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NOTES AND COMMENTS

Anti-Trust Laws—Price Discrimination Act—Requisite Competitive Injury and Burden of Proof

Immediately following the passage of the Robinson-Patman Amendment to §2 of the Clayton Act,¹ considerable discussion took place concerning its probable effect on the marketing structure of the nation,² together with some speculation as to how its controversial provisions would be treated by the Federal Trade Commission and in the courts.³ Now in its twelfth year, the Act is seen to be "in a very important period of judicial review and construction,"⁴ as important questions of interpretation and administration are being decided in increasing numbers by the Supreme Court.⁵ Some of these were considered recently in *Federal Trade Commission v. Morton Salt Co.*⁶

There, a cease and desist order had been issued against Morton Salt as a result of a finding by the Commission that the respondent's use of a "standard quantity discount system" in the sale of its products amounted to a price discrimination within the meaning of §2(a).⁷ On review, the Seventh Circuit Court of Appeals set aside the Commission's findings and order, and directed a dismissal of the complaint.⁸

¹ 38 STAT. 730 (1914), as amended 49 STAT. 1526 (1936), 15 U.S.C. §13 (1946).

² E.g., BUSINESS AND THE ROBINSON-PATMAN LAW (Werne ed. 1938); ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937); BURNS, *Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301, 308-19 (1937); George, *Business and the Robinson-Patman Act: The First Year*, 4 LAW & CONTEMP. PROB. 392 (1937); Learned & Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137 (1937); McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937); Smith, *The Patman Act in Practice*, 35 MICH. L. REV. 705 (1937); *The Robinson-Patman Act in Action*, 46 YALE L. J. 447 (1937); Note, *Marketing Under the Robinson-Patman Act*, 31 ILL. L. REV. 907 (1937).

³ E.g., PATMAN, THE ROBINSON-PATMAN ACT (1938); Copeland, *The Problem of Administering the Robinson-Patman Act*, 15 HARV. BUS. REV. 156 (1937); McAllister, *Price Control by Law in the United States: A Survey*, 4 LAW & CONTEMP. PROB. 273, 289-96 (1937); McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Construction*, 4 LAW & CONTEMP. PROB. 410 (1937); Stevens, W. H. S., *An Interpretation of the Robinson-Patman Act*, 2 J. MARKET-ING 38 (1937).

⁴ Haslett, *Price Discriminations and Their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 451 (1948).

⁵ E.g., *Federal Trade Commission v. Morton Salt Co.*, 68 Sup. Ct. 822 (1948); *Federal Trade Commission v. Cement Institute*, 68 Sup. Ct. 793 (1948); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743 (1947); *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

⁶ 68 Sup. Ct. 822 (1948).

⁷ *Morton Salt Co.*, 39 F.T.C. 35 (1944), order modified, 40 F.T.C. 388 (1945).

⁸ *Morton Salt Co. v. Federal Trade Commission*, 162 F. 2d 949 (C.C.A. 7th 1947), 60 HARV. L. REV. 1167 (1948), 42 ILL. L. REV. 556 (1948), 15 U. OF CHI. L. REV. 384 (1948).

The majority of the United States Supreme Court, in an opinion by Mr. Justice Black, held, inter alia, that 1.) the announced quantity discounts were discriminatory, 2.) the burden of justifying the discrimination rested with the company, and 3.) there had been a sufficient showing by the Commission that the discrimination had the required effect on competition. Accordingly, the decision of the Circuit Court of Appeals was reversed.⁹

On the question of discrimination, it should be noted first that Morton's price system, given by the Supreme Court as

	<i>Per case</i>
Less-than-carload purchases.....	\$1.60
Carload purchases	1.50
5,000-case purchases in any consecutive	
12 months	1.40
50,000-case purchases in any consecutive	
12 months	1.35,

involved both of the two general types of quantity discounts, *viz.*, the non-cumulative or unit delivery discount which is based on the size of the individual order (here represented by the ten cent discount for carload purchases), and the cumulative or volume discount based on the aggregate volume of orders filled within a specified period of time regardless of the size or number of orders within that period.¹⁰

