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# Unfair Competition--Good Faith Price Reduction to Meet Competition as Defense

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this is a ground for exemption equivalent to actual charitable, educational or religious use.<sup>9</sup>

The Ohio Constitution<sup>10</sup> and the laws passed under its authority<sup>11</sup> exempt from taxation property of charitable, educational and religious institutions if the property is "used exclusively" for a charitable, educational or religious purpose. The Ohio Supreme Court in the past has given a narrow construction to these exemption provisions.<sup>12</sup>

In *In re The Bond Hill-Roselawn Hebrew School*,<sup>13</sup> however, this court relaxed its adherence to the narrow construction by allowing exemption of an entire property as being used exclusively for public worship when the caretaker and his family were living on the premises.

In the *Good Samaritan* case, the court shows a liberal tendency by interpreting an exclusive charitable use to include repair of the premises with the intention to fit and use them for a charitable purpose. The only significant difference between the *Good Samaritan* case and the *Orthodox Hebrew Board of Education* case seems to be that in the latter, the repairs were not actually begun by tax lien day. The two decisions do not seem consistent.

EUGENE J. GILROY

#### UNFAIR COMPETITION — GOOD FAITH PRICE REDUCTION TO MEET COMPETITION AS DEFENSE

The Federal Trade Commission challenged the right of the petitioner, under Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act,<sup>1</sup> to sell gasoline to four large "jobber" customers at a price per gallon less than that at which it sold like gasoline to many small service station customers in the same area. The petitioner's defense was that its lower price to these "jobber" customers was justified under Section 2 (b) of the Clayton Act as amended by the Robinson-Patman Act, because it was made in good faith to meet an equally low price of a competitor. The Commission ordered the company to cease and desist from making such price discriminations,<sup>2</sup> and its order was affirmed by the court of appeals.<sup>3</sup> The commission's ruling that Section 2 (b)<sup>4</sup> of the Act does not constitute a defense, when the price discrimination results in an

<sup>9</sup> *McGlone v. First Baptist Church*, 97 Colo. 427, 50 P. 2d 547 (1935); *In re Miriam Osborn Memorial Home Ass'n*, 140 N.Y. Supp. 786 (1912)

<sup>10</sup> "General laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose"  
"OHIO CONST. Art. XII, § 2.

<sup>11</sup> OHIO GEN. CODE §§ 5349 and 5353. See notes 2 and 4, *supra*.

<sup>12</sup> See 1 *Western Res. L. Rev.* 151 (1949).

<sup>13</sup> 151 *Ohio St.* 70, 84 N.E. 2d 270 (1949).

actual or threatened injury to competition, was reversed by the Supreme Court.<sup>5</sup>

Prior to 1936, Section 2 of the Clayton Act<sup>6</sup> gave an absolute defense in cases where the price reduction was motivated by the necessity of meeting in good faith a competitor's price.<sup>7</sup> In 1936 the Robinson-Patman Act revised the original section and divided it into two subsections: Section 2 (a) relates what constitutes unfair price discriminations, and includes several defenses which justify price reductions in certain enu-

<sup>1</sup> 49 STAT. 1526, 15 U.S.C. § 13 (1936). The material parts of the statute appear in note 4 *infra*.

<sup>2</sup> Federal Trade Commission v. Standard Oil Co., 43 F.T.C. 56 (1946).

<sup>3</sup> Standard Oil Co. v. Federal Trade Commission, 173 F.2d. 210 (7th Cir. 1949).

<sup>4</sup> The material parts of the Clayton Act Section 2 as amended by the Robinson-Patman Act are:

Section 2 (a) " it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided* that nothing 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 *And provided further*, That nothing contained shall prevent price changes from time to time in response to changing conditions affecting the market for or the marketability of the goods concerned.

(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 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." 49 STAT. 1526, 15 U.S.C. § 13 (a) and (b).

<sup>5</sup> Standard Oil Co. v. Federal Trade Commission, 71 Sup. Ct. 240 (1950) Dissenting opinion at 250.

<sup>6</sup> Section 2. " it shall be unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities 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." 38 STAT. 730-731, 15 U.S.C. (1934 ed.) § 13.

<sup>7</sup> See American Can Co. v. Ladoga Canning Co., 44 F. 2d. 763 (7th Cir. 1930).

merated circumstances.<sup>8</sup> Section 2 (b) states that evidence of reduction in prices in good faith to meet competition rebuts the prima facie case of unlawful discrimination established by the price reduction.

The issue becomes one of statutory interpretation. Did Congress intend the amendment to remove as an absolute defense the good faith reduction of prices to meet competition?

Although the principal case, by answering "no" to this question, resolved a conflict existing in the lower courts,<sup>9</sup> the result in the principal case leaves much to be desired. The court reasoned that the two subsections of the amendment should be read together, thus interpreting Section 2 (b) as creating a defense equal to those enumerated in Section 2 (a)

The Court did not appear to give adequate consideration to the legislative history of the Robinson-Patman Act. By it Congress intended to narrow the avenue of escape given price discriminators by the "meeting competition" clause of the Clayton Act.<sup>10</sup> The Supreme Court's decision means that no real change has been brought about by the Robinson-Patman Amendment. As the dissent points out,<sup>11</sup> it should be held that Section 2 (b) deals with the procedural aspect of the Trade Commission's enforcement of the statute, not with the creation of an absolute defense.

NORMAN P ZUCKER

<sup>8</sup> The defenses in Section 2 (a) include, with slight modifications, all those in the original Section 2 of the Clayton Act, *except* good faith reduction of price to meet competition, which was relegated to a separate subsection, (b) See notes 4 and 5 *supra*.

<sup>9</sup> Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d. 378 (2nd Cir. 1945) The court held that Section 2 (b) of the Robinson-Patman Act gave the petitioner an absolute defense where he had reduced prices to meet a lower price of a competitor. *But see*: Russellville Canning Co. v. American Can Co., 87 F. Supp. 484, 489 (1949); General Shale Products v. Struck Construction Co., 132 F.2d. 425, 429 (7th Cir. 1942). In *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U. S. 746, 751, 65 Sup. Ct. 971, 974 (1945), the Supreme Court had previously indicated a position contrary to that of the principal case.

<sup>10</sup> 80 CONG. REC. 9418 (June 15, 1936) The Chairman of the Committee which considered the bill reported before Congress: "If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product." At p. 9414, the committee said: "The Senate bill contained a further proviso: 'That nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition.' This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, intended only to operate as a rule of evidence in a proceeding before the Trade Commission is included in subsection (b) in the conference text as follows [Section (b) as enacted.]"

<sup>11</sup> See Standard Oil Co. v. Federal Trade Commission, 71 Sup. Ct. 240, 258 (1950) (dissenting opinion).