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THE American genius lies quite as much in distribution as in manufacturing. Other peoples have demonstrated equal or greater creative ability in many fields. And it is debatable whether their talents are any less at mass production given adequate economic demand. But they have nowhere shown the American genius for distribution. It is axiomatic that if you manufacture in Detroit and your potential customer lives in New York, you need mutual friends. We seem to have figured out better ways to provide better friends for this purpose than any other nation.

But manufacturing came first. Someone had to build a mousetrap and someone then had to build a better one. Only then did it become apparent that the adage isn't necessarily true—that the mere fact of a better mousetrap is no guarantee of beaten paths—and that even the better mousetraps must be moved out to make room for more.

Our antitrust laws followed the same chronological pattern. Congress first, in 1890, sought to control unbridled power in the manufacturing field.[1] In 1914, it sought to extend that control to distribution—but, principally, distribution as practiced by manufacturers.[2] In 1936, when distribution had become a separate giant with a mind of its own, Congress sought to control it at the distributive levels as well.[3]

It might seem, therefore, that the statutory evolution was as logical and consequential as the business evolution. But it has just not proved out. There is only a seeming parallel between an original effort to prevent manufacturers from cartelizing or monopolizing in order to insure fair and aggressive competition and a subsequent effort to hold myriad forms of distributive organizations in fair competition. What the vast majority of our people believe is the secret of our economic health in manufacturing had not proved in 1936, nor has it since, to be as fully the legal answer to the problems of distribution.

The Attorney General's Committee is acutely, if at times mutely, aware of this.[4] The committee members, too, are chronological in

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1 Sherman Anti-Trust Act, 26 Stat. L. 209 (1890), as amended, 15 U.S.C. (1952) §§1-7.

2 Clayton Act, 38 Stat. L. 730 (1914), as amended, 15 U.S.C. (1952) §§12-27.

3 Robinson-Patman Antidiscrimination Act, 49 Stat. L. 1526 (1936), 15 U.S.C. (1952) §§13, 13a, 13b.

4 This critique is addressed solely to chapter IV of the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, March 31, 1955 (hereinafter cited as REPORT, followed by the page number).

their thinking. In the beginning was the Sherman Act, and it was good. Later came the Clayton Act, and it was good, but no matter what additional purposes it may have had, it should be read in the full light of the Sherman Act. Later came the Robinson-Patman Act, hard after a tragic depression and, on a different economic theory, addressed to different economic problems. The committee had to fish or cut bait.

I submit that it cut bait. But its choices were difficult. It could disapprove of the Robinson-Patman Act as being unwise and un-American for sponsoring soft competition. It could recommend elimination of the act from the body of antitrust laws as such but, somewhat like interstate transportation and communication, advocate legislative and administrative controls outside the strictly antitrust field to curb conceded evils in specific areas of distribution. It could recommend retention of the act's philosophy but with extensive legislative overhaul in the light of its textual ambiguities. It could read and interpret the act strictly without regard to legislative inconsistency over a period of half a century. Or, it could attempt to harmonize by interpretation what Congress, without too much aim at harmony, has thus far legislated.

The committee has chosen the latter route in chapter IV, the portion of its very comprehensive report dealing with distribution.[5] Whether that is wise or not will unquestionably be debated for some time to come, and very frequently, it is feared, on a predicate of whose ox is gored. But it does seem important, in any analysis of this part of the committee's *Report*, that the reader be fully aware of the Sherman Act philosophy with which the committee has approached our existing laws covering distribution. Moreover, the members of the committee are reasonable men—they very sincerely believe in the Rule of Reason (the interpretive cornerstone of the Sherman Act).[6] They have sought to find a harmonious antitrust whole in the laws as they stand today by returning to the philosophy of Sherman especially as applied under the Rule of Reason, Professor Louis B. Schwartz to the contrary notwithstanding.[7]

[5] REPORT 129-221.

[6] This rule of Sherman Act construction was first enunciated in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502 (1911).

[7] It would appear from the *Report* that Professor Schwartz of the committee takes violent issue with this approach. In his general dissent, at p. 392, he says, "One can have more uncertainty and fewer *per se* rules, or less uncertainty and more *per se* rules. Antitrust critics will have to make a choice." His choice appears to be per se illegality as against the Rule of Reason in practically every instance.

Thus, at the outset,[8] the *Report* notices that these "ambiguities and conflicts have not escaped judicial notice." It recalls that the Supreme Court itself has found it difficult "to 'reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts.'" But, as the committee reads the cases, "judicial process has evolved one fundamental accommodation to protect competitive distribution—resolution of every statutory doubt in favor of the Sherman Act's basic antitrust directives." And, having come to this conclusion, the committee says, "we accept the views expressed by the Supreme Court accommodating all legal restrictions on the distribution process to dominant Sherman Act policies."

