App. 206, 61 N. E. 961, 963.

16. *Smith v. Smith* (1924) 81 Ind. App. 566, 142 N. E. 128.

17. (1932) 48 S. W. (2d) 109.

18. *Reeves, Domestic Relations* (4th ed. 1888) 357; *McCurdy, Torts Between Persons in Domestic Relations* (1930) 43 Harv. L. R. 1030, 1079.

1. Buyers sometimes named the seller from whom they preferred to purchase, sometimes not. Sellers shipped and billed orders directly to buyers, and buyers paid directly to sellers, who sent commissions to the purchasing agent.

2. (1937) 106 C. C. H. Trade Reg. Serv. par. 9058.

3. " * * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive 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 be-*

On petition for review of the order, *held*, that, irrespective of their effect on competition, the payments and their receipt violated this section of the Act. Order enforced.⁴

The instant case is the second⁵ to declare that the exception "for services rendered" in Section 2(c) of the Robinson-Patman Act has no application to services rendered to a seller by a buyer or his agent.⁶ Designed to strike at the receipt of pseudo-brokerage by powerful chain buyers,⁷ the section as originally drawn flatly prohibited payment of brokerage to the "other party" to the transaction of his agent or controlled intermediary.⁸ At the instance of representatives of cooperative buyers,⁹ the clause exempting payments "for services rendered" was added. This amendment has spawned endless conjecture as to who may render compensable services thereunder.¹⁰ A comparison of the wording of the section and of expres-

half, 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." (1936) 49 Stat. 1426, (1938 Supp.) 15 U. S. C. A. sec. 13(c) (*italics supplied*).

4. *Oliver Bros., Inc. v. Federal Trade Comm.* (C. C. A. 4, 1939) 6 U. S. L. Week 1068.

5. *Biddle Purchasing Co. v. Federal Trade Comm.* (C. C. A. 2, 1938) 96 F. (2d) 687, cert. denied (1938) 59 S. Ct. 101, involved almost identical facts. Sec. 2(c) has given rise to especially lively controversy in proceedings under it by the F. T. C., which has issued thirteen complaints of violations thereunder. The only contested proceedings under the Act have involved the brokerage paragraph. Four of the five orders issued under the paragraph have been appealed to the courts. Two cases are still pending. (1939) 6 U. S. L. Week 1199.

6. The position taken by the Federal Trade Commission in these cases, which was sustained by both courts, is that any services rendered to a seller by a buyer or his agent or controlled intermediary are incidental to the transaction of purchase and are donated to the seller. The cases themselves do not go so far, however, as to say that a broker may not render services to both seller and buyer and receive compensation from both, provided the broker retains all pecuniary benefits himself. If a buyer incurs expense in providing himself with a brokerage department or agency, the fact that services thus furnished his sellers cannot be compensated may result in an actual discrimination in favor of those employing brokers compensated by the seller. Note (1936) 50 Harv. L. Rev. 106, 113-4.

7. Hamilton and Loevinger, *A Second Attack on Price Discrimination* (1937) 22 WASHINGTON U. LAW QUARTERLY 153, 178; Note (1938) 6 Geo. Wash. L. Rev. 203; and see Fed. Trade Comm., *Final Report on Chain Store Investigation* (1935) Sen. Doc. No. 4, 74th Cong., 1st Sess., 62.

8. While the section is in terms applicable to payments to a seller, etc., the application to such a situation will be so rare that only payments to the buyer or his intermediary are here referred to. Presumably the same principles are applicable to either situation.

9. *2 Hearings before Subcommittee of House Committee on Judiciary on H. R. No. 4995* (1936) 74th Cong., 2d Sess., 334, 338.

10. See excerpts from brief for F. T. C. in the Biddle case (1937) 105 C. C. H. Trade Reg. Serv. par. 807; C. J. Swan's dissent in *Biddle Purchasing Co. v. F. T. C.* (C. C. A. 2, 1938) 96 F. (2d) 687, 693; Evans, *Anti-Price-Discrimination Act of 1936* (1936) 23 Va. L. Rev. 140; Fly, *The Sugar Institute Decision and the Anti-Trust Laws: 2* (1936) 46 Yale L. J. 228, 237; Gallagher, *Federal Price Fixing Laws* (1937) 3 John Marshall

sions of legislative intent¹¹ gives ample evidence that Congress was unaware of the import of its words. While the construction adopted by the court in the instant case seems to render sterile the exception, the phrase may yet be given some meaning if it is held to permit brokerage payments to intermediaries who actually render services and *retain* fees thus earned.¹² Unless this construction permits buyer-employed intermediaries to collect brokerage fees, however, the exception for services rendered is still meaningless inasmuch as only independent brokers would then be within the purview of the exception.¹³ There seems no justification in the wording of the act itself, in the utterances of Congressional intent,¹⁴ or in the two judicial interpretations of the pertinent section¹⁵ for the position that the exception applies to buyer-controlled or -employed intermediaries and not to buyers who render services to sellers, or who at least obviate the necessity of independent brokers' services. There is more justification for the construction that would bring cooperatives within the saving phrase "for services rendered."¹⁶

L. Q. 230, 232; George, *Business and the Robinson-Patman Act: The First Year* (1937) 4 *Law & Contemp. Prob.* 404; Jaffe, *Some Comments on the Price-Discrimination Act* (1936) 10 *U. of Cin. L. Rev.* 402, 418; Note (1936) 50 *Harv. L. Rev.* 106, 113; Note (1938) 6 *Geo. Wash. L. Rev.* 203. It is noteworthy that rarely do any two of the above authorities agree on the proper interpretation of the pertinent section.

