

1946

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Recommended Citation

Milton D. Solomon S.Ed., *UNFAIR COMPETITION--ROBINSON-PATMAN ACT--MEASURE OF DAMAGES IN PRICE DISCRIMINATION CASES*, 44 MICH. L. REV. 680 (1946).

Available at: <https://repository.law.umich.edu/mlr/vol44/iss4/18>

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UNFAIR COMPETITION—ROBINSON-PATMAN ACT—MEASURE OF DAMAGES IN PRICE DISCRIMINATION CASES—Defendant, a seller engaged in interstate commerce, paid clerks' salaries in unequal amounts to customer-clerks competing in the distribution of defendant's products. Where this discrimination had no basis or standing other than the seller's discretion it was held to amount to a violation of section 2, subsections (d) and (e) of the Clayton Act, as amended by section 1 of the Robinson-Patman Price Discrimination Act,¹ and the measure of damages awarded to the plaintiff was held to be three times the difference between the salary of a clerk paid by the defendant to the plaintiff and that paid to the plaintiff's competitor, without requiring proof of some special injury to the plaintiff's business. *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, (C.C.A. 8th, 1945) 150 F. (2d) 988. Riddick, Circuit Judge, dissented.

A well established common law principle requires that damages, to be awarded, must be certain, both in their nature and in respect to the cause from which they spring.² The requirement of certainty under the federal anti-trust laws has been strictly applied in determining whether the wrongful act of the defendant was the proximate cause of injury to the plaintiff; but once this is determined the difficulty of establishing definite and certain proof of damages has not barred recovery.³ The measure of recovery in quite a number of cases under the anti-trust laws, has been the increased cost to the plaintiff's business caused by the illegal act of the defendant. In these cases,⁴ all purchasers were discriminated against by the seller whose illegal act lay in doing something the

¹ 15 U.S.C. (1940) §§ 13(d), 13 (e).

² I SEDGWICK, DAMAGES, 9th ed., 317-318 (1912).

³ Donovan and Irvine, "Proof of Damages Under the Anti-Trust Law," 63 N.J.L.R. 297 (1940), for an extended discussion of this phase of the problem.

⁴ *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65 (1906) (where plaintiff, the ultimate consumer, was forced to pay more for iron pipe due to the defendant's unlawful combination, the measure of damages assessed was the difference between what the plaintiff did pay and what they would have had to pay had there been no unlawful combination); *Thomsen v. Cayser*, 243 U.S. 66, 37 S.Ct. 353 (1917) (difference between excessive rates charged shippers by an illegal steamship combination and reasonable rates were a proper measure of damages); *United States Tobacco Co. v. American Tobacco Co.*, (C.C.N.Y. 1908) 163 F. 701 (excessive prices charged for licorice paste less reasonable price for same is the proper measure of damages); *Monarch Tobacco Works v. American Tobacco Co.*, (C.C.Ky. 1908) 165 F. 174 (measure of damages is the difference between price plaintiff was compelled to pay because of illegal combination and price which he other-

statute did not allow him to do. In the principal case,⁵ the seller was not required by the Robinson-Patman Act to confer a benefit, but the act requires that if he confers a benefit upon one he must do so for all.⁶ Should this distinction require that the plaintiff show some special injury to his business or property to allow him to recover in the principal case? The majority of the Court in distinguishing a number of cases arising under the Interstate Commerce Act⁷ do so on the ground that, "Because . . . a carrier has committed one illegal act, Congress did not intend that it should be compelled or permitted to commit another."⁸ This is a valid distinction. However, in another case,⁹ arising under the Interstate Commerce Act,¹⁰ where the lower rate charged some shippers was deemed reasonable, the Supreme Court, speaking through Justice Cardozo, held that one shipper who had been discriminated against did not show damages by comparing the rates paid by him to rates paid by other shippers.¹¹ All the evidence of discrimination proves is that the competitors of the one discriminated against earned a greater margin of profit than he did.¹² In the principal case, there was no showing that the defendant's products were sold for less by the plaintiff's competitor, or that plaintiff lost any trade because of the discrimination: on the plaintiff's showing, there was gain for his competitor but it was not loss for himself.¹³ The Robinson-Patman Act makes the discrimination practiced by the defendant corporation illegal¹⁴ but in the absence of an express statutory statement¹⁵ making the amount of the dis-