This approach, then, underlies a very ably written discussion of the topics which follow. Because of it, few affirmative legislative recommendations appear. Rather is the general result a well-intended and well-executed lecture on how, hopefully, the law should be interpreted administratively and judicially. And no matter how it may be received in various quarters, it constitutes, for the practitioner, the completest yet most compact hornbook on the subject now available.

A. REFUSALS TO DEAL

Refusals to deal are not governed, as such, by any specific antitrust provision, which may account for much of the confusion in this area. It is not at all unusual to find well-informed businessmen who believe that *any* refusal to deal violates "those antitrust laws of yours."

The *Report* does much to clarify the status of refusals to deal. While they must be measured for legality against the Sherman, Clayton and Federal Trade Commission Acts, they are *generally* safe from antitrust if not conceived in combination or conspiracy. Combination boycotts have long been condemned. But even more deeply rooted in our law and tradition is the concept of a competitive market in which buyers and sellers are free to associate or disassociate as individual discretion dictates.

While all agree that the antitrust laws block combination refusals to deal[9] (except in the excluded field of labor), it also is clear that they place numerous restrictions on individually conceived refusals. When done for monopolistic ends (Sherman), or with resulting lack

[8] REPORT 131-132.

[9] Eastern States Retail Lumber Dealers Assn. v. United States, 234 U.S. 600, 34 S.Ct. 951 (1914); Fashion Originators Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703 (1941); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 65 S.Ct. 661 (1945).

of "proportionally equal" treatment (Robinson-Patman), they may be vulnerable. The committee, with considerable caution, sees danger (Clayton Act, section 3) in an implication that those *not* cut off by a seller may, by that token, have tacitly agreed to exclude the seller's competitors.

Again, the committee points out that the Federal Trade Commission has often used section 5 of its organic act to reach a pattern of refusals which smacked of resale price maintenance.[10] Since, however, as a practical business matter, price cutting is more often than not the reason behind a refusal to deal, widespread use of section 5 on this theory could leave little or nothing of the basic right of refusal asserted by the committee. On other pages in other connections, the committee has given more battle to Trade Commission theory. It may here have been caught in a philosophical conflict of its own—between the virtue of a free market and the Sherman Act vice of resale price maintenance.

Nevertheless, the *Report* does find that "an appropriate balance" has been achieved judicially between individual freedom and protection from trade restraint. This seems to be a sound conclusion as of the date of the *Report*.

B. EXCLUSIVE DEALING

Typical arrangements within the category of exclusive dealing run the gamut from outright illegality to questionable legality. As in the case of combination boycotts, little can be said for "tying" arrangements. They have been held many times to violate section 3 of the Clayton Act and the committee has no quarrel. It notes that the original goodwill exemption has now been confined to those specific situations in which restrictions are indispensable for protection. Beyond that, the Supreme Court has said flatly, in the *Times-Picayune* case,[11] that tying arrangements are illegal whenever the supplier "enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained. . . ."

The committee is less satisfied with the law as it applies to exclusive arrangements or, more particularly, with the *Standard Stations* case,[12] a "5 to 4 decision by the Supreme Court" accompanied by "a

[10] See cases cited, REPORT 136, n. 30.

[11] Times-Picayune Pub. Co. v. United States, 345 U.S. 594 at 608, 73 S.Ct. 872 (1953).

[12] Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S.Ct. 1051 (1949).

perplexing opinion whose rationale is not clear."[13] The committee faces this decision bravely not only in its own "exclusive dealing" context but elsewhere wherever the statutory phrase "substantial lessening of competition" requires analysis.

It will be recalled that in the *Standard Stations* case requirements contracts covering sixteen percent of the existing retail gasoline stations in the "Western Area" were held to violate section 3 because they "foreclosed competition in a *substantial* share of the line of commerce affected." This has become known as the "quantitative substantiality" test as distinguished from one which looks directly at the actual or probable economic effect in that particular market under its prevailing circumstances. The committee wants none of it.

This is not to say that the committee feels that all requirements contracts are lawful. It is to say that the committee, as avowed advocates of the Rule of Reason, would in each case examine market effect rather than postulate per se illegality wherever the quantity of commerce involved appears substantial. This necessarily sets the committee off on a somewhat different tack from its approach to "tying" arrangements, for there, as noted, it feels that "a relatively narrow inquiry" is sufficient.