Prior to this time reasonable non-cumulative discounts had not generally been regarded with disfavor by those charged with the enforcement of the Act, whereas cumulative discounts were consistently deemed discriminatory,¹¹ except those so arranged that even the smaller buyers could avail themselves of all the quantity limits.¹² The reason for this lies in the fact that the unit delivery discounts have an obvious commercial utility, savings in selling and delivery cost,¹³ while cumulative

⁹ 68 Sup. Ct. 822 (1948). Mr. Justice Jackson, joined by Mr. Justice Frankfurter, dissented in part. Other questions, not treated in this note, were considered, e.g., smallness of the item, *id.* at 829 and 835 (dissenting opinion) on which see, H. C. Brill Co., 26 F.T.C. 666, 680 (1938); Bayly, *Four Years Under the Robinson-Patman Act*, 25 MINN. L. REV. 131, 145 (1941); Haslett, *supra* note 4, at 468-9.

¹⁰ Ostlund, *The Robinson-Patman Act and Quantity Discounts*, 14 ACCOUNTING REV. 402, 403 (1939); Stevens, *Some Laws of Quantity Discounts*, 2 J. BUS. 406 (1929).

¹¹ Haslett, *supra* note 4, at 463-4 and Commission cases cited. MacIntyre, *Section 2(a): Its Application to the Quantity Price*, SYMPOSIUM ON ROBINSON-PATMAN ACT, NEW YORK STATE BAR ASS'N (CCH) 10, at 16 (1948) (hereinafter cited as SYMPOSIUM). By reasonable non-cumulative discounts is meant those not clearly disproportionate to delivery costs.

¹² E.g., Kraft-Phoenix Cheese Corp., 25 F.T.C. 537 (1937); American Optical Co., 28 F.T.C. 169 (1939). See Bayly, *supra* note 9, at 146. Crowley, *Equal Price Treatment Under the Robinson-Patman Act*, 95 U. OF PA. L. REV. 306, 328 (1947).

¹³ Stevens, W. H. S., *Some Laws on Quantity Discounts*, 3 J. BUS. 51, 55-6 (1930); 31 ILL. L. REV. 907, 921 (1937).

discounts are commercially advantageous primarily with respect to manufacturing costs only, and even there the saving may be more in theory than in fact, especially in the sale of stock merchandise.¹⁴

In holding the system to be discriminatory the majority of the Court made no distinction between these types, but looked to the fact that the discount brackets were so broad only five large retail chain grocers had ever qualified for the cheapest rate offered, while some of their small independent competitors were unable to qualify even for the carload price. Thus, though ostensibly the discounts were available to all on equal terms, "functionally" they were not, the actual result being a rather large differential in price among competitors. Accordingly, since "the legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability"¹⁵ such a differential (involving competitive injury) is a discrimination under the Act.

Unquestionably, the objective of some of the proponents of the Act was to eliminate as far as possible the competitive advantage of large chain stores as indicated by the Court. It is not quite as certain, however, that either the intent of Congress or the words of the Act went the full distance toward that objective.¹⁶ Indeed, the Robinson-Patman Act purports to take its place with that segment of the broad field of anti-trust law which is concerned with promoting fair competition. This seems to indicate that its purpose was to remove the competitive advan-

¹⁴ Sawyer, *The Commission's Administration of Paragraph 2(a) of the Robinson-Patman Act: An Appraisal*, 8 GEO. WASH. L. REV. 469, 476-8, 488-90 (1940); H. C. Brill Co. 26 F.T.C. 666 (1938), discussed in Bayly, *supra* note 9, at 163-4. Copeland, *supra* note 3, at 163-4; Ostlund, *supra* note 10, at 403 ("Actually it has appeared at times that costs of supplying purchasers of large volume may exceed as a percentage of sales the cost of supplying certain smaller purchasers."). Stevens, W. H. S., *An Interpretation of the Robinson-Patman Act*, 2 J. MARKETING 38, 42 (1937); Freer, *Accounting Problems Under the Robinson-Patman Act*, 65 J. ACCOUNTANCY 480, 484 (1938); Thorp, *Price Discrimination and Cost*, 63 J. ACCOUNTANCY 183, 184 (1937).

