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THE PATMAN ACT IN PRACTICE*

Blackwell Smith †

A RECENT act of Congress[1] directed against price discrimination and related phases of buying and selling has already become famous as the Robinson-Patman Act, so named for its two principal sponsors in Congress. This act has been much written about,[2] and yet those whose law practice confronts them with daily problems in its application to the actuality of the business world find daily new aspects. The act has something to say with reference to every business transaction (in or related sufficiently to interstate commerce) which involves a price or a service or a facility in connection with the sale of a commodity. Business actuality is so varied that the important problems already seriously studied by practitioners under this act in a little over six months would be sketchily treated in anything short of a treatise of hundreds of pages.

An understanding of the act requires inquiry into both what it *says* and what it *does*. The present article is directed more toward the actual problems, applications and effects of the act, present or prospective, than toward the details of its provisions. But in the desire to be intelligible without requiring overly much reference to other writings, there will first be given a high-light analysis of what the act

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[1] Officially entitled "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 (U. S. C., title 15, § 13), and for other purposes," signed June 19, 1936.

[2] For other treament of the Act, see CONFERENCE PROCEEDINGS ON ROBINSON-PATMAN ANTI-DISCRIMINATION ACT (1936); 36 COL. L. REV. 1285 (1936); 50 HARV. L. REV. 106 (1936); 46 YALE L. J. 447 (1937); 23 VA. L. REV. 201, 316 (1936-37).

says. An effort will be made in this analysis to omit matters thought to be relatively unimportant for a general understanding, or well covered elsewhere, and to emphasize what is thought relatively important or novel.

At this stage, section 1 of the act (which is section 2 of the Clayton Act as amended) will primarily be considered. It is more important at the moment than the other sections of the act, due to the fact that it is more used,[3] is more widely publicized and is enforceable by a greater variety of means.[4] It is not a criminal section. Section 3 of the act, commonly referred to as the Borah-Van Nuys Act,[5] will be largely left out of consideration, since it is, in effect, a complete, separate criminal act overlaying the whole field in such an unlimited and uncertain way that careful analysis at this time cannot be very fruitful. In addition to section 3, two other sections (section 2, saving pending or prior accrued rights of action, and section 4, protecting cooperatives) also will largely be disregarded herein, because thought relatively unimportant.

WHAT THE ACT SAYS

The substantive portion of the act, that is to say section 1, disregarding refinements, may be summed up as making unlawful in connection with the sale of commodities:

[3] The Federal Trade Commission up to January 13, 1937, had by formal complaint commenced 14 cases under amended Section 2 of the Clayton Act and neither the Federal Trade Commission nor the Department of Justice had commenced any under Section 3.

[4] Amended Section 2 of the Clayton Act is enforceable by the Federal Trade Commission and the Department of Justice and by private injunctive and triple damage suits.

[5] "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 contract 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." 49 Stat. L. 1528, 15 U. S. C. A., § 13a (1936).

First, giving[6] or knowingly receiving[7] injurious price discrimination;

Second (which may have nothing to do with price), giving or receiving so-called fake brokerage;[8] and

Third, granting arrangements (which again may have nothing to do with price), either in the form of payments for services or facilities[9] (aimed primarily at advertising allowances but not so limited), or in the form of furnishing services or facilities;[10] unless such payments for or furnishing of services or facilities are on proportionally equal terms.

Although the act may be thus briefly summarized, refinements cannot wisely be disregarded, especially in view of the many drafting

[6] "That it shall be unlawful . . . 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. . . " 49 Stat. L. 1526, 15 U. S. C. A., § 13a (1936).

[7] "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." 49 Stat. L. 1526, 15 U. S. C. A., § 13(f) (1936).

[8] "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." 49 Stat. L. 1526, 15 U. S. C. A., § 13(c) (1936).

[9] "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or 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." 49 Stat. L. 1526, 15 U. S. C. A., § 13 (d) (1936).

[10] "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." 49 Stat. L. 1526, 15 U. S. C. A., § 13 (e) (1936).

oddities, quirks and perhaps accidents, found in its language. For example, subdivision (a) of section one contains certain limitations, which are non-existent in the other subsections and sections. A rule of reason may be read in by the court, which would make the qualifying phrases of subdivision (a) applicable to all other subsections and sections; but the other sections and subsections do not expressly embody those limitations [11] and—what is worse—in some instances do provide different treatment for specific cases.

Looking at some of the refinements of the revised section 2 of the Clayton Act: subdivision (a) prohibits price [12] *discrimination*, direct or *indirect*, between purchasers of commodities *of like grade and quality*. The word "discrimination" carries some uncertain freight of meaning over and above mere "difference." [13] The word "indirect" bulks large. Like the Biblical archangel set at the gate of the Garden of Eden to bar mankind thenceforth from its forbidden pleasures, it stands at the gate of subterfuge. The words "like grade and quality" are dragnets that sweep in for comparison commodities substantively the same, but perhaps sold in different dress, such as so-called "special brands" (or perhaps substantively different but the same in appearance or function).

Another qualification is that not all price "discrimination," even in the sale of commodities "of like grade and quality" in interstate commerce, is illegal. It is only where there is public or private injury.[14]

[11] Each subdivision of revised Section 2 of the Clayton Act was apparently intended to be independent of the others. Note, e.g., HEARINGS BEFORE COMMITTEE ON THE JUDICIARY ON H. R. 8442, 74th Cong., 1st sess., (Serial 10, Part 2, 1936) at pp. 510-511.

[12] Terms of sale are prohibited only to the extent that they effect indirect price discrimination. Statement of the Managers on the Part of the House, attached to the Conference Report, p. 5; 80 CONG. REC. 9410 (June 8, 1936).

[13] "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 differences granted to one casts some burden or disadvantage upon the other. *If the two are competing in the resale of the goods concerned, that relationship exists*. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination." Statement of Rep. Utterback to Congress, 80 CONG. REC. 9559 (June 15, 1936). (Italics supplied.)

[14] "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*." (Italics supplied.) 49 Stat. L. 1526, 15 U. S. C. A., § 13 (a) (1936).

The italicized language, new in the law, is substantially the same as one clause

The clause covering private injury is new; the language forbidding public injury is adopted from the old Clayton Act.