Where coverage is substantial, the committee concludes: all tying arrangements are bad (see *Times-Picayune*); only *some* requirements contracts are (don't see *Standard Stations*). The *Report* points out, realistically, that requirements contracts may often be preferred by customers to assure source of supply, that they often fortify the competitive position of newcomers and weaker concerns in the market. But it concedes that some requirements contracts could be as objectionable as a tying arrangement. Its position, therefore, is this:

> "In our view, the mere coverage of a substantial *volume of commerce* by exclusive dealing arrangements, while a factor to be considered, is not tantamount to 'foreclosure' of rivals from access to a substantial market, so that some analysis of particular distributive patterns is essential to any determination of actual foreclosure."[14]

But how to get around *Standard Stations?* The committee resorts to a not altogether successful *tour de force.* It points out that since that decision, the Federal Trade Commission has voluntarily taken the "actual foreclosure" approach in preference to the Supreme Court's

[13] REPORT 141.
[14] REPORT 147.

"quantitative substantiality."[15] It then says in effect that what is good for the commission is good for the courts.

> "We do not understand *Standard Stations* to suggest that Congress envisaged the parallel enforcement of the statute by the Department of Justice and the Federal Trade Commission to rely on disparate legal principles, depending solely on whether the initial adjudication is rendered by a judicial or an administrative tribunal."[16]

Where this leaves the matter is the reader's guess. If the Federal Trade Commission were to reverse field and apply the *Standard Stations* rule (which it has every right to do), would this part of the *Report* become a wilderness voice? Without legislative recommendation of any kind, this part is little more than a lawyer's brief on one side of a very real question.

C. RESALE PRICE MAINTENANCE AND "FAIR TRADE"

The committee's position on "Fair Trade" is quite the clearest in this chapter, if not in the entire *Report*. The committee is against it, and would do something about it. It would repeal the federal enabling statutes, Miller-Tydings[17] and McGuire.[18]

It could have taken no other position consistent with its conviction that Sherman Act philosophy should prevail in the laws of distribution. For fair trade has twice been made an express statutory exception to that philosophy. It is price fixing in an otherwise free price area. It is the one safe island in a sea of per se illegality where even the Rule of Reason finds no place.

The committee has powerful friends at court. Both the Department of Justice and the Federal Trade Commission are for repeal.[19] But it has enemies in retailers' and manufacturers' groups who reasonably seek protection of good will against price cutting and "loss leader" selling. The committee has a large portion of the judiciary in its camp, but, judging from past performance, it has the majority of Congress against it.

The committee itself was not unanimous. A minority of the members feel that there must be statutory treatment of problems like loss leader sales and debasement of business good will. Especially do

[15] The Maico Co., F.T.C. Docket No. 5822 (1953).

[16] REPORT 148.

[17] Miller-Tydings Act, amending §1 of the Sherman Act, 50 Stat. L. 693 (1937), 15 U.S.C. (1952) §1.

[18] McGuire Act, amending §5 of the Federal Trade Commission Act, 52 Stat. L. 111 (1938), 15 U.S.C. (1952) §45.

[19] REPORT 153, n. 90.

they fear that repeal would adversely affect the small businessman.

It is submitted that the committee omitted the strongest reason for the repeal of fair trade in its present form. It doesn't work.

D. PRICE DISCRIMINATION

The vast field of commercial transactions which the Robinson-Patman Act controls has quite logically been subdivided by the committee according to the problems and questions which arise most frequently rather than according to the sections of the act as such.

1. *The Prerequisite of "Goods of Like Grade and Quality"*

Section 2(a) applies only to discriminations "between different purchasers of commodities of like grade and quality." Unlike "cost justification" and "good faith meeting of competition," which are affirmative defenses to a prima facie case of illegal price discrimination, this provision determines whether the act is applicable in the first instance. If the differential prices were for commodities of unlike grade and quality, section 2(a) simply does not apply and there can be no subsequent occasion for raising the affirmative defenses available under the act.

The committee points out that there have been very few judicial or administrative interpretations of "like grade and quality." To the extent that there have been, it seems clear today that mere differences in brand names and labels, or nominal physical differences not affecting functional utility, or different size packaging and methods of packaging will not render the goods unlike in grade and quality within the meaning of the act.[20] Indeed, recently, the Federal Trade Commission has held that a grocery pack of coffee is of the same grade and quality as an institutional pack even though the latter contained an additional type of coffee bean which gave it a staying power lacking in the other and was packaged differently and in different sizes.[21]

The committee believes that these interpretations are sound but, more important, that it is a mistake to dwell too long on this question in a price discrimination case. Its point is well taken. It recognizes that there are economic factors inherent in brand names and national advertising which create a necessary differential in consumer acceptance. Brand name goods often command a significant premium over

[20] REPORT 157. Boss Mfg. Co. v. Payne Glove Co., (8th Cir. 1934) 71 F. (2d) 768; Bruce's Juices v. American Can Co., (D.C. Fla. 1949) 87 F. Supp. 985; Goodyear Tire and Rubber Co., 22 F.T.C. 232 at 290 (1936); Sylvania Electric Products, F.T.C. Docket No. 5728 (1953).

