Integrated Company and the Price Squeeze under the Sherman Act and Section 2(a) of the Clayton Act, as Amended

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THE INTEGRATED COMPANY AND THE PRICE SQUEEZE UNDER THE SHERMAN ACT AND SECTION 2(a) OF THE CLAYTON ACT, AS AMENDED*

INTRODUCTION

The subject assigned for this paper was, generally, buying and selling for the corporate family. This covers a very considerable amount of territory. If one could encompass all the problems, to say nothing of their solution, in a matter of thirty minutes, I suspect there would be many fewer antitrust lawyers and a much happier business community. Because my first loyalty is to my profession, I will make no attempt to accomplish any such drastic end.¹

The term "corporate family" suggests a natural limitation of subject matter. My Webster's dictionary defines "family" as "[a] group of closely related individuals. . . ."

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¹ Even with the valuable assistance of two fellow lawyers, George N. Tompkins, Jr., and Khalil Sfer, to whom I am very grateful.
hence, a plurality of persons. Therefore, it is appropriate to confine this paper to problems flowing from and peculiar to the operation under single management of a plurality of separately identifiable economic functions, loosely termed an integrated company. The subject has been further pruned down—arbitrarily—to a major pricing problem generally peculiar to such a business entity. That is the problem of how much attention an integrated company need pay to the relationships between its prices at different vertical levels or in different geographical areas. There are circumstances where these relationships may give rise to what has been termed the "Price Squeeze,"2 either on competitors of the integrated company at some level of its operations or on competitors of customers of such a company, which may have antitrust significance.

More specifically I will discuss the following:

1. Why a "squeeze" on competitors by an integrated company is considered an unfair and sometimes unlawful practice.

2. Squeezing competitors under the Sherman Act—3 the implications of price relationships and resulting relative profitability among different functions of the integrated enterprise.

3. Squeezing competitors or competitors of customers—the dilemma of Standard Oil of Indiana.

4. A possible new governmental implement for attacking the squeeze—may subsidiaries or divisions be considered purchasers for the purpose of establishing a price discrimination under section 2(a) of the Clayton Act, as amended?4

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2 United States v. Aluminum Co. of America, 148 F.2d 416, 436 (2d Cir. 1945).
I

THE SQUEEZE AS AN UNFAIR AND SOMETIMES UNLAWFUL PRACTICE

No citation of authority is necessary for the bald proposition that integration—and the term is used herein to include any business entity which is carrying on two or more separately identifiable economic functions—is not unlawful per se. It is equally clear that basic antitrust policy requires the exercise of economic power flowing from integration with the utmost circumspection.

Any integrated company has, in addition to the problem of actively competing in accordance with the dictates of fundamental antitrust policy, the infinitely more difficult problem of avoiding a use of advantages flowing from its multifunction position to the detriment of competitors, performing fewer functions or a single function, in such a manner that any such use may be termed a predatory practice.

There are many contexts in which this has arisen in the decided cases. By way of illustration, an automobile manufacturer which also ran a finance company contravened the antitrust laws when it used its control over the supply of automobiles to induce its dealers to use the services of its finance company to the detriment of other finance companies. The owner of a chain of motion picture theaters likewise ran into difficulty when it used its mass buying power to secure blanket first run privileges for substantially all its theaters to the detriment of other competing theater owners. The manufacturer of a patented salt dis-

5 Nevertheless, see United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948).
6 United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941).
7 United States v. Griffith, 334 U.S. 100 (1948).
pensing machine found itself in trouble when it used its patent control to attempt to force the use of only its salt in its patented machines. Through these cases, and many more, runs the basic thread of judicial insulation of the less advantageously situated competitor from the full rigors of the law of the competitive jungle.

One advantage an integrated company has over its non or less integrated competitors is simply that it has more "irons in the fire." It can afford to make less profit at some levels or in some geographical regions than in others and still, perhaps, achieve an overall return on capital satisfactory to it. To the extent it can control its pricing destiny, it also has more flexibility in operation.

To what extent can this flexibility be consciously used? Or, putting it another way, what inferences may be drawn from varying levels of profits in different functions of an integrated business or from different prices in different areas?

The present day view of this situation has its roots in the common law, which considered it a tort deliberately to destroy another's business, *inter alia*, by selling or offering to sell at unreasonably low prices. The gravamen of the offense was the intent to destroy.

The original Clayton Act incorporated this theory in part but slightly changed the nature of the wrong. For deliberate intent to destroy a competitor it substituted discriminations in price where the effect might be "to substantially lessen competition or tend to create a monopoly in any line of commerce." The addition of the requirement of a discrimination in price introduced explicitly the idea that the wrong stemmed from the use of superior economic power, the ability to sell to some customers or in some

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9 See Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913).
10 38 Stat. 730 (1914).
areas at a higher price than to other customers or in other areas—an ability which may be possessed by the integrated company. The leading case under that statute on this particular point, *Porto Rican Am. Tobacco Co. v. American Tobacco Co.*, still, however, seemed to turn on deliberate and explicit intent to destroy a competitor; similarly with *E. B. Muller & Co. v. FTC*, decided under section 2(a) of the Clayton Act as amended by the Robinson Patman Act.