¹⁵ Federal Trade Commission v. Morton Salt Co., 68 Sup. Ct. 822, 826 (1948). See Learned & Isaacs, *supra* note 2, at 142 (behind the Act is a general assumption against bigness) and George, *Federal Trade Commission Decision in the Goodyear Case III*, 44 DUN'S REVIEW 5, 9-10 (June 1936) (briefly summarizing both sides of "big v. little" argument).

¹⁶ Learned & Isaacs, *supra* note 2, at 149 ("It was the apparent intention of Congress, however, to preserve for these institutions [the large chains] their operating efficiencies."). That Congress intended a justified price differential to be lawful even though it operated in favor of a large buyer is obvious from the fact it made other and specific provision (quantity limits proviso, *infra* note 19) for such a contingency. Patman, *op. cit. supra* note 3, at 260: ("It is entirely possible that quantity discounts of such proportions may be legally granted as to enable large dealers to drive out smaller ones. This is the very reason that a protective factor was incorporated [quantity limits proviso]."). See also 80 CONG. REC. 8111, 6282 (1936).

tage of large buyers only to the extent that such advantage was *unfair*.¹⁷ And "large quantity purchasing ability" is not in itself unfair—it is merely a power, obtained through the utilization of an efficient method of sales and distribution, which may be used either fairly, to encourage competition by effecting savings to the consumer,¹⁸ or unfairly, to suppress competition and create monopoly. The Act strikes only at the latter use of this power, not at the power itself.¹⁹ This point is recognized by the Court—but it is stressed by the minority in urging that a distinction should be made "between discounts which the Act would foster and those it would condemn."²⁰

The conclusion then that Morton's cumulative discount system is a discrimination is entirely supportable. Yet this phase of the opinion appears open to the criticism that the language (quoted at note 15 above) overstates the proposition in such a manner as to open the way for an application of the Act to situations beyond its scope, which can work a detriment to those small buyers for whose benefit it was enacted.²¹

¹⁷ For an excellent statement of the meaning of competition see Stevens, W. H. S., *An Interpretation of the Robinson-Patman Act*, 2 J. MARKETING 38 (1937). Bayly, *supra* note 9, at 187 (meaning of unfair).

¹⁸ See Stevens, W. H. S., Brief for Respondent, *Raymond Bros.-Clark Co. v. Federal Trade Commission*, 280 F. 529 (C.C.A. 8th 1922) reprinted in OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 720, 721 (1948) ("Each of these systems of distribution [the old line 'wholesaler-retailer-consumer' and the chain-store 'retailer-consumer'] thus in conflict is entitled economically under the rule of fair competition to compete with the other on the basis of the prices of the goods, their quality, and such incidental service as may be rendered, and each system is entitled economically to survive to the extent to which it serves the public in these respects. The one system might conceivably eliminate the other, but if this elimination be due to lower prices, better quality, superior service . . . the elimination in question is but a part of the competitive process.").

¹⁹ As pointed out *supra* note 16, where the Commission finds, after due investigation and hearing, that there are so few purchasers able to qualify for large quantity discounts in a certain commodity that the situation is promotive of monopoly, it may establish quantity limits under the second proviso of §2(a). Thus "the Act puts a limitation on producing and selling efficiency at a point where it seems likely to injure competition. . . . The economic and competitive theory lying behind this provision is much the same as that which has been consistently applied by the Interstate Commerce Commission in rejecting applications for lower rates on train load than on carload lots." Stevens, *An Interpretation of the Robinson-Patman Act*, 2 J. MARKETING 38, 45 (1937).

The first use to be made of the Commission's power under this proviso was begun by a resolution to investigate the tire industry, adopted July 7, 1947. CCH TRADE REG. SERV. ¶24,015 (FTC 1948).