But even if a questioned transaction falls within the scope of these definitions, there are still several opportunities to uphold it. The seller may show that the price difference made "only due allowance for differences in the cost."[15] The seller is also protected (1) if he can show that he has merely selected his customers in good faith and not in restraint of trade;[16] or (2) if he can show the price was a mere price change due to changing market conditions,[17] in any one of several specified forms or perhaps other forms.

Then come the refinements contained in one of the most vital subsections of the revised section 2: the procedural subsection.[18] It has in it first what probably must be treated as a substantive exception, to-wit the reference to permission to meet competition. The draftsmen have sought to limit the right to meet competition, but it seems likely that they have failed.[19] In other words, there probably is a sub-

in the Clayton Act when originally introduced. See Mennen Co. v. Federal Trade Commission, (C. C. A. 2d, 1923) 288 F. 774 at 778, cert. den. 262 U. S. 759, 43 S. Ct. 705 (1923).

[15] This clause reads in full: "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." (Italics supplied.)

[16] This clause reads in full: "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." (Italics supplied.)

[17] This clause reads in full: "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." (Italics supplied.)

[18] "(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." 49 Stat. L. 1526, 15 U. S. C. A., § 13 (b) (1936).

[19] State statutes prohibiting discrimination have been held unconstitutional by the Supreme Court because they did not give the right to meet competition. Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506 (1927); Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115 (1929).

stantive limitation in this subsection that is effective more broadly than the procedural form in which it is cast.

The aim of this procedural subsection is, when the Commission has shown discrimination, to put on the party charged the burden of affirmatively showing that what he did was justified (under one of the provisos mentioned or perhaps on some other ground). However, this subsection probably will not be construed to mean literally what it says.[20]

WHAT THE ACT DOES

We come now to the inquiry as to what the act does or may be expected to do over a period of time sufficient to bring out its full operative force. The discussion which follows is based on experience in connection with the problems of manufacturers; and the problems relating to distribution are analyzed, as it were, through the eyes of an adviser to manufacturers.[21] A different approach would doubtless vary the analysis. The problems chosen here as nuclei for organization of discussion (quantity discounts, special brands, functional discounts, and advertising allowances) are believed to be central and general in import.

1. *Quantity Discounts*

The first Patman Act problem chosen for discussion is the quantity discount. It is doubtless the focal point of the act in practice.[22] When raised in general terms, it may be treated with relative ease and, on some aspects, with relative assurance. After such a general discussion, the writer will, in order to show the baffling intangibles raised by concentrated application to actual commercial facts, outline and discuss some of the questions which would be presented should there be litigation of the propriety of a sample transaction.

The problem of the quantity discount is raised when a seller has "discriminated" between different purchasers of commodities "of like

[20] See excellent note of Zorn and Feldman, "Federal Trade Commission Hearings and Burden of Proof Under the Robinson-Patman Law (1936)," PRENTICE-HALL FEDERAL TRADE AND INDUSTRY SERVICE, § 40,191. However, see American Can Co. v. Ladoga Canning Co., (C. C. A. 7th, 1930) 44 F. (2d) 763 at 768. How this provision bears on proceedings other than by the Commission is not clear.

[21] What the act does will be observed in the form of problems and action taken in response thereto presently coming to the attention of this observer; but, there are no measures, other than mere human reasoning and guess work, available as to the degree of pervasiveness of such problems and actions in response.

[22] Most of the complaints thus far issued by the Federal Trade Commission under the Robinson-Patman Act have attacked as illegal alleged quantity discounts.

grade and quality," where any of the purchases involved were in interstate commerce, by giving a lower price[23] or a larger allowance of some sort to the buyer of larger quantity.

Analyzing the above statement, it is seen that the problem of the quantity discount is raised under the act, in the first place, only where the seller has "discriminated." It is probably true that a sale may validly be made by a New York seller, acting without any intent to injure anyone, to an isolated California buyer who does not compete with the seller's other customers and for whose business the seller's competitors do not compete, in large quantity, on a price that is too favorable to be justified under the act when compared on the basis (as for example, difference in cost) prescribed in the act. This is because there is no discrimination. Likewise, for the same reason, a seller probably may sell a large quantity to an industrial user on a price basis that is too favorable otherwise to be justified under the act when compared with the price given a chain store. Again, but more properly discussed under "functional discounts," the quantity price given a wholesaler probably need not meet the statutory test against a price given the retailer. In all these cases, while there is a price *difference*, there would not seem to be price discrimination in the sense of different treatment given two purchasers so related to each other as reasonably to entitle them to the same treatment.[24]

Next it is seen that the problem of the quantity discount is raised under the act only where the commodities involved are "of like grade and quality." This raises endless potentialities where the products involved, as in the case of the industrial user and retailer relationship above, may look exactly alike (as Ivory vs. white floating soap), may serve identical purposes (as Crisco vs. white vegetable cooking fat), or may not look alike while serving identical purposes, or may look alike but not serve identical purposes. These problems will be treated more thoroughly under the heading of "special brands" below.

Assume that the problem of the quantity discount exists, and that the above conditions are present. The seller must now justify his price differential on the ground that the lower price for the larger quantity made "only due allowance" for differences in cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which

[23] The quantity discount allowance may be given through the medium of a lower unit price, instead of in the form of a specific discount. Note, e.g., Matter of Standard Brands, FTC Docket No. 2986 (1936), 106 CCH, ¶ 8670.

[24] See note 13, supra.

the goods are sold or delivered. While this justification seems difficult enough substantively, it will be in practice either impossible or distressingly difficult—depending on the leniency of the courts—when coupled with the procedural provision which purports to require that the seller must "affirmatively" show justification when the Commission succeeds in showing that there has been "discrimination."[25] The impossibility of such "affirmative" showing of "only due allowance," if the words are interpreted literally, can be gathered from the illustrative case hereinafter discussed.

In addition, there are endless narrower questions arising in practice of which a few may serve the purposes of illustration.

The question constantly arises as to what are supportable schemes of arrangement of quantity price allowances, assuming the amounts when properly related are justifiable. The commonest scheme in the past probably has been the allowance of a certain discount covering purchases within a rather wide bracket of volume. Such allowance presumably averages out over all purchases in that quantity bracket at about what it is worth to the seller to push his customers into deals of that average size. Now, however, this scheme is attacked as discriminatory as between those relatively near the dividing line between any quantity and its discount and the next larger quantity and discount. This criticism seems unsound where all customers are freely offered an opportunity to buy in any quantity bracket, except where the brackets are so large that it is not practicable for the smaller customers to cross the line.