Even in the much criticized *Moss* case there were findings by the FTC of sales below cost with the result that one competitor was driven out of business. That "sleeper," section 3 of the Robinson Patman Act, makes it a crime to sell at lower prices in one part of the country than in another only where it is for the purpose of "destroying competition or eliminating a competitor" or to "sell, or contract to sell, goods at unreasonably low prices" only where it is for the same purpose. And the *Mead* case, decided under this statute, could very reasonably be said to turn on the same point, i. e., deliberate intent to destroy a competitor.

In this process, however, there came to be a sensitivity to any suggestion that variations in prices or "profits" in

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11 30 F.2d 234 (2d Cir.), cert. denied, 279 U.S. 858 (1929).
12 142 F.2d 511 (6th Cir. 1944).
13 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1952). The Muller case is based in part upon the language, "... to injure, destroy, or prevent competition with any person who... grants... the benefit of such discrimination...," which did not appear in the original Clayton Act.
different elements of the integrated company were having adverse effects on less or non-integrated competitors regardless of any specific intent to destroy a competitor's business. By virtue of integration a company may have, as Corwin Edwards has put it, "the power to squeeze" its competitors. The very word "squeezing" suggests unfairness. It is done, as the Department of Justice has put it in one case, by "subsidization" of one function by profits from another. "Subsidization" is a label which implies "insulation from competition in some areas." Or, as another writer has put it, "losses" in one segment are made up by "profits" in another, thus inferentially equating what may be a result of differing competitive conditions in different markets to a practice outlawed in many states, of deliberately selling particular products at a price below cost—of being the loss leader.

Complaints concerning integration based in part on the ability of the integrated company to "subsidize" one function by "profits" from another have come largely from wholesalers and retailers, and Congress has always lent a sympathetic ear. Recently such complaints have, in part, produced the introduction of bills in Congress intended to exclude manufacturing or refining companies from retail activities in particular industries such as tires and petroleum. One recent bill would have excluded all manufac-

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18 Edwards, Maintaining Competition 98 (1949).
21 Cook, Control of the Petroleum Industry by Major Oil Companies 22 (TNEC Monograph No. 39, 1941).
23 E.g. S. 175 83d Cong., 1st Sess. (1953), introduced by Senator Murray.
turers from retail marketing. The most recent of these, aimed at partial divorcement in the petroleum industry, introduced by Representative Roosevelt on July 23, 1956, states that the evil to be corrected stems from the "ability [of the 'producer'] to operate retail gasoline stations at less than cost by subsidizing their retail operations from profits made in other activities. . . . It is therefore the purpose of this Act . . . to restore . . . unsubsidized competition in gasoline and other petroleum products. . . .""
Alcoa produced and sold virgin aluminum in ingot form. It also engaged in several fabricating operations, one of which was rolling the ingot into sheet. It was the sole domestic producer of virgin aluminum. There were, however, several other manufacturers of sheet who purchased ingot from Alcoa and sold the sheet in competition with Alcoa.

In 1932 the Department of Justice began investigating complaints from Alcoa's competitive sheet manufacturers to the effect that the spread between the price of ingot—set by Alcoa—and the price of sheet, which the court said Alcoa also set, was not sufficient to permit a very profitable sheet manufacturing operation. In 1933 Alcoa reduced the price of ingot and the complaints ceased.

The "squeeze," or "subsidization" of "sheet manufacture" by "profits" from ingot sales, was relied upon heavily by the Government as proof of intent to monopolize. This particular situation was considered, to some extent, in isolation by the court.\textsuperscript{30} Alcoa was making an overall profit from its operations which Judge Hand, after considering, did not find unreasonable.\textsuperscript{31} When, however, he looked at the "squeeze" he considered only the profitability of the sheet manufacturing operation. He found a violation of the Sherman Act from the following facts: Alcoa's own cost of sheet manufacture left a small or non-existent profit in that operation for Alcoa; Alcoa had knowledge that this was making it difficult for competitors to operate; it subsequently reduced the price of ingot which

\textsuperscript{30} Judge Hand had already held that Alcoa had monopolized the ingot market in 1940 so it wasn't necessary to consider these practices as evidence on that point. However, because it appeared that Alcoa's monopoly on ingot might disappear before a decree was entered, and, therefore, dissolution might not be required, he wanted to consider whether certain specific practices were illegal and should be enjoined absent dissolution. 148 F.2d at 432.

\textsuperscript{31} He considered it irrelevant but did say "... a profit of ten percent, so conditioned, could hardly be considered extortionate." \textit{Id.} at 426-427.
increased the sheet manufacturers' profit margin.\textsuperscript{32}

The key factor was Alcoa's operation of its sheet manufacturing operation at a level which bordered on a loss, and Alcoa's protests that it could not tell until the end of an accounting period whether there would be a profit or a loss were to no avail.\textsuperscript{33}

Clearly the court considered Alcoa's monopoly power over the price of ingot as the fountainhead from which its responsibility for the welfare of its competitors flowed.\textsuperscript{34} Sheet manufacturing was "subsidized" by profits from ingot manufacture, a function "insulated from competition."

