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of adoption might be denied to a child whose domicile is merely a technical one established by operation of law and where his real contact is with another state. In cases where the child's domicile is more than a mere technicality, it is evident that the state of his domicile has a real interest in the child's welfare and in any proceedings which will affect his status. Under such circumstances an adoption decree rendered in a state other than the child's domicile may be justified on the theory that adoption is beneficial to the child and consequently his domicile will cooperate.

In *In re Adoption of Hildy McCoy* the adoption was decreed in a state to which the child had been brought in spite of court decrees from the state of her domicile. The state which was Hildy McCoy's domicile of origin had made the child's mother her legal custodian and had unequivocally disapproved the proposed adoption upon ground of its policy declared by statute. Although Florida was not required to give full faith and credit to the Massachusetts decrees, comity between sovereigns and the social need for stability of personal status seem to require that the policy, laws and decrees of a competent state should not be rendered nugatory unless evident and serious considerations of the child's welfare demand it.



THE ROBINSON-PATMAN ACT AND TREBLE DAMAGE SUITS

Background

The Sherman Anti-Trust Act of 1890¹ was considered unsatisfactory in curbing monopolies. Its prohibitions were general in nature,² and courts interpreted it so as to stop monopolistic tendencies only when monopoly was present or imminent.³

¹ 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).

² "As a charter of freedom, the Act has a generality . . . comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute. . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). See Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301, 302-03 (1937).

³ See *United States v. United States Steel Corp.*, 251 U.S. 417, 444 (1920); *Standard Oil Co. v. United States*, 221 U.S. 1, 99 (1911) (dissenting opinion); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 3, pt. 1, at 125-26 (1955); Jackson & Dumbauld, *Monopolies and the Courts*, 86 U. PA. L. REV. 231, 242-49 (1938).

In 1914 the Clayton Act⁴ was passed to outlaw monopoly in its incipency.⁵ Although couched in rather general language, it did prohibit certain specific practices where their effect “. . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”⁶ Among these practices were price discrimination between purchasers, leases and sales of goods which bind the purchaser not to use goods of another supplier, acquisition of the stock of one corporation by another, and interlocking directorates of certain kinds of corporations.⁷ The act provided for both government action⁸ and private suits.⁹ The Clayton Act, however, was not considered adequate. Against charges of price discrimination it provided the defense of “good-faith meeting of competition,” and exempted discounts based on the quantity of goods bought.¹⁰ Until 1929 the courts interpreted it as prohibiting only price-cutting that reduced competition among “sellers,” that is, between the price cutter and its competitors.¹¹ Even after the United States Supreme Court construed this prohibition as including reduced competition among “buyers,” the customers of the “sellers,”¹² the exemption of quantity discounts provided a convenient and legal way to give advantageous prices to the larger buyers,¹³ the very ones the act was intended to curb. Furthermore, the required proof of injury to competition in general as a result of a discrimination in price was difficult.¹⁴

During the 'twenties and early 'thirties chain stores had phenomenal success. Their growth disturbed the advocates of a strong antitrust policy, since their mass-buying power enabled them to receive preferential treatment from suppliers.¹⁵ The lobbies of independent dealers' organizations actively campaigned for a law to protect the small retailer against the competitive advantages of the

⁴ 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12, 13, 13b-27 (1952).

⁵ Transamerica Corp. v. Board of Governors, 206 F.2d 163, 169 (3d Cir. 1953), quoted with approval in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592-93 (1957); S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

⁶ Clayton Act §§ 2, 3, 38 STAT. 730, 731 (1914), 15 U.S.C. §§ 13, 14 (1952).

⁷ *Id.* at 730-32, 15 U.S.C. §§ 13, 14, 18, 19.

⁸ *Id.* at 734, 736, 15 U.S.C. §§ 21, 25.

⁹ *Id.* at 731, 737, 15 U.S.C. §§ 15, 26.

