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# Trade Regulations: Robinson-Patman Act--Defense to Price Discrimination

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he received the value and quality bargained for. The effect is alarming in the light of present day merchandising methods. There was no deception because the seller's fraud in allowing the prospective donee to pay a portion of the price prevented the coat from being entirely a gift. The misrepresentation must refer to the subject matter of the sale in order to justify recision for fraud. Collateral attitudes, and motives behind the purchase, have no bearing on the materiality of the misrepresentation, as they are not bargained for. The subject matter of the sale should not be expanded to include a status the purchaser hoped it would assume. As pointed out by the dissent, the purchaser wanted her to have the coat and the arrangement enabled her to get it at a price he was willing to pay. Because she failed to live up to his expectations is no basis for recision, and cannot be attributed to the seller. "Suitability," is no obstacle when it appears that the coat is still servicable as a coat. In view of the donee's eagerness to acquire the coat, it appears to be as suitable a subject of a gift as ever. The purchaser only intended to give her a $4,000 gift, and had all gone well that is what she would have received.

The error is in determining when one has suffered an injury. To allow one to rescind a sale for fraud, the court should look to what was promised, and what was received. If there is not a material disparity between the two, the recision should be refused. The "materiality" with which we are concerned is limited to the value and the quality of the subject matter of the sale. It is unfortunate when a rule so well established is misapplied.

*T. Marsh.*

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TRADE REGULATIONS: ROBINSON-PATMAN ACT—DEFENSE TO PRICE DISCRIMINATION.—Petitioner sold gasoline to certain customers at 1½ cents per gallon less than the prices charged other dealers for the same product in the same area.[1] This reduction in price has reached the outlets of these customers, thus "injuring, destroying and preventing competition" between the favored dealers and the dealers purchasing at the regular price.[2] Petitioner contended that its lower prices were made in good faith to retain the favored individuals as customers. The prices were made to meet equally lower prices of local competition, and in no case did the petitioner reduce prices below that of his competitors. The commission treated evidence to this effect as irrelevant. *Held:* Reversed and remanded. The facts offered by the petitioner constituted an absolute defense to the charge of price discrimination. (Five to three split; opinion by Mr. Justice Burton.) *Standard Oil Co.* v. *Federal Trade Commission* (1951), 41 F. T. C. 263; modified, 43 F. T. C. 56; modified, 173 F. 2d 210; reversed and remanded, 340 U. S. ——, 71 S. Ct. 240, 95 L. Ed. ——.

The issue revolves on the determination of the meaning of the Clayton Act, section 2, as amended by section 2(a) and (b) of the Robinson-Patman Act. They are as follows:

> "Sec. 2(a). That it shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities . . . where the

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[1]There was an attempt to show that this differential was due only to the lower cost of sale and delivery to the favored customers. (Bulk sales, etc.) If proved this would bring the conduct under section 2(a) of the Robinson-Patman Act, to the effect that nothing shall prohibit differential in price, making only due allowance for differences in cost of distribution to these customers. (49 Stats. 1526, 15 U. S. C. sec. 13(a), 15 U. S. C. A. sec. 13(a).) The defense was not sustained. (41 F. T. C. 263, 280.)

[2]41 F. T. C. 263, 283.

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*:[3] . . .

"(b) *Upon proof being made . . . that there has been discrimination in price* or service 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." (Emphasis added.) 49 Stats. 1526, 15 U. S. C. sec. 13(a) and (b), 15 U. S. C. A. sec. 13(a) and (b).

Unless, then 2(b) acts as an absolute defense the evidence offered by the petitioner would be of no avail. Taking the language of 2(b) there is an ambiguity presented which admits of two reasonable interpretations. The view adopted by the majority of the court (with which this writer concurs) is that the prima-facie case referred to in 2(b) is made out by showing that the conduct has come within 2(a), which includes the harmful affect on competition, and not by merely showing that there has been discrimination. Upon showing that the discrimination was in good faith to meet the equally low price of a competitor the prima-facie case is rebutted, even though it may have had a detrimental affect on competition. It follows that since the injurious result to competition was used in setting up the prima-facie case it can't again be used to overthrow the rebuttal. Thus the language of 2(b) acts as an absolute defense. This is the view adopted by the authorities, although generally there seems to have been a lack of serious consideration of the problem. (*Corn Products Refining Co.* v. *Federal Trade Commission* (1945), 324 U. S. 726, 741, 65 S. Ct. 961, 968, 89 L. Ed. 1320, 1333, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.* (1945), 324 U. S. 746, 748, 753, 758, 65 S. Ct. 971, 972, 974, 976, 89 L. Ed. 1338, 1341, 1343, 1346; *Moss* v. *Federal Trade Commission* (1945), 148 F. 2d 378, cert. denied 326 U. S. 734, *McWhirter* v *Monroe Calculating Machine Co* (1948), 76 Fed. Supp. 456, 462 and cases cited.

The other reasonable construction of section 2 is that the prima-facie case has been made out by merely showing there has been price discrimination. This prima-facie case may then be rebutted by showing the "lower price . . . was made in good faith to meet an equally low price of a competitor, . . ." It then becomes a separate question of fact whether the "effect of such discrimination may be substantially to lessen competition." This is the view urged in the dissenting opinion by Mr. Justice Reed. There is merit in this contention, but to reach such a conclusion the two sections of the statute must be read separate and apart. For if they are read together the "rebutting [of] the prima-facie case thus made" seems, by context, to have reference to subsection (a), which includes the effect on competition in setting up the prima-facie case. There is no doubt under the language of the Clayton Act, section 2, before amended, that the evidence offered by the petitioner, if supported, would constitute a good defense. It reads as follows:

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[3] 2(a) does not require a finding as a fact that the discrimination has had an adverse affect on the competition. It is sufficient for the application of this section that the discrimination "may" have this affect. (*Corn Products Refining Co.* v. *Federal Trade Commission* (1945), 324 U. S. 726, 738, 65 S. Ct. 961, 89 L. Ed. 1320; *Cf. Standard Fashions Co.* v. *Margon-Houston Co.* (1922), 258 U. S. 346, 42 S. Ct. 360, 66 L. Ed. 653 (same provision under the Clayton Act.) Thus the findings of the commission bring the activity clearly within the meaning of the letter of 2(a).