But suppose the function from which the "subsidy" flows is not a monopoly or near monopoly, but merely less competitive. And suppose competitors are not dependent

\textsuperscript{32} Id. at 438. It is there summarized as follows:

"That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must be regarded as higher than a 'fair price.' True, this was only a consequence of 'Alcoa's' control over the price of ingot, and perhaps it ought not to be considered as a separate wrong . . . . But it was at least an unlawful exercise of 'Alcoa's' power after it had been put on notice by the 'sheet rollers' complaints . . . . We hold that at least in 1932 it had become a wrong."

The judgment on remand found this a violation not of section 2 but of section 1 of the Sherman Act. United States v. Aluminum Co. of America, S.D.N.Y. Eq. No. 85-75, para. 8 of the final judgment entered April 23, 1946.

\textsuperscript{33} Id. at 437.

\textsuperscript{34} The responsibility even in Alcoa did not extend to all competitors. The Government also charged Alcoa with a similar squeeze on cable fabrication. There were similar complaints regarding this squeeze which continued after 1933 when the price of ingot had been reduced. Of this, Judge Hand said:

"That may be true, but aluminum 'cable' must in any event compete with copper 'cable,' and the plaintiff failed to show that, even though the price of ingot were reduced so as to realize only a 'fair' profit, it would have been possible to compete with copper 'cable' and leave an adequate 'spread' for 'cable' fabricators . . . . 'Alcoa' may have had another intent in selling at a loss than to monopolize the market, or to suppress competition; and the finding was that it did." Id. at 438.

For this reason the finding was not disturbed.
on the integrated company for supplies. This was the situation in A & P.\(^35\)

A & P, in the period covered by the information, was essentially a retailer of food. While it performed a number of vertical functions, it sold with one exception\(^36\) only at retail. Thus while it operated some food processing plants and performed wholesale functions for its retail chain, it only made a dollar and cents profit when the final sale was made at retail. Its competitors were not dependent on it at the processing or wholesale levels for supplies and its prices at those levels were not determinative of competitors costs as they were in Alcoa.

Moreover, during the period complained of, A & P was doing an average of less than 10% of the retail food business in the United States and its position was declining both in relation to independents and to other chain stores.\(^37\) It was, however, the largest food retailer.

The Government did not claim that A & P intended to secure an absolute monopoly in the retail food business, nor, indeed, that it aimed at more than 25% of the business in any particular city.\(^38\) Nevertheless for an accumulation of isolated, but highly competitive acts, it was found guilty of violating section 2 of the Sherman Act.\(^39\)

\(^35\) United States v. New York Great A & P Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), aff'd, 173 F.2d 79 (7th Cir. 1949). This was a criminal case brought for violation of sections 1 and 2 of the Sherman Act, tried before Judge Lindley without a jury. His verdict of guilty was affirmed by the 7th Circuit.

\(^36\) The exception: ACCO, a separate buying organization which sold some products to A & P's competitors. The volume of these sales was small compared with A & P's total sales. For discussion of the ACCO phase of the case, see Adelman, Integration and Antitrust Policy, 63 Harv. L. Rev. 27, 53-55 (1949) and Dirlam & Kahn, Fair Competition 78-80 (1954).

\(^37\) According to Judge Lindley, in the period 1933 to 1943, A & P's position in the food business was declining from 11.6% to 7.1%. Meanwhile the independents were increasing from 61.7% to 70.2%, while the position of chain stores, including A & P, was declining from 38.3% to 29.8%, with A & P taking over half the loss. 67 F. Supp. at 633. The government contended these were misleading but offered no alternatives.

\(^38\) Id. at 641.

\(^39\) As well as section 1.
Essentially the vice in A & P's conduct was overaggressiveness. It would not be undersold at retail, and therefore varied prices from store to store and region to region.

Because A & P's methods resulted in low prices to the public—and a very modest overall profit to A & P—the Government had to find an undesirable label for this conduct—one which could taint A & P's whole course of doing business. It did this by suggesting that A & P had used its integration to squeeze competitors in an unfair manner by subsidization of one function by another. It was stated in their brief in the circuit court in this fashion:

... [F]irst [A & P] have subsidized their total retail operations by crediting non-retail profits to retail operations. ... Second they have sold merchandise in selected retail areas below their actual cost of doing business at retail in such areas.\[^{40}\]

And in their supplemental brief:

This is subsidization of selected retail areas by other retail areas. It is an illegal use of horizontal integration, and hence unlawful.\[^{41}\]

This seems to have been the key point upon which Judge Minton decided to uphold the district court. After speaking of A & P's method for establishing price levels at its different stores, he stated:

When the gross profit rate is reduced in Area X, it is an almost irresistible conclusion that A & P had the power to compensate for any possible decline in net profits by raising the gross profit rate and retail prices in Area Y, where it was in a competitive position to do so. ... There must inevitably be a compensation somewhere in the system for a loss somewhere else, as the overall policy of the company is to earn $7 per share per annum on its stock.\[^{42}\]

This, coupled with A & P's enormous buying advantage, spelled out a violation.\[^{43}\]

\[^{40}\] Brief for the United States, p. 73.
\[^{41}\] Supplemental Brief for the United States, p. 36.
\[^{42}\] 173 F.2d at 87.
\[^{43}\] Ibid.
A & P goes much further than Alcoa. In Alcoa the source of the subsidy was ingot profits over which Alcoa had an economic monopoly. In A & P, however, the ability to subsidize in any chosen area came from the fact of widespread geographical distribution of retailing operations, not from the fact of monopoly control in any area. Did Judge Minton thereby hold, as the Government contended, that subsidy of operations in one geographical area by operations in another is unlawful without more, regardless of monopoly control in the more profitable one?