¹⁰ *Id.* at 730, 15 U.S.C. § 13(a); *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir.), cert. denied, 308 U.S. 557 (1939). See H.R. REP. No. 2287, 74th Cong., 2d Sess. 7 (1936); S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936); AUSTIN, PRICE DISCRIMINATION 8 (1950).

¹¹ See *National Biscuit Co. v. FTC*, 299 Fed. 733, 740 (2d Cir.), cert. denied, 266 U.S. 613 (1924); *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir.), cert. denied, 262 U.S. 759 (1923); Bayly, *Four Years Under the Robinson-Patman Act*, 25 MINN. L. REV. 131 (1941).

¹² *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929).

¹³ See *Goodyear Tire & Rubber Co. v. FTC*, note 10 *supra*; *National Biscuit Co. v. FTC*, note 11 *supra*; Bayly, note 11 *supra*.

¹⁴ See H.R. REP. No. 2287, 74th Cong., 2d Sess. 8 (1936).

¹⁵ AUSTIN, PRICE DISCRIMINATION 7-8 (1950).

chains.¹⁶ In answer to this and to a report¹⁷ of the Federal Trade Commission which characterized the chain store as adverse to the economic good of the country, the Robinson-Patman Act of 1936 was enacted.

The Robinson-Patman Act

The Robinson-Patman Act was avowedly anti-chain store. Its purpose was ". . . to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by unfair competitors."¹⁸ The principal means used was an amendment¹⁹ to the price discrimination provisions of the Clayton Act. It broadened their scope so as to cover injury to individual competitors as well as general injury to competition.²⁰ Furthermore, instead of limiting liability to the discriminating party, it imposed liability upon the person inducing or receiving the benefit of the discrimination in price if he knew that it was illegal when he induced or received it.²¹ It provided that, in proceedings before the Federal Trade Commission, once an otherwise unlawful discrimination is shown the burden is upon the defendant to prove a justification under the Act.²² The available defenses, too, were limited. The exemption for quantity discounts was confined to those reflecting the difference in the seller's costs due to the differences in quantity.²³ Thus the discount, to be justifiable, had to be of direct economic advantage to the seller's operation, not merely a coerced courtesy to his best customers.²⁴ In addition, the Federal Trade Commission was au-

¹⁶ *Ibid.* Indeed, it has been asserted that the bill introduced by Representative Patman was drafted by the United States Wholesale Grocers' Association. See Rose, *The Right of a Businessman to Lower the Price of His Goods*, 4 VAND. L. REV. 221, 236-37 (1951); Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140, 143 n.21 (1936).

¹⁷ *Final Report on the Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1934).

¹⁸ Preamble to H.R. 8442, 74th Cong., 1st Sess. (1935), quoted in PATMAN, *THE ROBINSON-PATMAN ACT* 3 (1938).

¹⁹ 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952).

²⁰ H.R. REP. NO. 2287, 74th Cong., 2d Sess. 8 (1936); S. REP. NO. 1502, 74th Cong., 2d Sess. 4 (1936). See Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334-35 (1948).

²¹ 49 STAT. 1527 (1936), 15 U.S.C. § 13(f) (1952). See *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953); Massel & Gormley, *Business Methods and Antitrust Policy: The Automatic Canteen Case*, 1 ANTITRUST BULL. 361, 467 (1955).

²² 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1952). In actions brought by the FTC it has been held that once the Commission proves the discrimination, the respondent must prove a lack of injury to competition. See *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945); *Ostberg, The Meaning of the "Injury to Competition" Provision of the Robinson-Patman Act*, 32 ST. JOHN'S L. REV. 26, 31-35 (1957). *But see Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

²³ See *FTC v. Morton Salt Co.*, 334 U.S. 37, 48 (1948).