[21] General Foods Corp., F.T.C. Docket No. 6018 (1955), 3 CCH TRADE REG. REP. ¶25,379.

private "economy" brands in the market place. And, under the language of the act, such economic differences, if demonstrable, can be said to bear on the question of "like grade and quality." The committee recommends, however, that rather than explore them in an initial jurisdictional inquiry, these economic factors should be evaluated under the "more flexible 'injury' and 'cost justification' provisions of the statute." If economic differences are demonstrable, the seller's price differentials may well have caused no injury to competition or may well be cost justified through equivalent savings in advertising and promotion. The committee's view is entirely consistent with its basic approach to the entire subject of distribution in that it again places emphasis on the actual effect in the competitive market with, of course, the Rule of Reason hovering in the background. The committee sums up:

> "Both these potential defenses should be evaluated by the Commission in any preliminary investigation. In this way, a strict interpretation of the statutory phrase 'like grade and quality' can facilitate Federal Trade Commission enforcement while yielding realistic results in practice."[22]

While the Federal Trade Commission may believe that consumer preferences should be examined only under the "cost justification" provision, it seems likely, nevertheless, that the commission will favor the strict interpretation of the phrase recommended by the committee since it will raise less question as to the commission's jurisdiction in the first instance.

2. *Competitive "Injury," and Proof of Prima Facie Violation of the Price Discrimination Law*

For some years, the mere fact of differential pricing alone made out a prima facie case under section 2(a) of the act. It may still in the influential Second Circuit where, as late as 1951, the court of appeals reiterated its surprising *Moss* holding[23] that the burden of disproving injury is on any seller shown to have granted differential prices.

[22] REPORT 159.

[23] Samuel H. Moss, Inc. v. Federal Trade Commission, (2d Cir. 1945) 148 F. (2d) 378; Federal Trade Commission v. Standard Brands, Inc., (2d Cir. 1951) 189 F. (2d) 510.

[24] Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission, (7th Cir. 1951) 191 F. (2d) 786.

But the committee feels that the subsequent *Minneapolis-Honeywell*[24] decision of the Seventh Circuit and the *Automatic Canteen*[25] decision of the Supreme Court (although the latter involved the buyer's, not seller's, burden) have isolated and immunized the *Moss* case. And it points to the Federal Trade Commission's recent *General Foods* decision in which it is avowed that in a price discrimination case " 'counsel supporting the complaint has the burden of proof to establish the necessary . . . injury.' "[26] Indeed, the commission disclosed that the court of appeals, in the *Moss* case, had volunteered a principle which the commission's attorneys had never urged upon that court.

What then is the necessary injury which the commission concedes it must establish? It is not as clear that the commission and the committee would agree on this,[27] although the commission is placing increased emphasis on actual economic impact on the market.[28]

The committee suggests "that analysis of the statutory 'injury' [must] center on the vigor of competition in the market rather than hardship to individual businessmen." This, it will be recalled, is the characteristic resolution by the committee of any conflict between Sherman and Robinson-Patman. The conflict is between hard competition and soft competition, and the soft must accommodate.

> "Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at the serious risk of stifling the competitive process itself."[29]

And the reconciliation:

> "Such a view comports with the text of Section 2(a). We emphasize that it is not 'injury' *to competitors* but adverse effects on 'competition *with*' parties privy to discriminations that the statute expressly forbids. Hence we believe that criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law."[30]

[25] Automatic Canteen Co. of America v. Federal Trade Commission, 346 U.S. 61, 73 S.Ct. 1017 (1953).

[26] REPORT 162, quoting General Foods Co., F.T.C. Docket No. 5675 (1954), 3 CCH TRADE REG. REP. ¶25,069 at p. 35,212.

[27] See the position taken by the Federal Trade Commission in Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948), but reversed (7th Cir. 1951) 191 F. (2d) 786.

[28] E.G., Maico Corp., F.T.C. Docket No. 5622 (1953); Pillsbury Mills Corp., F.T.C. Docket No. 6000 (1953); Anchor Serum Corp., F.T.C. Docket No. 5965 (1954), affd. (7th Cir. 1954) 217 F. (2d) 867.

[29] REPORT 164.

[30] REPORT 165.

The committee's recommendation finds a sympathetic ear here because it shows a more realistic understanding of the competitive process than did Congress perhaps in superimposing the new Robinson-Patman concepts on the old Sherman and Clayton Acts. The fact remains, however, that, in 1936, Congress added to the well known injury criteria of "substantial lessening of competition" and "tendency to monopoly," a third criterion of whether the effect may be to "injure, destroy or prevent competition with" grantors or recipients of favored treatment. The committee may argue for realistic interpretation of this addition in the light of Sherman and Clayton, or may straight-facedly argue that the prepositions "with" and "to" are quite different (i.e., that injury to my competition *with* you is quite different from injury *to* me), and it may say that predatory price cutting must be set aside as an isolated exception to its basic interpretation, but, still, Congress, in 1936, must have thought something new had been added.[31] If the committee is right, Congress was mistaken and did not add anything new. It simply used new and different words to say "substantial lessening of competition" and "tendency to monopoly," the two things it had been saying since 1914.