When one looks at the retail aspects of the operation through A & P's glasses rather than the court's, the implications of this decision for all integrated companies are startling. A & P's company policy was never to drive particular competitors out of business. It's policy was merely to secure a certain volume of business which would give it a low unit cost of sale. A & P never deliberately planned to operate a store or division at a loss. It merely operated at a small planned gross margin of profit in the hope that this would produce a sufficient volume to make the operation profitable.

In pricing lower in some areas than in others it was meeting competition. As one writer has put it after study of the record:

[...]

[M]ost of A & P's retail price differentiation was, truly, a meeting of competition. Most of the units that ran at a loss for substantial periods did so in an effort to meet the far more aggressive competition of local chains and super markets. Many instances of local price cutting [...]

44 In the district court opinion two instances are cited where overzealous A & P employees threatened a particular competitor. In each case management intervened and corrected the situation. 67 F. Supp. at 664-671.

45 As John A. Hartford put it in his testimony at trial: "We thought it was sounder business to sell two hundred pounds of butter at a cent a pound profit than one hundred pounds at two cents. That was our theory." Transcript of Record, p. 122.

46 Contrary to the Government's contention. See Supplemental Brief for the United States, p. 36. Judge Minton impliedly concedes as much. 173 F.2d at 86-87. For documentation of A & P policy on this point, see Main Brief for Appellant, pp. 31-35, and Reply Brief for Appellant, p. 12.
appear to have been in response to the opening . . . of new stores by competitors. . . .

In both Alcoa and A&P much was made of supposed operation of particular elements of the business at a “loss.” Although not explicitly stated, “loss” as opposed to some margin of profit was important. This is sound because if it is to be the law that integrated companies cannot use profits from one function to subsidize another, or from one geographical area to subsidize another, where competitors in the latter are hurt, in an imprecise way, the test becomes whether a competitor can be expected to stay in business. If one is going to imply an unlawful intent to “squeeze”—to drive competitors out of business—it should not be inferred from facts indicating that a competitor can stay in business.

In both Alcoa and A & P, while there were external alarms sounded by injured competitors, the ultimate proof of the “subsidy” came from the books of the defendants. This suggests that the manner in which a company’s books are kept is of considerable importance.

Modern industrial management seems committed, and wisely so, to keeping close track of the profitability of the

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47 Which is an “important element in workable competition.” DiIam & KAHN, op. cit. supra note 36, at 212. These authors, however, do not condemn the result in A & P, seemingly on the theory that A & P was not selective enough in its response to competition—i.e., it was too willing to take “a loss” for too long a time. Id. at 214.

48 Judge Hand, for example, made no effort to compare profitability of sheet manufacture with that of ingot after Alcoa had purged itself of the squeeze in 1933 by lowering the price of ingot. 148 F.2d at 437–438. It seemed enough that some profit was possible for efficient competitors.

49 If the comparative experience of Ford and General Motors in the decade prior to 1947 is any indication. See Adelman, op. cit. supra note 36, at 27, 36. quoting from Fortune, May 1947, p. 84, where it is said: “Imagine a company that boasted of a higher order of integration than any similar organization in the country, with ownership of a steel mill, glass plant, timber stands, maritime fleet, etc., and no accurate knowledge of which individual operation was paying its way, or which was padding the cost of the company’s end product by open-market standards.”

By 1946 Ford was losing money and had lost substantial market position. In contrast, General Motors kept detailed track of the relative rates of return on each of its activities, operated profitably, and increased its position.
various functions of its business enterprise. It must know whether each function is being operated efficiently and whether capital is being profitably employed. The best method for ascertaining this is to treat each function as a separate business, billing it on the books for materials at market price and crediting it for its end product in the same fashion, thus testing its operation where possible by the market place.

But there are many areas where it is extremely difficult from an accounting point of view to make an allocation of cost which accurately interprets the business reality. It has been said that:

... [D]epending on what system of accountancy is used, any department of an integrated company can be made to show a profit...  

There are "common costs"—costs fairly allocable to either of two separate functions—which break down into "joint costs" (which arise when several products result from a single process) and "overhead costs."  