The difficulty probably can be obviated by making the brackets small. There are, however, at least three inherent difficulties here which are almost insurmountable if the act is literally to be enforced. First, the decreasing costs of larger transactions may well not run in smooth steps. Certainly, they will not if costs as to particular sales have to be taken into account, as they may be (to be illustrated in the sample case hereinafter discussed). Secondly, the cost savings on which allowances in the nature of things must be based are at the time of offer necessarily prospective; they relate to goods not yet sold and perhaps not yet made, whereas the test which will be sought to be applied in enforcement proceedings will be actual costs as they have

[25] The seller may have had the burden of justifying price discrimination under the original Section 2 of the Clayton Act. American Can Co. v. Ladoga Canning Co., (C. C. A. 7th, 1930) 44 F. (2d) 763 at 768, cert. den. 282 U. S. 899, 51 S. Ct. 183 (1931). But the burden on quantity prices in light of the new language, such as the "only due allowance" clause, is more difficult under the new law.

worked out in experience. Thirdly, the total volume of the seller, with the concomitant unit cost, is a loosely correlated incident to the amount of advertising, incentives, etc., offered by the seller. Larger allowances for just this purpose to push customers into larger volume and push goods off shelves are a feature of American mass production and sale that it seems ought to be supportable, but of which the "only due allowance" clause takes no account.[26] Perhaps the answer can be found in a frank pushing allowance, as such, *equally* allowed all customers who account for a named volume. This, however, while non-discriminatory, may not be "proportionally equal" as required by subsection (d). This subsection is not limited to discriminatory payments, but purports to require that all payments fitting its description shall be "available on proportionally equal terms to *all* other customers competing" etc.[27]

Another important question is whether the law permits recognition of the theory of so-called "increment tonnage." Under this theory, the only cost that need be attributed to the additional and latest increment of business—that supplied by the transaction in question—is the added cost caused by that business, treating all general overhead as necessarily covered by business previously in hand. Some of the major objectives of the act cannot be accomplished if this theory is supportable, but it has considerable appeal. In fact, costs per unit may be shifted radically downward by the addition of a single enormous order; and, assuming the prior existence of the other business, additional cost involved in fulfilling such an order does approximate direct costs. The Federal Trade Commission and Congressional speakers on the subject have served notice that this theory is not permissible,[28] but the act may be interpreted differently, and the courts must eventually decide.

There is a troublesome question, which has not been disposed of, as to the limits of propriety in discounts to meet competition from quantity discounts by another.[29] It is little comfort for the smaller-sized

[26] The practice of granting a quantity discount to promote sales was defended in the answer of respondent to the Federal Trade Commission complaint in Matter of Kraft-Phoenix Corp., FTC Docket No. 2935 (1936), 106 CCH, ¶ 8646.

[27] The Federal Trade Commission has issued two complaints alleging the payment of "push money" to clerks of customers to be a violation of Section 2 (d) of the Clayton Act, as amended. Matter of Burjois, Inc., FTC Docket No. 2972 (1936), 106 CCH, ¶ 8647; Matter of Richard Hudnut, FTC Docket No. 2973 (1936), 106 CCH, ¶ 8648.

[28] Thus, e.g., Rep. Utterback, 80 CONG. REC. 9650 (June 15, 1936).

[29] The question of meeting quantity discounts of a competitor has been raised by respondent in its answer in Matter of Shefford Cheese Co., Inc., FTC Docket No. 2936 (1936), 106 CCH, ¶ 8711.

seller of goods in competition with a successful seller of large quantity to be told he can meet the competitor's competition by quoting equally low prices on equal quantities. He needs to quote equally low prices without regard to the quantity quoted on. The prospective seller's prospective customer will buy all of his needs from the supplier of large quantity at the low large-quantity price unless the smaller-size would-be seller can do as well. This poses the question as to meeting competition in some of its most difficult forms. Must the competitor *know* that the buyer has *obtained* a large order at the low price, has been *offered* such a proposition, or that a certain seller *will* offer such terms, or can the competitor take a chance where in good faith he *believes* such competition to be existent or impending? Of course, the amendment has taken out the clear statement of any substantive right to meet competition in whatsoever form and has substituted an anaemic procedural phrase. But there is certainly such a substantive right,[30] and the courts must be waited on to define it in some fashion.

Many other important questions are arising constantly, far too numerous to treat; for example, whether a quantity allowance may be broken into only the two traditional but rough brackets of carload lots and less than carload, and whether contract allowances must meet the tests of the act in comparison with other contracts or with spot business.[31]

While the foregoing doubtless seems unsatisfactory as a scheme of things within which to decide what prices or allowances can reliably be quoted on account of quantity purchases, just how difficult reliable decision really is in any important deal can be conjectured only after looking at a sample case. When this has been examined on an over-simplified assumption, the variants, some of which are likely to occur as part of the combination in any real case, will be recorded for application to the sample.

The following facts chosen for a sample problem of quantity discount assume a seller of a household article who, by some strange accident, sells only a single product. The case is not unlike combinations constantly arising, except in being over-simplified. On his single

[30] See note 19, supra.

[31] Deliveries under a "futures" or a long term contract where the market price for new business has risen, may be permitted under the "changing conditions" proviso of subdivision (a) of Section 2 of the Clayton Act, as amended, or by the theory that—the future purchaser having taken a substantially different risk—no discrimination has taken place. See, e.g., HEARINGS BEFORE COMMITTEE ON JUDICIARY ON H. R. 8442, 74th Cong., 1st sess. (Serial 10, 1935), p. 24. The opportunity to enter into such contracts, however, must be extended to all to a reasonable extent.

product he gives two quantity prices, one (on very large quantities) practically available only to the very large customer—the typical mail order house with its large chain of retail outlets,—and another quantity price (on moderate quantity) available to the medium-sized buyer—the typical independent wholesaler or relatively large single store retail distributor. The large customer buys on a four-year contract and is committed for that period of time. The medium-sized customer has bought for many years from this same seller and yet he has not committed himself on any binding contract. The question is, can the seller affirmatively show justification for the difference? [32]

The act provides that it is illegal to "discriminate" in price, but this and other important considerations, such as whether the goods are of like grade and quality, etc., have been arbitrarily excluded for the moment. For present purposes, the big problem for the seller is affirmatively to show that he is justified by the following proviso: "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." (Italics supplied.)