Despite the committee view, it would seem that the legislative history and the cases support the narrower inquiry as to injury under Robinson-Patman *and* that such an inquiry does not consist in many fact situations with basic antitrust policy. Consistency may not be necessary or advisable, but inconsistency should be recognized for what it is before that question can be determined.

But if the committee has no trouble with competitive injury, it is concerned over the Federal Trade Commission's enforcement policies once it has found an illegal price discrimination. It notes with regret a tendency by the commission to throw the entire book at a respondent even though he has been found to have violated only one chapter. It thinks "that Commission orders, indiscriminately proscribing all differentials regardless of amount, necessarily impede desirable flexibility in pricing."[32]

The committee is straining a bit to protect respondents in advance against the consequences of future pricing conduct which neither can quite predict. The *Ruberoid* case[33] would appear to have greatly

[31] That it did, see S. Rep. 1502, 74th Cong., 2d sess. (1936); H. Rep. 2287, 74th Cong., 2d sess. (1936).

[32] REPORT 168.

[33] Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 72 S.Ct. 800 (1952).

clarified the scope of the commission's orders in that it held the statutory qualifications and defenses against illegal discriminations to be "necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso*."[34] The committee, of course, approves this decision but wants the commission voluntarily to go further by affirmatively indicating areas in which the future conduct of the respondent would not be subject to attack. This, it would seem, injects a new and much more far-reaching idea of the commission's function in Robinson-Patman Act cases than is urged in any other part of the committee's *Report*. The commission has shied away from such a role in advance of proceedings and has viewed it with horror once a proceeding is successfully underway. Given the commission's presently accepted way of doing business, the *Ruberoid* case would seem to provide a satisfactory clarification of the scope of its orders. If more than that is sought by the committee, it might well have recommended comprehensive legislative redefinition of the functions and operation of the Federal Trade Commission.

3. *The Cost Defense*

Cost justification under the act, an affirmative defense written directly into the basic price discrimination section, has been a mirage, and the committee very ably documents the fact. In nineteen years, this defense has twice succeeded completely and twice partially. In seven other recorded cases it has failed summarily.[35] And unquestionably the futility of it has, in many other cases, persuaded respondents to accept consent orders.

Having recognized how complex the problem is and how excessive the demands on a respondent to make this defense, only, in all probability, to have it rejected, the committee has had great and understandable difficulty in coming up with any solution. It recommends the adoption of "realistic standards acknowledging the inadequacies inherent in accounting measurements of price"; it recommends "recognition that a Robinson-Patman cost defense is not susceptible to testing by precise or mechanical rules"; it recommends "that a reasonable approximation of production or distribution cost variances to price differentials—when demonstrated in good faith through any authoritative and sound accounting principles—suffice"; and it recommends "statutory change" only in the event that administration in this man-

[34] Id. at 476.
[35] REPORT 171, nn. 142-145.

ner "proves unfeasible."[36] When the smoke has cleared, it seems apparent that the committee has conceded, in effect, that it doesn't exactly know what to do about the defense, except that the Federal Trade Commission ought to be "reasonable" about it and less strict in interpreting it.

Most attorneys, who have represented a respondent before the commission in a case of this kind, will wholeheartedly support such a suggestion, but it is doubtful that the committee in this respect has been able to make any very considerable contribution. The act provides such a defense. How to make it available remains a question. Perhaps a patch of blue sky lies in the fact that the Federal Trade Commission also recognizes that it is a very real problem and, in consequence, has appointed a distinguished advisory committee to seek the answer.

4. *Quantity Limits Proviso*

The "quantity limits proviso" places a potential roof over cost savings resulting from economical quantities even where a cost defense might have been established. The proviso has been invoked by the Federal Trade Commission just once and that proceeding is presently under judicial review.[37] Accordingly, there is no authoritative law on the subject.

The committee condemns it for "ineptly sanctioning a crude form of price fixing by administrative fiat where competition should safeguard the public interest." The fact that the commission has seen fit to invoke the proviso only once in nineteen years indicates that it plays no basic part in the commission's work. And most lawyers will agree with the committee: "We believe that any rational antitrust policy must leave the American business community free to explore new methods of distribution."[38]

5. *"Changing Conditions" Exemption*

The "changing conditions" proviso of section 2(a) has arisen in only two reported cases.[39] It sought to exempt certain transactions such as (but not limited to) distress sales under court process or in

[36] REPORT 174-175.

[37] Quantity Limit Rule 203-1, 17 FED. REG. 113 (Jan. 4, 1953). See B. F. Goodrich Co. v. Federal Trade Commission, (D.C. Cir. 1953) 208 F. (2d) 829.