Whatever else A & P did wrong, it did itself the greatest disservice by the "statistical accounting" system it used for management control purposes. This provided the glue with which the Government's charges of "subsidy" and actual operation in particular areas at a "loss" were made to stick. It arbitrarily minimized retail profits and not

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50 Fortune, February, 1941, pp. 116-117. This is quoted in Hale, Vertical Integration, 49 Colum. L. Rev. 921, 941 (1949), which contains an excellent statement of the accounting problems facing the integrated company as well as a critical analysis of the "squeeze," "double profits," "subsidization," "recoupment," etc.

51 Id. at 941-946.

52 A & P used two parallel record systems. One was a normal accounting system used to indicate long term trends and for stockholder and tax reports. The other was a system of statistical information and reports used as a management control device. The two were not identical. See Main Brief for Appellant, pp. 18-29, for a description of these systems.

53 For example: A & P computed its "gross profit rate" for retail operations on basis of the delivered cost of the goods to the store, rather than on the delivered cost to the warehouse as was the custom of its competitors. Main Brief for Appellant, p. 24. Thus its gross profit rate was uniformly smaller.
only indicated the existence of but magnified the paper profits from buying operations. Even assuming Judge Minton understood the statistical accounting system, and its relationship to A & P's other accounting system, reference to which was necessary to determine actual profit, the former left its impression upon him and gave him the basis for speaking of the "large fund accumulated at the buying and supplying level" and finding that in some areas a particular "store runs below the cost of operation."

There is no indication in the opinion as to whether the final result of the normal accounting system of A & P gave an accurate picture of non or less integrated competitors' costs in comparable functions. This fact should have been the crucial question.

The consent decree entered in the companion civil suit brought against A & P would seem to indicate that the Department has backed away from any rigid requirement that all A & P stores be operated at a profit. It simply enjoined planned operation of a "division," which includes all retail stores in a large geographical area, at so low a gross profit rate that it is "known" that the result will be operation of such "division" at a loss, when done for the purpose of destroying competition. Mere operation of a division at a loss will not give rise to the presumption of such purpose. Under this decree A & P purposely could operate

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54 173 F.2d at 86-87.
55 Ibid.
56 In Alcoa, Judge Hand recognized this by assuming that Alcoa's costs were fairly representative of its competitors' costs, 148 F.2d at 438; this is an assumption of questionable soundness in A & P.
58 Ibid. The pertinent provision of the decree is as follows:

"Defendants are jointly and severally restrained and enjoined from assigning . . . a gross profit rate for any Division, knowing that such . . . will result in the operation of any such Division at a loss, for the purpose of or with the intent of destroying or eliminating competition in the retail purchase, sale or distribution of food or food products. . . . The purpose or intent prohibited in this Section shall not be presumed merely by reason of the operation of a Division at a loss."
some retail stores, the real tactical units in the food merchandising wars, at a loss and, provided the “division” showed a profit, be in the clear.

A & P thus retains, to a large degree, its flexibility within its “divisions.” In some respects it may, therefore, be considerably better off under the decree than it was before.  

On the other hand, the decree in Alcoa flatly prohibited any sale by Alcoa of its sheet at a loss.

III

SQUEEZING COMPETITORS OR COMPETITORS OF CUSTOMERS — THE DILEMMA OF STANDARD OIL OF INDIANA

Standard of Indiana did just the reverse of what Alcoa was accused of doing. It did not “squeeze” its wholesale customers with whom it competed as a wholesaler in selling direct to retailers. Rather it maintained too large a spread between its price to such wholesalers and its price to re-

59 For the alleged practice of planning particular retail store operations within a “division” at a “loss” it was severely chastised in the criminal case.

60 Paragraph nine of the Judgment on Mandate against Aluminum Company of America entered April 23, 1946, S.D.N.Y. Civ. No. 85-73, provided that Alcoa was enjoined from:

“1. . . . selling aluminum ingot for the fabrication of aluminum sheet or aluminum alloy sheet at higher than fair prices, if the fabricator of such sheet is thereby prevented from fabricating and selling aluminum sheet or aluminum alloy sheet at a reasonable profit, provided that such fabricator is efficient, well equipped, and otherwise able to fabricate and sell such sheet on a fully competitive basis; and further enjoined and restrained from selling aluminum sheet and aluminum alloy sheet, both coiled and flat, at prices below its selling prices for aluminum ingot, plus the cost of manufacturing and selling such sheet. . . .”

This order has its curious facet also. It might make it difficult for Alcoa not to discuss its ingot and sheet prices with competitors in order to comply with the decree. Such conduct could be a per se violation of section 1 of the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Query as to what protection the decree affords Alcoa in this respect?

61 For history of case, see note 64, infra.
tailers on direct sales. Its wholesale customers sold, in part, to other retailers at prices lower than those of Standard to its retailers and, in part, through their own retail facilities to consumers at prices lower than those charged the retailers supplied directly by Standard. Standard’s retail customers complained.

The Federal Trade Commission faced a difficult choice when this situation came to its attention. It had to choose between two classes of competitors with divergent interests, *i.e.*, wholesalers and retailers. It decided in favor of the retailers and reached a conclusion which, ironically, is just the reverse of that in Alcoa. It, in effect, compelled Standard to apply an absolute squeeze to any wholesaler which also sold as a retailer.