In seeking to support the price differential by a cost differential, the good cost accountant might suppose that he had done his job when he could show that the particular allocation of costs as between sales to the large customer class and sales to the medium-sized customer class were supported by good accounting practice, but not so. The act provides that, if the Commission shows that there has been any discrimination in price or services or facilities, the burden of rebutting the prima facie case thus made shall be upon the person charged with the violation, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the practice. Limited to our assumed problem, this means affirmatively showing that the price differential made "only due allowance" under the above proviso.

Now let us take the more debatable items of cost assumed in the case of this particular seller and erect as to each item a theory of justification for the seller. Then, having observed that there is a sensible justification for making an allowance to the large customer freeing him

[32] The legality of the grant by a rug manufacturer of lower prices to Montgomery Ward & Co. than to retailers generally is questioned in Matter of Bird & Sons, Inc., Federal Trade Commission Docket No. 2937 (1936), 106 CCH, ¶ 8584.

from the item of cost, let us see what the Commission, in light of the *Goodyear* case[33] and other pronouncements, may say on the other side of the case.

The first class of costs includes the items of sales expense. Within this class there are various items such as national advertising, which we will assume for simplification are to be apportioned uniformly by volume. But what about such an item as trade advertising? It should be recalled that the charged discrimination is between a large customer who is on a four-year contract, against a medium-sized customer who is not. Trade advertising has been allocated by the seller to the medium-sized and other independents. No allocation of any substantial size has been made to the large customer who is on the contract basis. The seller, in order to be practical, compares all of the medium-sized customers as a group with the single large customer, since the medium-sized customers buy in total amount a volume roughly equivalent to that of the large customer. The seller argues that none of this trade advertising expense was in fact incurred with reference to the large customer who stands committed for four years. He maintains that there was no point in spending money for trade advertising nor, in fact, for any of the other advertising costs of special nature, as far as the large customer was concerned. Since there was no trade advertising, miscellaneous advertising, promotion or mail advertising cost incurred with reference to the large customer, the seller gives the large customer complete allowance for all of that (or practically complete allowance) in support of the price differential.

What may the Commission say? It may be expected to say that the advertising department and all these advertising expenditures were necessary and unavoidable so far as the seller was concerned; that they were essential parts of his business as a going concern; that the good will which was created by extensive trade, mail and other advertising, redounds to the benefit of the large customer in making more customers for the commodity involved, making more people aware of the seller's goods. The Commission may be expected to say that it was clearly wrong to allocate to the medium-sized customers—at least this particular medium-sized customer who had bought always without any question from this particular seller—any larger part of these costs than was allocated to the large customer. In other

[33] Matter of the Goodyear Tire & Rubber Co., FTC Docket No. 2116 (1936), 105 CCH, ¶ 602.211; 702.308. In this case the FTC considered to be illegal under the unamended Section 2 of the Clayton Act price discrimination not in its opinion justified.

words, the Commission may reject the comparison based on checking the group of medium-sized independents against the large customer and insist that whatever may be said about independents as a whole, it is discrimination to allocate costs to the medium-sized customer which are not charged to the large customer, in the case where the medium-sized customer is a buyer of long standing. The Commission may also say that the large customer, by his cut-price competition, has made it enormously harder for the medium-sized distributor to get along and therefore that the cost of all this extra effort on behalf of the medium-sized and small distributors must be apportioned equally against the large customer because he made it necessary.

What is the result when such imponderables are weighed against each other? The seller is supposed to show affirmatively that his allocation, and the justification based thereon, made "*only* due allowance." Hence if he fails by as much as two or three per cent to show affirmatively that the allowance made in favor of the large customer made *only* due allowance, the Commission may win. The Commission accordingly may argue, not that the cost should be equally apportioned as between the medium and large customers, but rather that there should be *some* allocation to the large customer. Because, if there is *some* charge allocated to the large customer for *each* of the debatable items, the seller is bound to fail by as much as two or three per cent when all such allocations are added together at the end of the contest. Who can say what the partial allowance should be and when it is affirmatively shown that such allowance or the non-allowance is correct? That is the kind of problem confronted in such cases.

Now let us consider further under sales expense such items as salaries and traveling expenses of salesmen, in connection with sales to this large customer and medium-sized customers. Remember that the large customer is committed for four years. The seller, accordingly, in making what he considers "due allowance" for differences in cost, has allocated no cost to the large customer for salaries and traveling expenses of salesmen. He gives the large customer a complete allowance for those items of cost. He argues that such costs were not incurred in sales to the large customer. It sounds at least sensible. On the other hand, the Commission may be expected to say[34] that the sales department was a necessary department of the seller's business; that, being essential, its costs should be allocated to all customers; that the gen-

[34] Compare the Goodyear case, FTC Docket No. 2116 (1936), which raises the same sort of problem under Section 2 of the Clayton Act before amendment.

eral good will built up by the salesmen redounds to the benefit of the big buyer; that it was clearly wrong and discriminatory again, whatever may be said about the group of independents as a whole, to make an allocation proportionally in excess of that made to the large customer against any particular medium-sized independent who did not require any selling effort. This, too, has certain plausibility. If, however, the seller has to compare costs as to each customer with costs as to every other customer and if he must pay the penalties for illegal discrimination where he is unable to justify the comparison between any particular two customers, he has a new and most extraordinary task of cost accounting to perform before deciding what his price differentials should be.

Coming to the question of credit expense, the large customer pays "cash on sight draft." There has never been any credit loss sustained by the seller on sales to this customer and there is no reason to suppose there would be. The seller, therefore, argues that this entire department is unnecessary so far as the large customer is concerned and gives him, roughly speaking, complete allowance for the costs of the credit department. The seller makes some small allocation to this customer for postage and mail expense, banking costs and handling of the sight drafts, etc., but this allocation is insubstantial. The Commission may argue, of course, that the credit department was essential to the seller, and that any allowance was clearly wrong, again, as between the large customer and any particular independent who had "A-1" credit, but yet was not given the benefit of the allowance. A very interesting argument may be urged, to-wit, that, if a seller can give such an allowance to a particular customer whose credit is "A-1," it ought also to be proper to give the same allowance to all other customers who, in fact, mean no credit loss. This logic leads finally to the interesting conclusion that credit costs should be imposed entirely on the bad credit risks. The Commission may be expected to maintain that the seller should make at least as great an apportionment of credit costs on the large customers as on other purchasers.