wise would have had to pay); *Strauss v. Victor Talking Machine Co.*, (C.C.A. 2d, 1924) 297 F. 791 (retailer may recover the difference between a reasonable price and price he was compelled to pay); *Peto v. Howell*, (C.C.A. 7th, 1939) 101 F. (2d) 353 (purchaser may recover the difference between the price he was compelled to pay the defendant for corn and the reasonable price of the product).

⁵ *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, (C.C.A. 8th, 1935) 150 F. (2d) 988.

⁶ Clayton Act, § 2 (d, e) as amended by Robinson-Patman Price Discrimination Act, § 1, 15 U.S.C. (1940) § 13 (d, e).

⁷ 24 Stat. L. 382, 49 U.S.C. (1940) § 8.

⁸ Principal case at 995.

⁹ *I.C.C. v. United States ex rel. Campbell*, 289 U.S. 385, 53 S.Ct. 607 (1933).

¹⁰ See note 7, *supra*.

¹¹ "When the discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of damages suffered by the shipper." *I.C.C. v. United States ex rel. Campbell*, 289 U.S. 385 at 389, 53 S.Ct. 607 (1933).

¹² That was gain to them but it was not loss to the complainant," *I.C.C. v. United States ex rel. Campbell*, 289 U.S. 385 at 392, 53 S.Ct. 607 (1933).

¹³ If the defendant, in the principal case, had only provided the plaintiff's competitor with one-half of the clerk's salary, both the plaintiff and his competitor would have been in an equal position and the plaintiff would have been no better off, by his showing, than he was when discriminated against.

¹⁴ See note 6, *supra*.

¹⁵ Such a provision was a part of the original Senate bill, "the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved in such violation." This provision was stricken from the bill in conference. See, Statement of

crimination the basis for measuring damages, it is difficult to reach the conclusion that the plaintiff has succeeded in showing damage to himself. The statute¹⁶ requires that the benefit be given the plaintiff also but where it is not so given there is no damage to the plaintiff unless he can show that the discrimination was the proximate cause of some business loss. The majority in the principal case speak of restoring plaintiff and his competitor to a position of equality by awarding the plaintiff triple damages.¹⁷ With this position, the dissent takes issue.¹⁸ Three-fold damages under the Anti-Trust Acts are remedial rather than penal; very often the plaintiff loses prospective business profits or good will and the complete loss suffered is extremely difficult to ascertain. Consequently, triple damages are more likely to compensate the injured party than would the usual measure of damages.¹⁹ This is true where some special damage can be shown.²⁰ Where no such showing is made, the point of the dissent, in the principal case,²¹ seems well taken. The Senate statutory provision²² might well have been a desirable feature of the act,²³ but, as it was not ultimately made a part of the act, it does seem that the plaintiff has not made out a case for recovery in view of the established principle that the defendant's wrongful act must be the proximate cause of damage to the plaintiff.²⁴

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Managers on Part of House, Report No. 2951, June 8, 1936: "Subsection (e) of the Senate bill set up a new measure of damages for violations of the law, whereas the House bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded."

¹⁶ See note 6, *supra*.

¹⁷ Principal case at 966.

¹⁸ Principal case at 997. The dissent contends that the award of triple damages substitutes one violation of the act for another in that, prior to the suit, the plaintiff was the one discriminated against and after the award of triple damages the competitor of the plaintiff is the one who is discriminated against.

¹⁹ Vold, "Are Threefold Damages Under the Anti-Trust Acts Penal or Compensatory?" 28 Ky L. J. 117 (1940).

²⁰ *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931).

²¹ See note 18, *supra*.

²² See note 15, *supra*.

²³ See note 6, *supra*.

²⁴ See note 2, *supra*.