²⁴ For a general discussion of quantity discounts see Haslett, *The Validity of Quantity Discounts*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 26 (1948).

thorized to limit the quantity at which a discount would be allowed wherever it finds that the purchasers of amounts above that quantity are so few as to render the discount differential unjustly discriminatory or promotive of monopoly.²⁵ The defense that the discrimination in price resulted from differences in the grade or quality of the goods sold was retained, as was the proviso that dealers may select their own customers in bona fide transactions not in restraint of trade.²⁶ Discrimination based on changing market conditions or marketability of the goods sold was expressly recognized as a valid economic defense²⁷ as was a discrimination made in good faith to meet the equally low lawful price of an actual competitor.²⁸ However, certain practices were considered economically indefensible and were made illegal per se.²⁹

Section 3 of the Robinson-Patman Act³⁰ is a penal provision declaring certain practices in interstate commerce illegal and imposing penalties for their violation.³¹ Specifically, the section prohibits a seller from knowingly discriminating between competing purchasers by means of any discount, rebate, allowance or advertising charge in the sale of goods of like grade, quality and quantity. Also prohibited is price discrimination in sales in different parts of the country, or sales at unreasonably low prices, for the purpose of destroying competition or eliminating a competitor. While no defenses are specified, it would appear that any defense negating an intention to destroy competition or eliminate a competitor is valid. Thus it would seem that any defense valid under Section 2 of the Clayton Act might be used.³² Furthermore, since Section 3 prohibits discounts on sales of

²⁵ 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952); *B. F. Goodrich Co. v. FTC*, 134 F. Supp. 39 (D.D.C. 1955). The FTC has used this power very seldom. See AUSTIN, PRICE DISCRIMINATION 71 (1950); ELKOURI, TRADE REGULATION 207 (1957); 16 C.F.R. § 310.1 (Supp. 1957) (FTC order which was held invalid in *Goodrich* case, *supra*).

²⁶ 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). See also Clayton Act § 2, 38 STAT. 730 (1914); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 49 (2d Cir. 1915).

²⁷ 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). See *Moore v. Meade Service Co.*, 190 F.2d 540 (10th Cir. 1951); *Frederick W. Huber, Inc. v. Pillsbury Flour Mills Co.*, 30 F. Supp. 108 (S.D.N.Y. 1939).

²⁸ 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1952). Like the old proviso, this is an absolute defense. *Standard Oil Co. v. FTC*, 340 U.S. 231, 250-51 (1951). Unlike the old law, however, a price may be lowered only to meet the equally low lawful price of an actual competitor. *Id.* at 242.

²⁹ 49 STAT. 1527 (1936), 15 U.S.C. § 13(c) (1952) (brokerage commission to buyer upon buyer's own purchases), *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F.2d 667, 673 (3d Cir. 1939); *id.* § 13(d), (e) (discriminating in the furnishing of, or payment for, services or facilities by the buyer or seller), *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132 (2d Cir. 1946).

³⁰ 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952).

³¹ It provides a penalty of not more than \$5,000 fine or not more than one year in prison, or both. *Ibid.*

³² In *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956), the court construed § 3 in the light of § 2(a), saying that "these sections are parts of the same

goods of like grade, quality and quantity, the old quantity discount, unjustified by lower costs, seems to be beyond the reach of Section 3.³³

Treble Damages

Ideally, private treble damage actions are intended to supplement the vigilance of the government's antitrust enforcement agencies with that of the businessman himself.³⁴ This action may be brought in a federal district court³⁵ by any person³⁶ injured³⁷ in his business or property by a violation of the antitrust laws.³⁸ The plaintiff's burden of proof is alleviated, in many cases, by the provision that a judgment against the defendant in a government action is prima facie evidence in a subsequent private suit as to all issues determined therein.³⁹ The four-year statute of limitation on private suits is tolled during the pendency of the government action and for a year there-

law and must be construed harmoniously." *Id.* at 15. See also *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950) ("meeting competition" held valid defense under § 3 as well as under § 2(a)).

³³ See *Rose, The Right of a Businessman to Lower the Price of His Goods*, 4 VAND. L. REV. 221, 229 (1951).