Coming to the items of manufacturing expense (skipping over many and over-simplifying the remaining items), there appears cost for branches and warehouses. It is quite clear that branches and warehouses are not used in connection with the large customer, but it is also true that there are many independents for whom they are not used. The seller argues that, since they are not essential as far as the large customer is concerned, he should be permitted to give the latter a complete allowance. The Commission may reply with the arguments

previously set forth, perhaps adding that the expenses of branches and warehouses should be charged to the large customer because he made them necessary; that it was his cut-price competition that made it necessary for the seller to install branches and warehouses to carry stocks for the smaller competitors; that as to the particular independents who do not use branches and warehouses, it is clearly discrimination to give the large customers an allowance not given them; and again, this interesting proposition may be urged, that the seller should make "some" allocation to the large customer. Since the statute says "only due allowance," the seller must decide at his peril at what point the allowance is proper and at what further point it is too great.

There will be found analogous arguments on both sides as to costs for such items as shipping and crating (where there is an allowance to the large customer because he takes his goods "knocked down" and not crated); and raw materials and wages (where the seller insists that, with off-season buying and planned production made possible by fitting manufacture on behalf of the large customer into the low points on the production curve, he eliminates various costs and reduces unit costs and therefore an allowance should properly be permitted the large customer).

In real life the case will frequently be more difficult than the assumed sample. Many products will be made in the same plant instead of one. Some sellers will not think that it is possible for the accountants affirmatively to justify the differentials demanded by the large customers. These sellers may endeavor to avoid the act by setting up the large variety of special arrangements that are so intriguing but also so confusing that they will give the courts problems for many years to come. For example, a special product may be made for the large customer—not a pseudo-special product, as by simply changing the name. Another type of arrangement which may be resorted to is the processing contract or the conversion contract. The erstwhile seller, having failed to satisfy himself that he can affirmatively show that the differential which he finds necessary with his large customer makes "only due allowance," etc., decides that he will completely avoid the problem and enter into an arrangement whereby he does not sell at all. The former customer thereafter furnishes the raw materials and the erstwhile seller takes the design and specifications of the former customer and produces the goods on a contract basis for some sort of a toll charge—so much per unit for converting the raw materials into the finished product—no sale at all. Such a deal is not touched by the act unless found to be "indirect" price discrimination. Or the large

customer may rent one of the erstwhile seller's plants with staff, assuming that the volume of the buyer's needs is large enough and assuming that the seller has several plants. Again, the act is inoperative, unless "indirect" price-cutting is successfully invoked. The erstwhile seller is not selling anything; the erstwhile buyer is hiring a staff and renting a plant and the former seller carries on, to the extent that he participates, as an agent of the former buyer. Or the seller may divide his business into separate enterprises. If he has one enterprise which does nothing but sell the large customer, and that is really a separate enterprise, it is hard to see how there can be allocation to that enterprise of the costs of an entirely different enterprise which happens to be generous enough to supply the independent small customers, with all the costs that go with such business. Or, there may be collateral or special contracts. If the seller has need for property or services which the buyer has to sell, he may find that the seller is perfectly willing to pay well for them and the differential may be picked up in that fashion. Again, however, the act suspends the sword of "indirect" price discrimination over the seller's head.[35] On the other hand, the seller is entitled both by reason of express proviso in subdivision (a) and by Supreme Court construction of the Constitution,[36] to select his customers as he may see fit, so long as in good faith and not in restraint of trade. This may protect some of these arrangements.

These are examples of the pathological phases which are likely to develop when cost accountants cannot affirmatively show that the price differentials their clients feel compelled to give reflect only due allowance, etc. The extent to which this type of practice goes will probably determine the success or failure of this act in accomplishing its major objectives. It is an interesting possibility that the act, going into effect as it does on a rising business curve, may not break down in operation, simply because the seller's natural desire to avoid excessive allowances may, with the aid of the act and of the up-trend of business, be capable of resistance to the buyer's pressure. If the act had gone into effect during a depression, the seller would not have been able to resist the buyer's pressure and, as in the case of the NRA,

[35] The prohibitions of subdivision (d) of Section 2 of the Clayton Act, as amended, may apply as well.

[36] Grenada Lumber Co. v. Mississippi, 217 U. S. 433 at 440, 30 S. Ct. 535 (1910). Despite the absence of permissive words, the Sherman Act was interpreted as permitting a seller to select his own customers. United States v. Colgate & Co., 250 U. S. 300, 39 S. Ct. 465 (1919); Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., (C. C. A. 2d, 1915) 227 F. 46.

which was born and killed during a depression, the pressure might have been too great to be endured.

2. *Special Brands*

The so-called private or special brand is the focal point of a group of problems. The way the special brand may and does appear in the field of quantity discounts has been indicated in connection with the foregoing discussion. Such a case arises where the seller manufactures for the buyer what purports to be the buyer's product, to be sold by the buyer under his name and brand. The seller in such cases, it is believed, frequently narrows his margin of profit or even cuts into overhead costs on the theory of increment tonnage above mentioned. In so far as the special brand covers a legitimately individual and separate product, it may more properly be treated as sui generis. The price given is more than likely to be so low in relation to the seller's price on his own comparable advertised standard product that a discrimination will be clearly shown if the differential in price between the two is judged by the "only due allowance" test. The only question calling for decision is whether there must be such a judgment by comparison.

There are at least three important portions of the act that must be brought to bear on such a case. First and foremost is the question whether the product covered by the special brand is a commodity of "like grade and quality" to the seller's most comparable standard product. Second is the question whether the transaction constitutes "indirect" price discrimination. Third is the question whether the seller has merely exercised in a legitimate way his statutory and constitutional right to select his own customers in bona fide transactions and not in restraint of trade.

The approach from any angle practically reduces itself to the single question as to how comparable the commodities are. If the special brand product is truly a different product, then it would seem the seller cannot be deemed to "*discriminate*" in sale of the special product, for there is only one customer and no other price to compare. Likewise, if it is truly a separate product, the seller is clearly within his rights in "*selecting*" only one customer to whom to sell it. It is logically possible, notwithstanding the foregoing and even though the special brand product is a distinct product, to find that the seller is guilty of *indirect* price discrimination. For example, if the special brand customer buys other goods from the seller at standard prices, any very low price on the special brand product, or on any other transaction,

may be a cloak for a secret rebate or discriminatory allowance on the standard product. However, it is confidently asserted that some intent so to use the special brand transaction must be found in order to tie together the otherwise unrelated transactions.