This is just the reverse of *Alcoa* because in that case there were manufacturers of utensils, one step down the aluminum fabricating line from the sheet manufacturers, who complained both before and after Alcoa reduced the price of ingot in 1933 that *their* competitors, who had integrated sheet and utensil manufacturing, were able to undersell the non-integrated utensil manufacturer because the spread between the ingot and sheet price set by Alcoa was too large. The *Alcoa* decree, in effect, ordered this squeeze continued.62

You are no doubt familiar with the long history of the Standard of Indiana litigation.64 It started in 1940 and the

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63 See note 69 supra.

64 FTC v. Standard Oil Co. of Indiana, Docket No. 4389, Nov. 29, 1940. After hearings a cease and desist order was issued in 1945, 41 F.T.C. 263 (1945), which the FTC modified in 1946, 43 F.T.C. 56 (1946). The order was further modified and enforced by the 7th Circuit in 1949, 173 F.2d 210 (1949). The Supreme Court reversed and remanded on the point of good faith meeting of competition in 1951, 340 U.S. 231 (1951). The FTC issued its modified cease and desist order in 1953, 49 F.T.C. 923 (1953), and after a procedural setback in the 7th Circuit in 1954, 1954 Trade Cas. ¶ 67,727, its 1953 order was vacated and set aside by the 7th Circuit in May 1956, CCH TRADE REG. REP. ¶ 68,332.
most recent round was won in May, 1956, by Standard, when the Seventh Circuit upheld its defense of good faith meeting of competition and vacated the FTC cease and desist order. Most of the litigation in the courts has centered on the good faith defense—a kind of confession and avoidance. Therefore, the FTC order is otherwise as yet unquestioned.

The complaint charged Standard with discrimination in price in violation of section 2(a) of the Clayton Act as amended, which unlike the original Clayton Act contained no provision inferentially making functional discounts lawful but left them to be tested like all other price differentials by their effect upon competition.

The FTC's first order directed Standard not to sell any gasoline to its wholesale customers for retail sale by them at a price lower than Standard sold to its other retail customers, and not to sell gasoline to its wholesale customers for resale by them to retailers at a lower price than Standard sold to its retailer customers if such wholesale customers resold to retailers at a price less than Standard's price to retailers. The latter provision was modified in 1946 to provide that Standard could not sell to its retail customers at a higher price than its wholesale customers sold to theirs.

In other words, the FTC ordered Standard to put an absolute squeeze on its integrated wholesale customers. Such customers could perform the economic functions of a wholesaler but to the extent they integrated into retailing they had to buy as a retailer only, and at the same price at which other retailers bought directly from Standard.

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67 41 F.T.C. at 284. The order did not prevent "price differences of less than 0.5 cents per gallon which do not tend to lessen, injure or destroy competition with such dealers." But this was deleted in 1946, 43 F.T.C. 56 (1946).
68 41 F.T.C. at 285.
69 Modified Order, 43 F.T.C. 56, 58 (1946).
Although the economic results of this may not make much sense to economists,\textsuperscript{70} to lawyers,\textsuperscript{71} or to Standard of Indiana,\textsuperscript{72} the Attorney General’s Committee assumed the Commission’s position reflected sound law.\textsuperscript{73} In other words, in this type of situation a single price to all purchasers regardless of differences in cost of selling or function, while it may work economic discrimination, gives rise to no discrimination legally actionable under the Robinson Patman Act.\textsuperscript{74} Query, in view of \textit{Alcoa}, as to the Sherman Act?

\textsuperscript{70} See Adelman, \textit{Integration and Antitrust Policy}, 63 Harv. L. Rev. 27, 63–74 (1949); Diriam & Kahn, op. cit. supra note 36, at 245–253.

\textsuperscript{71} Attorney General, op. cit. supra note 66, at 207–209.

\textsuperscript{72} Which wanted badly to keep the wholesalers’ business and it apparently has. It is reported that two of them have gone out of the retail business. See Note, \textit{Functional Discounts Under The Robinson-Patman Act: The Standard Oil Litigation}, 67 Harv. L. Rev. 294, 312–313 (1953).


\textsuperscript{74} The cases seem to bear them out although the point seems never to have been squarely presented to the Supreme Court. In three “delivered price” (and, therefore, different) cases the Supreme Court seems to assume that the Robinson Patman Act requires price differentials recognizing one type of cost saving in selling to different purchasers—\textit{i.e.}, freight. These are different, according to Attorney General, op. cit. supra note 66 at 217. As a matter of fact:

“This obviously differs from the denial to an integrated buyer of functional discounts or ‘brokerage’ concessions, thereby depriving him of returns on capital invested in the requisite distributive facilities. In the theoretical ‘discrimination’ arising from a ‘delivered’ price which does not reward a customer’s geographical proximity, it cannot be assumed that he invested in a location near a particular supplier’s mill in anticipation of a freight advantage. As a matter of fact, in view of the traditionally established ‘delivered’ pricing in basic industries which doubtless enters into fabricators’ investment calculations for plant location, the opposite assumption is equally plausible—entirely apart from the many other factors attracting buyers of basic industrial goods to locate near consuming markets.”