³⁴ *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 893 (5th Cir. 1954), cert. denied, 348 U.S. 912 (1955); *Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir. 1943). "In practice, [this] . . . purpose has hardly been achieved, since private suits generally are not brought until the government wins a suit against a violator, after which the private plaintiff can not only take advantage of section 5 of the Clayton Act, but can also rely on the successful legal theory developed in the government's case. The great complexity and expense of antitrust cases seems to prevent any pioneering in the field by private plaintiffs, the proof of which is that the landmark cases in recent times have not been treble damage suits." *Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954). See also *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suits*, 61 YALE L.J. 1010, 1060-61 (1952).

³⁵ 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952). The jurisdiction of the federal court, being derived from the statute, is not dependent upon the amount in controversy or the status of the parties, but only upon the interstate character of the transactions. See *Christian v. International Ass'n of Machinists*, 7 F.2d 481, 483 (E.D. Ky. 1925). However, the courts will not initially take jurisdiction if defendant is under a regulatory agency which may provide relief for parties injured by defendant's violations of the antitrust laws. See *Far East Conference v. United States*, 342 U.S. 570 (1952).

³⁶ "Person" includes a state, *Georgia v. Evans*, 316 U.S. 159 (1942), and a municipality, *Chattanooga Foundry Works v. Atlanta*, 203 U.S. 390 (1906). The United States may recover actual damages for injury to "its business or property." 69 STAT. 282 (1955), 15 U.S.C. § 15a (Supp. IV, 1957).

³⁷ The injury must be to the plaintiff; an injury to the general public is not enough. *Peller v. International Boxing Club, Inc.*, 135 F. Supp. 942 (N.D. Ill.), *aff'd*, 227 F.2d 593 (7th Cir. 1955).

³⁸ Section 1 of the Clayton Act defines the "antitrust laws" as the Sherman Act, the Clayton Act and the Wilson Tariff Act. 38 STAT. 730 (1914), 15 U.S.C. § 12 (1952).

³⁹ 38 STAT. 73 (1914), as amended, 15 U.S.C. § 16 (Supp. IV, 1957).

after,⁴⁰ thus increasing the likelihood of one or more treble damage suits after a successful government action.⁴¹

To recover treble damages for violations of the Robinson-Patman amendment to the Clayton Act, the plaintiff must prove that he was injured as a result of defendant's unlawful price discrimination, which also has at least a reasonable possibility of harming competition,⁴² and either that one of the parties was engaged in interstate commerce, or that interstate commerce was used to commit, or was impaired by, the violation.⁴³ Actual, and not merely speculative, damages must be proved,⁴⁴ but absolute certainty is not required.⁴⁵ There is dispute as to the proper measure of damages.⁴⁶ General damages, or the amount of the unlawful discrimination, have been allowed in some cases; at other times the courts require proof of the actual financial impairment of the plaintiff's competitive position.⁴⁷

From the legislative history of Section 3 of the Robinson-Patman Act it is clear that its purpose was to provide penal sanctions for the type of discriminations forbidden by the remaining provisions of the act.⁴⁸ It was not drafted as part of the Robinson-Patman Act, but came almost verbatim from a controversial Canadian penal statute.⁴⁹ It was introduced in the Senate as the Borah-Van Nuys amendment and was added to the Act with little debate, apparently as a political compromise.⁵⁰ As a penal measure, however, it has been used only

⁴⁰ *Ibid.*

⁴¹ See Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954); *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suits*, 61 YALE L.J. 1010, 1060 (1952).

⁴² See *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945). Reasonably possible injury to competition need be proven only for violations of § 2(a), since §§ 2(c)-(e) are per se offenses. See ATTORNEY GENERAL'S COMMITTEE, REPORT ON THE STUDY OF THE ANTITRUST LAWS 191-92 (1955). For a detailed discussion, see Ostberg, *The Meaning of the "Injury to Competition" Provision of the Robinson-Patman Act*, 32 ST. JOHN'S L. REV. 26 (1957).