[38] REPORT 177.

[39] Frederick W. Huber, Inc. v. Pillsbury Flour Mills Co., (D.C. N. Y. 1939) 30 F. Supp. 108; Moore v. Mead Service Co., (10th Cir. 1951) 190 F. (2d) 540.

discontinuance of business which might otherwise be vulnerable as price discriminations.

Since no particular light has been thrown on the proviso by the courts or the Federal Trade Commission, the committee has tried its own hand. It notes that while the proviso cites specific examples, each of which reads on the "marketability of the goods concerned," to confine its scope simply to deterioration of the seller's goods or business position would be to ignore the equally prominent statutory phrase "changing conditions affecting the market." It concludes, therefore, that a broader and more logical interpretation would be to apply it to all transactions which reflect *"a spontaneous shift in market conditions beyond the seller's control."*[40] Here, as always, the committee is concerned with the actual state of the market and protection of the seller's flexibility in it. Its thesis makes for a logical and equitable interpretation.

6. *The "Good Faith" Meeting of Competition Defense*

It is in its treatment and interpretation of this defense that the committee's underlying Sherman Act philosophy becomes most apparent. It feels that if the defense were not absolute, it would be a victory for soft Robinson-Patman Act competition over hard Sherman Act competition; that if victory there must be, it should go the other way. But, as in other instances, the committee believes that reconciliation by administrative and judicial interpretation can be employed to obviate the need for legislative change.

The *Standard Oil* decision[41] provides direct support for the committee's basic position in this area, since it clearly held that, at least under certain circumstances, the defense is absolute. But the committee quite accurately notes that the Supreme Court, in deciding that case on its own facts, provided no clear-cut guide for the application of the defense to numerous other fact situations. The Court did not provide guidance as to (1) what constitutes a competitor's lawful price, (2) whether the defense is available in obtaining, as distinguished from retaining, a customer, (3) whether the defense applies to regular, as distinguished from sporadic, competitive differentials, (4) whether there can be only dollar-for-dollar meeting, (5) precisely what constitutes "good faith," and many other questions. The committee finds further dissatisfaction in the fact that, much as has

[40] REPORT 179.

[41] Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 71 S.Ct. 240 (1951).

been the experience with the cost defense, "not a single seller in a recorded case to date has succeeded in finally justifying a challenged discrimination by recourse to Section 2(b)'s 'meeting competition' defense."

Accordingly, while the committee "approves the result of the *Standard Oil* decision as consonant with the nation's antitrust policy," it feels that the absolute defense must be available in a variety of other situations untouched by the Court's opinion. "Anything less," the *Report* states, "would move the price discrimination statute into irreconcilable conflict with the Sherman Act."[42]

The committee would, for instance, give a businessman the benefit of the doubt on the question of whether he knew he was meeting a lawful price. It would not confine him to sporadic or isolated meeting of competition but would give him flexibility "to cope with competitive pressures so long as they exist." It would not hold him to exact dollar-for-dollar meeting of competition but would allow him to be the law's typical "reasonable and prudent person." It would make the defense quite as applicable to the obtaining of new customers as to the retaining of old. In short, it would apply a form of Rule of Reason in every situation, and "since the statute may be presently interpreted as we propose, we do not consider legislative amendment necessary now."[43]

Others do—and in both directions. Several members of the committee dissent, not only from its suggested interpretive guides, but from the *Standard Oil* rationale. Their views are strongly shared by Senator Kefauver and a sizable group of senators and congressmen who have introduced, in the present Congress, an "equality of opportunity" bill which would remove the absolute defense where the discrimination "may substantially lessen competition or tend to create a monopoly."[44] Conversely, and since the *Standard Oil* decision, Senator Capehart and others have introduced bills which would codify and extend the *Standard Oil* rationale along the lines suggested by the committee.[45]

There is great fear among independent wholesalers and retailers that if the defense is to be administered as the committee suggests, it will

[42] REPORT 181.
[43] REPORT 182-184.
[44] S. 11, 84th Cong., 1st sess. (1955) and H.R. 11, 84th Cong., 1st sess. (1955).
[45] H.R. 3949, H.R. 4824, 84th Cong., 1st sess. (1955).

mark a return to pre-1936 days with the chains and other mass purchasing organizations free again to exact preferential treatment from suppliers. As applied to such independent wholesalers and retailers, the point seems well taken. And, in any event, it serves to emphasize the very philosophical conflict which the committee seeks to reconcile. If the law is to protect hard competition, it can hardly assure soft competition at the same time. The conflict seems too basic and deep-rooted in the present antitrust structure to be capable of solution merely by partisan interpretation one way or the other. Whichever way our people would have it in the best economic interest of the country, the statutory language should be clarified.