It is an important, but little understood, fact that in all good faith the differentials in prices in ordinary business, between related but separate commodities, cannot be expected to bear any close correlation to the differences in costs of making and selling those separate commodities. For example, where a single type of article is made in a range of sizes, the *price* differentials between sizes are likely to bear a smooth progressive comparability, the price rising on a smooth curve as the size increases. This is because of notions as to what the articles should bring in the market, partly traditional, partly pragmatic psychology. *Costs*, on the other hand, may be found to increase in uneven jumps, depending on the points at which the processes of manufacture require changed and additional effort, special attention or new processes. For example, the work involved may be a large part of the cost and it may be no more, or, due to ease of access, even less, on a larger model. Likewise, costs per unit may be very small on a model that happens to be sold in volume while an even smaller model, having less value to the buyer, may require special runs, small in number of units, at much greater cost per unit.

All this being so—and almost infinite illustrations are available—the workability of the act is thought to be in important measure dependent on a strict construction of the phrase "like grade and quality." Products which are merely similar may be compared and differentials between them forced to fit the Procrustean bed of "only due allowance" for differences in cost between them. If this is done, however, the limitless troubles of Pandora's box will seem to have been delightful nothings compared to the troubles falling on business men and enforcement agencies under such a loose construction of the phrase "like grade and quality."

Returning, with these thoughts in mind, to the problem of the special brand, let us confront some of the types of situations presented.

Suppose the seller's standard advertised commodity is a cooking fat which is based upon olive oil, and suppose that a chain store on its own research decides that cocoanut oil, costing much less and making a product identical in appearance, is just as good, if not better. The seller is induced to put up a special brand using cocoanut oil and sells the product at cost, plus a small mark-up. The ultimate consumer cannot tell the difference in products except that she recognizes the ab-

sence of the well known nationally advertised name. Are these commodities of "like grade and quality?" Again, since the consumer cannot tell the difference in any event, suppose that the seller, in order to save costs incident to special products handled apart from the planned production schedule, gives the special brand buyer identically the same product as his standard product, but packaged under and marked with the special brand. Should the difference depend on chemical analysis? The way the goods are appraised by the ultimate consumer seems important, but his *sole* criterion, where the products look alike, is name. On the other hand, the appraisal of the products by a sophisticated judge in possession of the facts also should be given some importance. The cocoanut oil product was by assumption not an inferior product, but like appearance might as readily have been produced by an inferior oil, say, for example, cottonseed oil.

It is tentatively submitted that the products should not be found to be "of like grade and quality" if any truly substantial difference is found by the sophisticated appraiser. It should be observed that the test of the act is not "like commodities," but "commodities of like grade and quality," a more stringent double requirement. Since the wording of the act is dependent solely upon the grade and quality of the commodity, it seems difficult, however, to find that a special brand sale of an identical commodity, having only a difference in the name marked or labeled thereon, need not be compared with other sales of the same commodity under different markings or labels.[37]

Suppose, again, that the second special brand commodity was sold for a different market, for example, industrial buyers for commercial baking as opposed to housewives for home-cooking. This should probably be treated as making no difference so far as deciding whether the products were "of like grade and quality," except that recognition by the sophisticated industrial user of a difference because of the different base should be given weight if comparison were held necessary. In another respect, however, the difference in the use to be served should have large importance. There is no relationship between the housewife and the commercial baker which should entitle them to the same treatment. This, however, is more a question of functional discounts, which subject will be next discussed.

Suppose now that the special brand product, while substantially

[37] Of this opinion apparently is Rep. Patman, 80 CONG. REC. 8336 (May 27, 1936), and the Federal Trade Commission, Matter of the Goodyear Tire & Rubber Co., FTC Docket No. 2116 (1936), supra note 33.

fulfilling the same purpose to the same degree of efficacy, is entirely different in appearance. In a line where good will attaches to form, color and dress of a commodity and no substantially different appearing commodity would be accepted as the same—especially if style is a factor,—it is submitted that the quality of appearance and style are substantial enough to warrant a conclusion that the two commodities are not of like grade *and* quality.

3. *Functional Discounts*

The group of problems that arises perhaps most often, although not the most important, is that group symbolized by the term "functional discount."[38] The question, in simple form, is whether a seller is permitted under the act to give an allowance, price difference or discount, to one class of buyers (e.g., wholesalers) that is not given to another class (e.g., retailers) when the sole reason, if any, entitling the recipient to receive the advantage, is the function to be performed. It is likely to be true in many cases that the discount given the one class, for example, the wholesaler, cannot be affirmatively shown to make "only due allowance" for differences in the cost of supplying such buyer as compared with a larger customer in the other class, for example, the retailer. The act, however, does not expressly permit discrimination in favor of the wholesaler simply because he is a wholesaler, except where the seller can affirmatively show that the lower price given the wholesaler made only due allowance, etc. This act is a result of the sponsorship of a group of relatively small wholesalers and it would be a weird satire if their creature is found to be the means of depriving them of their traditional discount.[39]

It is submitted with some confidence that, notwithstanding a serious surface hiatus in the act in this respect, there should not be found "discrimination" in the case where the purchasers are in non-competing and substantially different classes of business. They are not under the circumstances in such relationship to each other as reasonably to entitle them to the same treatment.[40]

[38] The legality of certain alleged functional discounts has already been challenged by the Federal Trade Commission. Thus, e.g., note Matter of United States Quarry Tile Co., FTC Docket No. 2951 (1936), 106 CCH, ¶ 8603; Matter of Richard Hudnut, FTC Docket No. 2973 (1936), 106 CCH, ¶ 8648.

[39] The Act was originally drafted by Mr. Teegarden, counsel for the United States Wholesale Grocers Association. See HEARINGS BEFORE COMMITTEE ON JUDICIARY ON H. R. 8442, 74th Cong., 1st sess. (Serial 10, 1935), p. 9.

[40] The original Section 2 of the Clayton Act, which failed expressly to authorize functional discounts, was construed to permit them. National Biscuit Co. v. Federal

The problem in daily commercial experience is not so simple, because the old-fashioned picture of a general wholesaler who intervened between the manufacturer and the old-fashioned retailer is no longer (if it ever was) the true picture. The manufacturer sells not only to the wholesaler, but also to large retailers and to industrial users, institutions and governments,—national, state and local and their agencies. Moreover, the wholesaler competes with the manufacturer in seeking all such business, except wholesale, and the large retailer is likely to do the same. Furthermore, there are as many different kinds of wholesalers (service, non-service, general, short-line, warehouse, drop-shippers, etc.) and as many different kinds of retailers (large, small, mail-order, chain, local, department store, specialized, etc.), as there are colors in the spectrum. Broadly posed then, the question for the manufacturer-seller is how he may classify his customers and to what classes he may give prices, identical within the class but not related necessarily to differences in cost as between the classes.