⁴³ *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

⁴⁴ *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 855 (8th Cir. 1952).

⁴⁵ *Loew's, Inc. v. Cinema Amusements Inc.*, 210 F.2d 86, 95 (10th Cir. 1954).

⁴⁶ See Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 406-11 (1952).

⁴⁷ Compare *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947) (dictum), with *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir. 1957); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949).

⁴⁸ 80 CONG. REC. 6346 (1936).

⁴⁹ Criminal Code, 1953-54, 2 & 3 E.L.Z. 2, c. 51, § 412 (Canada), the validity of which was upheld in *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368 (P.C.).

⁵⁰ See McAllister, *Price Control by Law in the United States*, 4 LAW & CONTEMP. PROB. 273, 290 (1937); Rose, *The Right of a Businessman to Lower the Price of His Goods*, 4 VAND. L. REV. 221, 224-26 (1951).

once, and then unsuccessfully.⁵¹ Most of the litigation of Section 3 has been in the field of treble damages, the question of its availability for use in such actions provoking a marked conflict among lower federal courts.⁵²

When the Robinson-Patman Act was codified, the editors of the United States Code, apparently inadvertently, included Section 3 as a part of the Clayton Act, for violations of which treble damages may be had.⁵³ Since the section also dealt with antitrust matters, and reasoning that it was the intent of Congress that treble damages should be had for antitrust violations, the majority of the lower courts held that it would support an action for treble damages.⁵⁴

In order to resolve this conflict, the United States Supreme Court granted certiorari in the companion cases of *Nashville Milk Co. v. Carnation Co.*⁵⁵ and *Safeway Stores, Inc. v. Vance*.⁵⁶ The *Nashville Milk Co.* case was an action for treble damages for violation of the Section 3 prohibition of unreasonably low prices.⁵⁷ In a 5-4 decision the Court affirmed the lower court's dismissal of the complaint. The majority reasoned that an action for treble damages is given by Section 4 of the Clayton Act for violations of the "antitrust laws."⁵⁸ Section 1 defines "antitrust laws" as the Sherman Act, the Wilson Tariff Act and the Clayton Act.⁵⁹ To give rise to a

⁵¹ See Rose, *supra* note 50, at 228. The Department of Justice attempted to enforce § 3 in *United States v. Bowman Dairy Co.*, 89 F. Supp. 112 (N.D. Ill. 1949) (motion to dismiss denied). A verdict was returned for the defendant. 1 CCH TRADE REG. REP. ¶ 3551.18.

⁵² The majority held that § 3 would support a treble damage action. *Vance v. Safeway Stores, Inc.*, 239 F.2d 144 (10th Cir. 1956), *rev'd*, 355 U.S. 389 (1958); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S.D. Cal. 1950); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950); *A. J. Goodman & Sons, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890, 892 (D. Mass. 1949); *Atlantic Brick Co. v. O'Neal*, 44 F. Supp. 39, 43 (E.D. Tex. 1942). A few courts and many legal publications and law review articles were *contra*, *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86 (7th Cir. 1956); *National Used Car Market Report v. National Auto Dealers Ass'n*, 108 F. Supp. 692, 694 (D.D.C. 1951) (dictum), *rev'd on other grounds*, 200 F.2d 359 (D.C. Cir. 1952); Gordon, *Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3*, 22 A.B.A.J. 593, 649 (1936); Hamilton & Loevinger, *The Second Attack on Price Discrimination: The Robinson-Patman Act*, 22 WASH. U.L.Q. 153, 182 (1937); Legis., 50 HARV. L. REV. 106, 121-22 (1936); Comment, 55 MICH. L. REV. 845, 850-57 (1957); Legis., 85 U. PA. L. REV. 306, 312 (1937).