The cases are:

\begin{itemize}
\item FTC v. Cement Institute, 333 U.S. 683 (1948),
\item Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), and
\end{itemize}
A POSSIBLE NEW GOVERNMENTAL IMPLEMENT FOR ATTACKING THE SQUEEZE—CONSIDERING SUBSIDIARIES OR DIVISIONS AS PURCHASERS FOR THE PURPOSE OF ESTABLISHING A PRICE DISCRIMINATION UNDER SECTION 2(a) OF THE CLAYTON ACT, AS AMENDED

A recent case in the Eastern District of New York dealt with a “squeeze” situation similar in principle to that in Alcoa, in part, under section 2(a) of the Clayton Act, and in so doing appears to have put a somewhat novel construction on that statute. This was Danko v. Shell Oil Co., decided in 1953.

One count of the complaint appears to have predicated a cause of action on a difference in price in two “sales” by Shell—one to its own retail service station and one to an independent retail station selling in competition with the Shell retail station. The Shell service station was allegedly selling at retail to consumers at a price lower than the complaining retailer could match, thus squeezing that retailer. Judge Bruchhausen overruled a motion to dismiss directed specifically to this count although he did dismiss the complaint on other grounds but with leave to file an amended complaint.

One of the fundamental requirements of section 2(a) of the Clayton Act, as amended, is that there be two sales. This is clear from the face of the statute which makes it unlawful only “... to discriminate in price between different

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76 None was ever filed and the action was dismissed with prejudice by stipulation. Danko v. Shell Oil Co., Civil No. 13638, E.D. N. Y., December 28, 1953.
purchasers. . . ." 77 Mr. Justice Jackson said in one case:

... [No] single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination. 78

Was there a sale between Shell and its own retail station? In order for a "sale" to occur, as that term is used in the general legal sense, there must be a transfer of title to goods from one legal person to another. 79 Therefore, if the retail station were a separate corporation from Shell there might have been a "sale" as that term is generally understood in the law. If, on the other hand, the retail station were merely another part of the Shell corporation, there could not be a "sale" in the mere physical transfer within the company, perhaps accompanied by a bookkeeping entry.

Which was the situation in the Danko case is not clear from the opinion. It does seem clear, however, that the court considered it immaterial when it said:

The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser. In any event, it is doubtful that such relationship if discriminatory, would be permitted to accomplish such objective. 80

78 Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755 (1947). Another authority on the subject has put it this way: "There must be actual sales at different prices to at least two different actual purchasers." Austin, Price Discrimination and Related Problems Under the Robinson Patman Act 38 (1950). Cf. Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939). See also, Sorrentino v. Glen-Gery Shale Brick Co., 46 F. Supp. 709 (E.D. Pa. 1942), holding it is not a discrimination to refuse to sell to one of two persons who have previously been customers thereby causing one to lose business to the other.
79 "[A sale's] meaning in law is: '... contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price or sum of money... .'" (Emphasis added). Beatty v. Santa Fe, 57 N.M. 759, 263 P.2d 697, 701 (1953). "A sale is defined as a contract whereby property is transferred from one person to another... implying the passing of the general and absolute title... ." Cullen v. Tolley, 199 Okla. 214, 184 P.2d 797, 800 (1947).
80 115 F. Supp. at 888.
If this be a holding that one department of a corporation may be a "purchaser" from another department of the same corporation within the meaning of section 2(a) of the Clayton Act, as amended, it would appear not only to ignore a clear requirement of the statute, but also to do violence to the basic structure and purpose of the act.\textsuperscript{81}

That portion of the Robinson Patman Act which became section 2 of the Clayton Act was not drafted to cover such a situation and this was clearly recognized by Congress in passing it.

The point was raised in the course of testimony by the author of the bill, Mr. Teegarden,\textsuperscript{82} before the House Judiciary Committee. Mr. Lloyd asked Teegarden:

It is a common practice in my country for large concerns to buy at wholesale and maintain large stocks and, at the

\textsuperscript{81} The author has been unable to find any other case in which this point seems squarely to have been raised and considered except possibly an informal early ruling by the Federal Trade Commission. A hat manufacturer was charged in part with selling to subsidiary jobbers at prices which permitted them to undersell competitor jobbers. The Commission ruling states that "the subsidiary concerns and the manufacturing concern are merely different corporate names for the same family. . . . The introduction of another firm name into the process does not introduce an additional element of competition, nor does it conceal the existence of the competition." The file was closed. Informal Rulings of the Federal Trade Commission, 81 Cong. Rec. 2339 (1935). Cf., In re U.S. Steel Corp., 8 F.T.C. 1 (1924), in which the Commission, without any apparent consideration of the question, indicated that differences in prices to a group including subsidiaries on the one hand, and to a different group on the other hand, resulted in competitive advantage to the favored group: But it does not appear that this was necessary to the finding of discrimination in price. See Sheehy, Implications of Intra-Enterprise Conspiracy Doctrine in Clayton Act Sections 2 and 3 Cases, A.B.A. Report, Section on Antitrust Law 107 (April 1956).