11. See *e. g.*, (1936) H. R. Rep. No. 2287, 74th Cong., 2d Sess., 14-15; (1936) H. R. Rep. No. 2951, 74th Cong., 2d Sess., 7; (1936) 80 *Cong. Rec.* 3114, 9418, 9420.

12. This is the construction favored by the Federal Trade Comm. (1937) 105 *C. C. H. Trade Reg. Serv.* par. 807.

13. No express exception is needed to legalize payments to independent brokers, who are nowhere dealt with in the Act. Note (1937) 23 *Va. L. Rev.* 316, 324. However, the House Committee viewed the section as requiring that no fees be paid even to true brokers except for services rendered to the payor. (1936) H. R. Rep. No. 2287, 74th Cong., 2d Sess., 15. This interpretation would treat an exception as broadening the scope of a general prohibition. See Note (1936) 36 *Col. L. Rev.* 1285, 1312-1315.

14. See *e. g.*, (1936) 80 *Cong. Rec.* 9414.

15. Indeed, the court in the *Biddle* case (C. C. A. 2, 1938) 96 *F.* (2d) 687, 691, stated that "if buyers' agents or intermediaries are excepted for services rendered, so too are the buyers themselves." But see Note (1938) 6 *Geo. Wash. L. Rev.* 203.

16. Such justification, if any, is to be found, however, not in sec. 2(c), but in the appendage to the Robinson-Patman Act, sec. 4, which provides that a cooperative may return to its members the net earnings or surplus resulting from its trading operations. Inasmuch as cooperatives are not elsewhere treated differently in the Act, the apparently superfluous provision may be given content by allowing the return to members of payments received by cooperatives for services to the adverse party in the transaction. There is reason to believe that this construction accords with the intent of Congress in enacting sec. 4. Conference Report and Statement of the Mgrs. on the Part of the House (1936) 80 *Cong. Rec.* 9415. It should be noted, however, that sec. 4 does not apply, in terms at least, to cooperative wholesale or retail associations. See for discussion of this interpretation George, *Business and the Robinson-Patman Act* (1937) 4 *Law & Contemp. Prob.* 404; Gordon, *Robinson-Patman Anti-Discrimination Act* (1936) 22

In the cases construing and applying Section 2(c), it had been found that services had been rendered by the intermediaries involved and that the sellers had merely paid the regular brokerage fees fixed for similar services rendered by independent brokers.¹⁷ In view of the acknowledged purpose of the legislation to prevent secret rebates in the form of fake brokerage allowances,¹⁸ a provision that condemns all payments, regardless of their actual effect¹⁹ and of whether valuable services are rendered therefor, except on condition that the compensation not reach the buyer under any arrangement whatever, might well seem to be so ill-adapted to reach the evil sought to be remedied as to be of questionable constitutionality.²⁰ A justification suggested for the provision is that the determination in each case of the point when a brokerage allowance exceeds the value of the services rendered presents a serious administrative problem, particularly in view of the intangible nature of brokerage services.²¹ It is submitted, however, that brokerage services have a relatively constant and fixed value to any particular seller and that the issue should be one of discrimination by the seller as between purchaser—a fact much easier of determination than the computation of the precise value of the services.²²

A. B. A. J. 593; Note (1937) 31 Ill. L. Rev. 907; Note (1936) 36 Col. L. Rev. 1285, 1291, 1313.

17. *Biddle Purchasing Co. v. F. T. C.* (C. C. A. 2, 1938) 96 F. (2d) 687, 693; *Oliver Bros., Inc. v. F. T. C.* (C. C. A. 4, 1939) 6 U. S. L. Week 1068. See also *Wilmington Provision Co., Inc. v. Wallace* (C. C. A. 3, 1934) 72 F. (2d) 989.

18. See Gordon, *Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3* (1936) 22 A. B. A. J. 593; Sen. Comm. Rep. No. 1502 (1936) 105 C. C. H. Trade Reg. Serv. par. 704.02; House Comm. Rep. No. 2287 (1936) 105 C. C. H. Trade Reg. Serv. par. 704.01. There can be little question as to the power of Congress to declare such practices to be unfair methods of competition in interstate commerce and to legislate against them. *Trunz Pork Stores, Inc. v. Wallace* (C. C. A. 2, 1934) 70 F. (2d) 689. The Commission has rejected a distinction proposed by the Great A. & P. Tea Co. between discounts equivalent to brokerage made as part of the price of goods and a discount in lieu of brokerage reflected by the price of goods. It also rejected the Tea Company's contention that brokerage might be passed on to buyers as savings in cost under the cost proviso or the differentials proviso of the general Act. F. T. C. Docket No. 3031 (1938) 105 C. C. H. Trade Reg. Serv. par. 9341.