⁵³ Compare 15 U.S.C. § 12 (1952), with 15 U.S.C. § 12 (1934). See *Nashville Milk Co. v. Carnation Co.*, *supra* note 52, at 88-89.

⁵⁴ See note 52 *supra*.

⁵⁵ 355 U.S. 373 (1958).

⁵⁶ 355 U.S. 389 (1958).

⁵⁷ "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952).

⁵⁸ 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952).

⁵⁹ *Id.* at 730, 15 U.S.C. § 12 (1952).

treble-damage suit, therefore, Section 3 must be part of the Clayton Act. Its codification as such is only prima facie evidence of the fact.⁶⁰ That part of the Robinson-Patman Act which amended Section 2 of the Clayton Act was specified as an amendment, both on its face⁶¹ and in the committee reports and debates in Congress.⁶² Section 3 was not so specified, and a further investigation of these sources⁶³ led the Court to conclude that Congress meant to confine the utilization of the section to criminal suits brought by the Department of Justice. Two of the three prohibitions of Section 3 are also bases for private actions in Section 2 of the Clayton Act.⁶⁴ The "unreasonably low prices" prohibition is of questionable constitutionality, and Congress may have preferred not to put such a potentially troublesome weapon into private hands.⁶⁵

The dissent⁶⁶ argued that the legislative history of the Act emphasizes that penal sanctions are confined to Section 3, not that private enforcement is excluded; that the interpretation of the codifiers should be given great weight, and that since the Department of Justice apparently has never enforced Section 3, to disallow private actions is, in effect, to repeal the section.⁶⁷

Conclusion

The *Nashville Milk Co.* and *Safeway Stores, Inc.* cases were correctly decided. Treble damages are a potentially dangerous enforcement technique. Although the courts hold that they are not penal in nature,⁶⁸ their effect upon a defendant is like that of a penalty. They often afford large profits⁶⁹ to a complainant for another's violation of the law, and antitrust laws are, at best, vague. A

⁶⁰ 1 U.S.C. § 204(a) (1952). See *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam).

⁶¹ See 49 STAT. 1526 (1936).

⁶² See S. REP. No. 1502, 74th Cong., 2d Sess. (1936); 80 CONG. REC. 3113 (1936).

⁶³ See H.R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936); 80 CONG. REC. 9419, 9421 (1936).

⁶⁴ *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378-79 (1958).

⁶⁵ *Id.* at 378-79 & n.7.

⁶⁶ *Id.* at 383-88.

⁶⁷ Proposed legislation would amend the Clayton Act so as to include the Robinson-Patman Act as an "antitrust law," thereby allowing treble damage actions for violations of § 3. H.R. 10243, H.R. 10251, S. 3079, 85th Cong. 2d Sess. (1958) (referred to Senate and House Committees on the Judiciary).

⁶⁸ See, e.g., *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577 (2d Cir. 1916). See Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 KY. L.J. 117 (1940). But see ATTORNEY GENERAL'S COMMITTEE, REPORT ON THE STUDY OF THE ANTITRUST LAWS 379 (1955); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1209 (1952).

⁶⁹ See *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1044 n.225, 1058-62 & nn.321-23 (1952).

law imposing such heavy penalties for violation, enforceable by competitors who stand to gain greatly by the verdict, should be carefully tailored to prevent abuse.

The third part of Section 3, the only part practically affected by the *Nashville Milk Co.* decision, provides little in the way of an objective test of legality. The Court expressly refrained from passing on the question, raised by the District Court, of whether the section was so vague as to be unconstitutional.⁷⁰ It would seem, however, that whether a price is "unreasonably low" is usually dependent upon economic factors not easily comprehended by the average jury, and might be held to impose too unclear a standard of criminality.

The remaining causes of action for private suits, under Section 2 of the Clayton Act, are sufficient both to provide compensation for persons injured by acts violative of the condemned discrimination, and to act as a deterrent to future violations.

⁷⁰ See *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 n.7 (1958)