Here again, manufacturers are being advised that they probably cannot justify under the act differentials between classes unless these differentials stand the "only due allowance" for cost test, except where there is a fairly high degree of support by traditional separation into layers; or where there are, with a fairly high degree of clarity, indications that the two classes are not entitled to like treatment; or where both conditions exist. If there is found to be the necessary relationship between classes of *purchasers* to call for subjecting sales to them to the test of this allowance, then a difference greater than differing costs will put a *competitor of the seller* in a position to claim injury. Furthermore, where the purchaser is in two classifications (as wholesaler and retailer) the manufacturer is being advised not to give a "functional discount" except on the goods used in the particular function.

The manufacturer cannot, without an elaborate study of his customers, feel any confidence in the extensive use of "functional discounts." Hence, here again, there is a tendency to avoid the problem, by erecting blanket classifications as broad as possible and lopping off customers of small size who do not clearly fit in. For example, wholesalers, large retailers, industrial users, institutions and governments may be given single treatment and small retailers left out. Another

Trade Commission, (C. C. A. 2d, 1924) 299 F. 733, cert. den. 266 U. S. 613, 45 S. Ct. 95 (1924); Mennen Co. v. Federal Trade Commission, (C. C. A. 2d, 1923) 288 F. 774.

means of narrowing the problem, which should not be indulged without careful study, preparation and supervision, is to set up agency distribution, at either the wholesale or retail level, or both. In such case the sale is made first by the agent, and treatment between agents need not be comparable.

4. *Advertising and Similar Allowances*

The class of problems which is most intensely felt from day to day, within a range not comparable in breadth or importance to the classification or quantity problems discussed, is that surrounding advertising and similar allowances.[41] Subsection (d) covering this subject, if literally construed, subjects the field of advertising, promotional and display contracts, where related to sale of goods, to a more rigid regime than that governing railroad rates. This is true notwithstanding the fact that advertising and related arrangements are likely to be made more or less secretly and relate to subject matter which is highly intangible and immeasurable. There is no provision in any way preventing secrecy. Furthermore, this subsection on its face purports to operate even though there is no injury to anyone, no discrimination, no subterfuge affecting the price of commodities.[42] The public utility regime, sought thus to be imposed on advertising, window and counter display and promotion contracts, is this: that payment must be "available on proportionally equal terms to all other customers competing...."

The full import of the literal wording of this subsection cannot readily be grasped until there has been careful comparison with the elaborate limitations of subsection (a), *all* of which are wanting in this subsection, and until there has been a factual application of the term "proportionally equal terms." The seller, in his cooperative advertising, if his goods have any prestige appeal, may well wish to accept advertising of his goods by select stores "above the tracks" to the extent that such customers are willing themselves to go, but may not wish any tie-up with customers "below the tracks." The seller, we will assume, pays all those customers that he cares to select for such coopera-

[41] The Federal Trade Commission has issued two complaints alleging the granting of advertising allowances in violation of Section 2 (d) of the Clayton Act, as amended. Matter of Burjois, Inc., FTC Docket No. 2972 (1936), 106 CCH, ¶ 8647; Matter of Richard Hudnut, FTC Docket No. 2973 (1936), 106 CCH, ¶ 8648.

[42] The prohibitions of the subsection were made "intentionally" broad in order to prevent "evasion." 80 CONG. REC. 9561 (June 15, 1936).

tion on an equal plane and carefully polices their performance to see that he gets what he pays for. Under such circumstances, there is no use of advertising or related allowances as a means of indirect discrimination and there seems nothing inherently bad in the practice. However, this is under the act apparently illegal. To escape, the seller must spread his advertising appropriation thinly over all customers in some fashion, buying services he does not want in an amount determined by law, or must cease selling commodities to those with whom he does not advertise, or must cease advertising in cooperation with customers. Needless to say, the last course, which again comes under the head of avoiding the problems rather than solving them, has a strong tendency to prevail.

If the seller decides to endeavor to comply with this subdivision by solving its riddle, he must determine what is "proportionally equal" treatment in respect to advertising, display, promotion, etc.—services which he appraises subjectively on an entirely intangible basis. The obvious standard is straight relationship to the number of units or value of goods bought by each customer. However, the value of the advertising, etc., to the seller bears no such relationship. In the case of window or counter display, perhaps the seller should employ as his unit for pay some such complex formula as total sales of all products times number of stores times seller's products bought divided by the surface footage involved. There are those now abroad who aim to capitalize on this situation by acquiring control of window display and other similar facilities and by peddling the same to manufacturers at what their value to the manufacturer is thought to be. This again would seem to provide an avenue of avoidance of the problems.

There are many other categories of weighty problems currently precipitated by the act,[43] and there are almost infinite extensions, supplementations and multiplications over and above those mentioned in the categories here employed. However, space does not permit completeness, so it is proposed now in a final section to treat the question of the broad effect of the act.

[43] Thus the granting of brokerage fees may violate Section 2 (c) of the Clayton Act, as amended. See Matter of The Great Atlantic & Pacific Tea Co., FTC Docket No. 3031 (1937), 106 CCH, ¶ 8757; Matter of Biddle Purchasing Co., FTC Docket No. 3032 (1937), 106 CCH, ¶ 8758. The furnishing of paid demonstrators on other than "proportionally equal terms" may violate Section 2 (e) of the Clayton Act, as amended. Note Matter of Burjois, FTC Docket No. 2972 (1936), 106 CCH, ¶ 8647; Matter of Coty, FTC Docket No. 2975 (1936), 106 CCH, ¶ 8650; Matter of Elmo, Inc., FTC Docket No. 2974 (1936), 106 CCH, ¶ 8649; Matter of Richard Hudnut, FTC Docket No. 2973 (1936), 106 CCH, ¶ 8648.

THE GENERAL EFFECT OF THE ACT

What is or may be the general effect of the act? Consider the question, for example, as it relates to quantity discounts. What the act may mean in the long run can only be reasoned and guessed on the basis of some assumption as to the degree of rules of reason applied by the courts with reference to the series of flexible words and phrases, substantive and procedural: "discrimination," "like grade and quality," "only due allowance" and "affirmative" showing of justification,—to mention only the high spots. Enforcement has to be assumed before compliance can be assumed. Enforcement depends on many imponderables in addition to the above.