7. *The "Brokerage" and "Proportionally Equal" Allowances or Services Provisions*

The committee has had much less trouble with these provisions despite the fact that they are about as ineptly written as anything on our books today. Strangely enough, their very ambiguity and inconsistency, as between themselves and as against other sections of the act, have led to clear judicial and administrative interpretation. Respondents can disapprove of, but rarely disagree on, what they mean today.

A. Brokerage. The committee finds that this provision has granted a preferred and monopolistic position to the "independent" broker, thus legalizing a form of discrimination right in the statute designed to outlaw it. Accordingly, the brokerage clause is at odds with "broader antitrust objectives," and the committee recommends legislation "to restore the original vigor of the exception 'for services rendered' in Section 2(c)," i.e., to make such payments available to all for services actually rendered. The committee believes that this would "revive that competition in the distribution process whose benefit the customer must now by law forego."[46]

The view here is that there can be no question but that the brokerage clause, as presently interpreted, is what the committee says it is. Again, however, if such payments are to be opened up to all comers, there can be justifiable fear by independent wholesalers and retailers of a return (mentioned above also in connection with the meet competition defense) to pre-1936 days in which the chains and mass purchasers were able to exact preferential treatment through hidden rebates and brokerage allowances. The committee is unquestionably

[46] REPORT 192-193.

aware of this but, on Sherman Act balance, would prefer aggressive competition in this area to protection of the favored few.

B. Allowances and services. No legislation is recommended by the committee in the case of allowances and services. The committee sees no need for change in sections 2(d) and (e) of the act, principally because "the allowances and services provisions, in our view, are beginning to be administered in a workable way."[47] The committee's view is that, whereas the Federal Trade Commission in the past took an ostrich-like attitude toward the business difficulties inherent in complying with the "proportionally equal" requirements, it has recently, in its Trade Practice Rules for the Cosmetics Industry and its opinion in the *Soap* cases,[48] come above ground. Given this encouragement, the committee prefers further interpretive reform to legislation.

Specifically, it deplores the present disparity under one statutory roof in the "consequences which attach to economically equivalent business practices." Price discriminations under section 2(a) are not proscribed unless they injure competition and cannot be justified. In contrast, proportionally *unequal* allowances are illegal per se. This sharp inconsistency (born, it is submitted, more of sloppy draftsmanship than design) should be eliminated by giving sections 2(d) and (e) a section 2(a) interpretation. While it is believed that these sections can and should be administered consistently with the price discrimination objectives of section 2(a), they remain inconsistent and inept in their language. Legislative editing would seem still to be in order.

8. *The Buyer's Liability*

One of the historical mysteries surrounding the Robinson-Patman Act is that section 2(f), which seeks to control the beneficiaries of price discrimination, was added at the last minute despite the fact that the growing and uncontrolled power of these beneficiaries in 1936 was the principal concern of Congress. And despite its pertinence to the underlying purposes of the act, it has been seldom used and never authoritatively interpreted until the Supreme Court's *Automatic Canteen* decision.[49] The Court there established a double stand-

[47] REPORT 191.

[48] Lever Brothers Co., Proctor & Gamble Co., Colgate-Palmolive-Peet Co., F.T.C. Dockets Nos. 5585, 5586, 5587 (1954).

[49] Automatic Canteen Co. of America v. Federal Trade Commission, 346 U.S. 61, 73 S.Ct. 1017 (1953).

ard. Sellers or grantors of preferential treatment continue, under earlier decisions, to carry the burden of disproving illegality. But *Automatic Canteen* holds that a buyer, at least in so far as the cost defense is concerned, has no such burden; that the Federal Trade Commission must itself establish, as against him, the "*knowing* receipt of an *illegal* concession as the essential element of the buyer's offense."

The committee merely notes and approves the *Automatic Canteen* decision in passing. It approves the Court's recognition of "the imperative necessity for preserving the legal freedom of buyers to engage in aggressive bargaining over price as basic to effectively competitive distribution."[50]

This decision and the committee's approval of it are sound, given the premise that the text of the act must be reconciled "with the broader antitrust policies" of other antitrust legislation. But it may still be asked, in view of the history and the language of the Robinson-Patman Act, whether Congress did indeed intend to create such a double standard with the more lenient half applicable to buyers. The committee correctly points out that the precise application of the *Automatic Canteen* interpretation "cannot yet be told." But there again appears to be room either for legislative reconciliation or a clearer legislative indication that "the broader antitrust policies" do not apply in this area.