\textsuperscript{82} Hearings Before the Committee on the Judiciary on H.R. 8442, H.R. 4995, H.R. 5062, 74th Cong., 1st Sess., at 9 (1935). The bill which finally passed was essentially H.R. 8442, which Mr. Teegarden was credited with drafting. This, however, did not include what has become known as section 3 of the Robinson Patman Act [Section 13a (not "(a)") of title 15, U.S. Code] which was the Borah-Van Nuyss Bill, S. 4171 and which has caused considerable confusion. See Dillon, Criminal Penalties in Section 3 of the Robinson-Patman Act (Borah-Van Nuyss Act); "Dead Horse" or "Sleeper"?, A.B.A. Report, Section on Antitrust Law 112 (April 1956).
same time, maintain a retail department. In fact their re-
tail department is not segregated at all from their gen-
eral business. But the small retailer comes in there and
buys from them at "wholesale prices," so called. . . .
How will this bill affect that situation where this concern
sells to itself for less than it sells to the independent re-
tailer?83

After a further colloquy necessary to straighten Mr.
Teegarden out on precisely what the question was, he
answered:

There would be no question of discrimination pre-
ounced as between itself and an independent retailer. . . .
Because it is not a sale to itself. This only covers dis-

criminations in sales. . . . 84

Later in his testimony when the same question was
raised again, Mr. Teegarden said:

. . . I do not believe this bill would reach it and off-

hand I doubt if it would be possible to reach it in this type
of legislation.85

In other words, the amended section 2(a) of the Clayton
Act was calculated to prevent a competitive evil by
striking at what were regarded as unfair financial con-
sequences to at least two different competitors flowing
directly from purchases or sales at different prices. Where,
for example, one of two retailers buying from the same
wholesaler, receives a lower price than the other, it is the
financial advantage gained by the one over the other flow-
ing directly from the difference in prices charged the two86
which is the root of the harm to competition for the pur-
poses of this statute. Similarly, where a vendor sells in
one area at a lower price than in another to the detriment
of his competitors in the former area, it is the financial
advantage gained by such vendor flowing directly from

83 *Hearings, supra* note 82, at 211.
84 Ibid.
85 Id. at 229.
the two sales at different prices which is the root of harm to competition\textsuperscript{87} under this statute.

Let us turn back now to the Danko case and assume first that the Shell transfer of gasoline to its own retail station was an intra-corporate transaction. It is difficult to see how any financial advantage could have flowed to Shell directly from the internal bookkeeping entry recording the transfer. The total amount of money in Shell’s till could not, under any circumstances this writer can conjure, have been affected one whit directly by this transaction regardless of what figures were entered in the books.

Let us next assume that it was an inter-corporate transfer from Shell to its wholly owned subsidiary — what might for some purposes be regarded as a “sale” — a transfer of title from one legal person to another. Should the subsidiary be considered a “purchaser” within the meaning of section 2(a) of the Clayton Act? It is submitted that it should not for the same reason stated above, unless there is some most unusual circumstance present which gives the Shell family a financial advantage over the competitor-retailer flowing directly from the difference in prices charged the subsidiary and such other retailer.

One might say there is a flaw in the logic of what has just been stated. The proposition isn’t really that the subsidiary should not be considered a “purchaser,” but that no injury to competition should be inferred from the mere fact of a lower price to the subsidiary, as it may be from any difference in price charged by a seller to two independent competitive resellers.\textsuperscript{88} Indeed, because such circumstances would be so unusual, no complaint should

\textsuperscript{87} E.g., E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944).

be considered sufficient, absent specific allegations showing financial advantage to the seller's family arising out of these transactions. The shorthand and accurate way of expressing this very complex idea is merely to say that the subsidiary is not a "purchaser," because that label has no necessary significance in terms of financial advantage, the fulcrum on which the lever of section 2(a) of the Clayton Act turns.

Realistically, such economic harm as there was to Danko for which Shell could be blamed stemmed from the spread between Shell's price to Danko and Shell's retail price. If Danko is to be given redress, it should be based on that fact, either under the Sherman Act, as in Alcoa, or under section 2(a) of the Clayton Act as amended, under the tests of such cases as Muller and Moss, which turned on discriminations in retail prices adversely affecting competitors of the seller.

The foregoing, however, is not to be taken as a necessarily reliable prediction of how the law will be interpreted, because, among other reasons, one group of very distinguished judges recently placed an interpretation upon one of the antitrust laws in a converse situation which prompted the following comment from an equally distinguished but less numerous group of judges:

Lack of sympathy with an Act of Congress does not justify giving it a construction that cannot be rationalized in terms of any policy reasonably attributable to Congress. . . . In this instance, I think the Court has departed from this rule by giving the Miller Tydings and McGuire Acts an artificial construction which produces results that could hardly be intended by Congress. . . . Indeed not even the fact that the only legislative history directly in point is squarely opposed to the Court's reading of the statute . . . prompts enough doubt in the Court to require an inquiry into the purpose of the Acts.89

The same zeal might be applied in placing an equally artificial construction upon a statute with which the courts are in sympathy to reach a result they think justified.

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