What this portion of the act does *now* varies with the awareness of, the strength of, and the ranges of advantage to sellers at this time. By means of various devices, those sellers who have freedom enough can and have *avoided* their problems rather than solved them, by changes in practice. Certainly a strong tendency in this direction exists among the stronger sellers in situations where they are free so to act. Often they are not free so to act because of the web of contracts and commitments outstanding which cannot all be changed and which in turn represent meeting of competitive pressures. The change indicated in competitive situations seems to be almost impossible to bring about by isolated action of any single seller, no matter how strong. Assuming for the moment that he could revamp his entire price and contract structure so far as his intramural problems were concerned, the change would still be out of the question if his competition were to stand pat on the old footing. No machinery now exists which enables such a seller (and it is believed that most large sellers are so involved at some points) to extricate himself with his fellows. This could be done, for example, by means of a device such as the old trade practice conference of the Federal Trade Commission operating under express statutory sanction, or, in more aggravated cases, by consent stipulations authorized by statute. But such statutory devices[44] do not now exist.

[44] Such statutory devices could be provided by an amendment of Section 5 of the Federal Trade Commission Act, at the end of the present first paragraph thereof, which now reads as follows:

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce." 38 Stat. L. 719, as amended by 43 Stat. L. 939, 15 U. S. C., § 45.

The proposed amendment would read somewhat as follows:

"and, as means to that end, to approve and validate (1) the application of representatives of any industry engaged in commerce to hold a trade practice

Another class of sellers, probably numerically in the vast majority but representing much less in volume of commodities sold, does not know (and cannot afford to hire counsel to advise on) the probable meaning of the act. The members of this class operate so largely on an expediency basis and are so small individually that they have so far made little effort toward adjustment to the act.

The idea seems prevalent, at least in some circles, that clarity will appear later. But the writer believes that existing instrumentalities of clarification (the courts) are not likely to clear up any considerable range of questions in fashion broadly applicable, short of many years, if they ever do. Here again a trade practice conference type of procedure operating under express sanction could cover more ground in a year than the courts could cover in a century. In view of the fact that this act cuts across the very base of the entire commercial structure, having something to say as to every transaction involving price, services or facilities in connection with sale of any commodities in interstate commerce, it focuses an enormous need for the instrumentalities of interpretation to be brought up to date.

As has been shown in passing, there are appalling difficulties (assuming instrumentalities of interpretation are not brought up to date) in solving the problems presented by the act to a degree enabling the seller to rely on his ability affirmatively to show justification for his differentials. This means, as has been indicated, a strong tendency to avoid problems where practicable rather than to face the pains of solving them. If this tendency turns out to be predominant, then the significant effects of the act are to be looked for, not in the direction that the pressures were aimed by Congress, but somewhere off to one side or the other. This may mean that as by-products of the act, entirely unpremeditated and unintended, we will have developments of fundamental and wide-sweeping economic importance, such as the following:

1. Elimination of sales to small buyers;

conference, (2) the trade practice conference rules adopted by any such conference in accordance with any applicable regulations of the Commission where the Commission finds on the facts duly presented to it by such industry that such rules are reasonably calculated to serve that end, whether by clarification or interpretation of any Statute of the United States or application thereof to methods of competition of the particular industry or by provision of means within the industry designed to bring about compliance therewith, or otherwise; and (3) stipulations from any parties complained of in such industries, based on expressed desire of such parties to save the time and expense of formal proceedings and without admission of any violation of law, to the effect that such parties will cease and desist from specified practices deemed by the Commission to be violative of law."

2. One-price sales policies;

3. Rigid price structures in the case of large sellers who try to conform to the act (Such price set-ups, because of the necessity of rigid interrelation of allowances, must be altered throughout, if at all, and would result in fixity. Such a price structure results also in uniformity between sellers, in that all must recognize and adjust to such a structure of any competing seller who is a big factor in the industry.[45]);

4. Elimination of wholesalers;

5. Substitution of agents; and

6. Wide-spread growth of special brands.

Procedurally, we have a similar situation. If the seller wishes to comply and cannot fully avoid the act, he must accumulate evidence as to his own prices and the reasons therefor and cause the same to be accumulated as to his competitors. This means new momentum behind efforts toward closed transaction and current open price reporting and more widespread use of price lists. At the very same time, those who wish to defraud the act will be driven underground into secrecy, subterfuge and indirection. Which force will predominate, it is too early to say.

Again, if the seller wishes to comply, he must have some interpretation to rely on and which he knows his competitors can rely on. The courts cannot provide such interpretations in any relatively short number of years. This means new incentive for obtaining some instrumentality such as the trade practice conference, with statutory authority.

If the seller is to adjust his differentials, he must know what his costs are, as to manufacture, as to sale, as to delivery, and broken down as to customers. This means cost accounting in an enormously expanded fashion.

Whether these or any other things are happening or will happen generally throughout industry, it is too early to say with any scientific authority. There are many forces tending against substantial change in industrial practice, as for example:

The belief that such unfortunate difficulties must be remedied;

The tendency to wait and see what develops in practice;

The tendency to believe in what the individual has already

[45] The act may result in the degree of price uniformity considered by the government to be so objectionable in previous anti-trust cases. Thus, e.g., Sugar Institute v. United States, 297 U. S. 553, 56 S. Ct. 629 (1936).

done as right and to accept any reasonable theory in support, even though not technically a close fit with the act;

The circular restraint of competitors not having first corrected their ways; and

Ignorance.

On the other hand, there are strong forces making for change along the lines indicated:

The tendency of sellers to use the act during good times as leverage to resist pressures for concessions; to wipe out relationships and arrangements found unprofitable;

The attractiveness of the simplicity of a rigid, simple price-list based on that of some leader in the industry.

It is the conclusion of this writer that very considerable change of widespread and fundamental importance has been going on and will go on, but mostly, as indicated, in the form of by-products rather than in the form envisaged by either the legislators or the sponsors. The results may well be worth while, but they will be fortuitous and in many respects contrary to former public policy. The extent of the potential break with past accepted philosophy and practice may be guessed when it is realized that, henceforth, price may be used as a weapon in competition only with the greatest circumspection.