9. *Criminal Prohibitions of Discriminatory Practices*

When the committee moves over to the criminal side of price discrimination, it becomes less satisfied with interpretive reform. It can see nothing good or desirable in section 3 and recommends its repeal "as dangerous surplusage."[51]

Much can and should be said for this view. The courts have been confused as to the constitutionality of section 3 and as to whether it is an antitrust law in the first place.[52] There has never been a conviction under it, and it has been rarely used by prosecuting authorities except as a throw-in with other charges. And, in the absence of government enforcement, it has been seized by private treble damage litigants not as a vehicle for crime prevention but of recoupment of actual damages plus enrichment through punitive damages. Treble damage litigation is, of course, authorized under the antitrust laws but, unlike the civil condemnation of price discrimination in section 2(a),

[50] REPORT 196.
[51] REPORT 201.
[52] See cases cited, REPORT 199-200, nn. 223-227.

section 3 provides no express defenses. The treble damage remedy is sufficiently extreme that it should not be available in an area to which the government itself gives short shrift. As the committee says, "it does not serve the public interest of antitrust policy."

10. *Functional Discounts and Delivered Pricing Practices*

A. Functional discounts. The classification of buyers and discounting to them in accordance with their respective distributive services presented no legal problem under the original Clayton Act or during the early days of the Robinson-Patman Act. During those years, wholesalers, jobbers and retailers were easily identifiable as separate links in the chain of distribution, each performing a well understood set of duties. In that state of things, functional discounts were generally regarded as lawful because of the lack of adverse effect on competition.

However, since World War II, myriad forms of distributive organization have arisen which defy such simple classification. There are specialists performing a narrow distributive service; there are integrated concerns doing the entire job from the manufacturer's to the consumer's door. The Federal Trade Commission soon attempted to untangle and subdivide the integrated distributor for discount purposes. Thus, with seeming logic, it ruled that a distributor could receive a wholesaler's discount on goods resold to retailers, but only a retailer's discount on goods resold directly to the consumer, a test based on the nature, in each instance, of the distributor's resale activities as distinguished from his buying functions.[53]

The committee breaks comparatively new ground in this area by concluding that "to relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing." The short of it is that the committee would break with the commission's interpretation and, wherever the distributor "fulfills the wholesale function, by relieving his suppliers of risk, storage, transportation, administration, etc.," would allow him the wholesaler's discount on all purchases without regard to whether he thereafter resells to the consumer at retail. Otherwise, the committee has it, the seller would be getting a free ride and "the free play of competitive forces" would be prevented.[54]

The now familiar question arises whether such an interpretation, albeit in the Sherman Act interest, would not turn the clock back-

[53] Sherwin-Williams Co., 36 F.T.C. 25 (1943); Standard Oil Co., 41 F.T.C. 263 (1945).

[54] REPORT 207, 208.

ward to the pre-1936 imbalance between the chains and independent wholesalers and retailers. Presumably, such an interpretation would promote increased integration in distribution and that may well be the order of the day, but again it may be questioned whether interpretive reform is an adequate substitute for a re-expression by Congress as of today of what it seeks to accomplish under a price discrimination law.

B. *Delivered Pricing.* For some years now, the antitrust lawyer's favorite parlor game has been to resurrect the supposedly dead and buried "mill net theory" in order to take another swing at it. The majority of the committee takes its swing, while a minority actually appears hopeful of reincarnation.[55] The latter seems unlikely at present but, if not, it is well that the committee as a whole has realistically endorsed delivered pricing as a lawful way of doing business, absent conspiracy. Its discussion of the development of the law in this area is extremely able, and the present Federal Trade Commission apparently shares its views.

CONCLUSION

The brief but frequent notation of dissenting views throughout the *Report's* chapter on distribution indicates that the committee did not reach its numerous conclusions without a vigorous backroom struggle. It has been thus among lawyers since 1936. And the mere but continuing presence of that struggle points up what the committee has done its best to smooth over—that there are glaring inconsistencies and conflicts within our antitrust structure.

The committee has, in my judgment, performed its basic task admirably. This was to provide "a thoughtful and comprehensive study of our Antitrust Laws."[56] Chapter IV is just such a study and contains within its brief compass of ninety-three pages a treasury of legal research in a very complicated field.

It is not as clear that this particular chapter of the *Report* has prepared "the way for modernizing and strengthening our laws."[57] The

[55] REPORT 217-218.

[56] Attorney General Herbert Brownell, Jr., announced this goal in an address on "Our Antitrust Policy" before the Fourth Circuit Judicial Conference on June 26, 1953. REPORT iv.

[57] Concurrently with Mr. Brownell's announcement of a national committee to study the antitrust laws, the President of the United States said that he hoped the committee would "provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition." REPORT iv.

committee has, in many areas, shied away from legislative recommendations and instead urged interpretive reform according to its own lights. I find myself in agreement with its basic Sherman Act philosophy and its antipathy to soft competition. But I cannot agree that laws which are said to need so much interpretive reform should be left as they are. Nor can I agree that interpretive reforms suggested by lawyers and economists should be substituted for a clearer legislative restatement of such antitrust controls as our people believe necessary to the continuing prosperity of our distributive economy.