19. Fair compensation for services actually rendered or savings effected can not injure competition, if paid without discrimination as to parties entitled thereto. See Hamilton and Loevinger, *A Second Attack on Price Discrimination* (1937) 22 WASHINGTON U. LAW QUARTERLY 153, 168; Comment (1938) 24 Iowa L. Rev. 179.

20. See Brown, *The Scope of Federal Power over Price Discrimination* (1936) 10 U. of Cin. L. Rev. 430, 450; Clothier, *Legislation in Restraint of Trade* (1937) 12 Temp. L. Q. 3, 26; McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction* (1937) 4 Law & Contemp. Prob. 410. *Oliver Bros., Inc. v. F. T. C.* (C. C. A. 4, 1939) 6 U. S. L. Week 1068, purports to find the section immune from constitutional attack. *Fairmont Creamery Co. v. Minnesota* (1927) 274 U. S. 1, is unsatisfactorily distinguished by the court.

21. Comment (1938) 24 Iowa L. Rev. 179.

22. See authorities cited supra, note 16.

The instant decision is a victory for the independent brokerage interests, which furnished part of the pressure that brought forth the Robinson-Patman Act.²³ Its effect will be an adjustment of the marketing function heretofore served by the purchasing agent.²⁴ The economies in distribution resulting from a combination of the brokerage function and that of performing purchasing services are sacrificed.²⁵ The net result is that the brokerage function will become an enforced responsibility of the seller.²⁶

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23. See George, *Business and the Robinson-Patman Act: The First Year* (1937) 4 *Law & Contemp. Prob.* 404.

24. See McNair, *Marketing Functions and Costs and the Robinson-Patman Act* (1937) 4 *Law & Contemp. Prob.* 334.

25. See Learned and Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations* (1937) 15 *Harv. Bus. Rev.* 137, 148; Note (1938) 6 *Geo. Wash. L. Rev.* 203. It may be noted that the Robinson-Patman Act makes legal one of the objectives sought by the Sugar Institute and condemned in *Sugar Inst., Inc. v. United States* (1936) 297 U. S. 553. See especially in this connection Fly, *The Sugar Institute Decision and the Anti-Trust Laws: 2* (1936) 46 *Yale L. J.* 228, 237-242.

26. See Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store* (1936) 15 *Harv. Bus. Rev.* 62, 73. One position taken in the Committee Reports is that a buyer or a buyer-controlled or -employed intermediary cannot render legally compensable services in the nature of brokerage to the seller. "When free of coercive influence of mass buying power, discounts in lieu of brokerage are not accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of seller's own selling cost." House Comm. Rep. No. 2287 (1936) 105 C. C. H. Trade Reg. Serv. par. 704.01. Cf. Mr. Celler's remarks in (1936) 80 *Cong. Rec.* 9420. It has been difficult to deny, however, that there may be a rendering of service by a purchasing agent, for instance, to sellers contacted by it, or, at least, a saving of the expense of sales promotion. See excerpts from brief for F. T. C. (1937) 105 C. C. H. Trade Reg. Serv. par. 807. Any defense based on that argument is lost before the Commission, however, if the fees collected by the purchasing agent are passed on to its subscribing buyers, who can render no service to either the sellers or their agent. See *e. g.*, F. T. C. Complaint No. 3032 (1937) 106 C. C. H. Trade Reg. Serv. par. 8758. See also *supra*, note 6.

An interesting line of cases in this connection is the series upholding allowances by railroads to elevator owners for elevation of their own grain which had been transported by the railroads involved, notwithstanding the elevation was advantageous to the recipients of the allowances. A federal statute prohibited payments by a carrier to a shipper in consideration of the latter's shipping goods over the carrier's lines, but made an exception where services were rendered by the shipper in connection with the transportation. (1906) 34 *Stat.* 584, 586, 587, 590, (1927) 49 U. S. C. A. secs. 1(1-9), 6, 41, 16; *Interstate Commerce Comm. v. Diffenbaugh* (1911) 222 U. S. 42; *Union Pac. R. R. v. Updike Grain Co.* (1911) 222 U. S. 215; *United States v. Baltimore & O. R. R.* (1913) 231 U. S. 274; and see *Mitchell Coal & C. Co. v. Pennsylvania Ry.* (1913) 230 U. S. 247; cf. *Lehigh Valley R. R. v. United States* (1917) 243 U. S. 444. *Quaere*: Are not brokerage payments to a buyer, or his intermediary, commensurate with the savings effected by the recipient's services, analogous to the allowances sustained for services rendered by shippers?