²⁰ *Federal Trade Commission v. Morton Salt Co.*, 68 Sup. Ct. 822, 834 (1948). Stevens, *supra* note 19, at 45 ("The danger to fair competition comes not primarily from the customary and relatively small . . . differentials given by nearly all sellers and taken advantage of by hundreds and thousands of distributors, but rather from the large differentials . . . available only to a limited number of large mass buyers. With its power to prescribe quantity limits [the Commission's] real opportunity lies in the elimination of the unreasonably large and discriminatory differentials, which are and always have been a real menace to fair competition.").

²¹ Learned & Isaacs, *supra* note 2, at 150, 154-5; George, *Business Adjusts Itself to the Robinson-Patman Act*, 45 DUN'S REVIEW 11, 12 (March 1937); Ostlund, *supra* note 10, at 403; 31 ILL. L. REV. 907, 939 (1937).

Even where a price schedule contains wide differentials, it may nevertheless be lawful if justifiable under the cost difference or other proviso of the Act,²² which brings us to the second phase of the case. The opinion of the Circuit Court of Appeals had been understood as requiring that in order to establish a violation the Commission must show not only a price differential between competing buyers but also the absence of any justification, on the theory that there is no discrimination so long as the differential may be justified.²³ It is not clear whether the Supreme Court so understood the opinion, but its position on this much discussed point was placed beyond question by the statement—"We think that . . . Congress meant . . . that in a case involving competitive injury between a seller's customers, the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors."²⁴

This seems to settle the law as to *who* has the burden of proof, but the question of *how* the burden shall be met was not presented.²⁵ We get a clue, however, that it must be by explicit showing, from the Court's attitude toward carload discounts. It is arguable that the ten cent per unit discount on carload shipments is so obviously the result of a saving in transportation costs that judicial notice could be taken of the fact at least so far as to raise a presumption in favor of the seller.²⁶ But the Court said carload discounts, "like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of respondent's case is that it has thus far failed to make such proof."²⁷

Perhaps the most significant phase of the case, at least so far as the practical enforcibility of the Act is concerned, is in regard to the

²² "Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences, in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

²³ Federal Trade Commission v. Morton Salt Co., 68 Sup. Ct. 822, 827 (1948); 60 HARV. L. REV. 1167 (1948); 42 ILL. L. REV. 556 (1948); 15 U. OF CHI. L. REV. 384 (1948).

²⁴ Federal Trade Commission v. Morton Salt Co., 68 Sup. Ct. 822, 827-8 (1948). The conclusion is based both upon the general rule of statutory construction that the party seeking to avail himself of an exception to a prohibition has the burden of bringing himself within it, and upon §2(b) which gives the commission a prima facie case upon proof of discrimination "unless justification shall be affirmatively shown." See, 80 CONG. REC. 3599 (1936).

²⁵ Much has been written and said about this eminently practical problem, which is beyond the scope of this note. For specimens see Freer, *Accounting Problems Under the Robinson-Patman Act*, 65 J. ACCOUNTANCY 480 (1938); Thorp, *Price Discrimination and Cost*, 63 J. ACCOUNTANCY 183 (1937); Ostlund, *supra* note 10; Haslett, *Price Discriminations and Their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 472 (1948).

²⁶ See Haslett, *The Validity of Quantity Discounts*, SYMPOSIUM (CCH) 26, 34 (1948) (disapproving).

²⁷ Federal Trade Commission v. Morton Salt Co., 68 Sup. Ct. 822, 829 (1948).

finding of requisite injury to competition. Under the Clayton Act discriminations were unlawful where their effect "may be substantially to lessen competition or tend to create monopoly in any line of commerce." By adding to this the phrase "or to injure, destroy or prevent competition with any person . . .", Congress intended that the work of the Commission in curbing injurious practices at their inception should be facilitated by making the law "less rigorous in its provisions as to the effect required to be shown in order to bring a given discrimination within its prohibitions."²⁸ The Circuit Court of Appeals did not hold simply that the burden of alleging and proving the required competitive effect was upon the Commission, which the Commission had from the very beginning assumed to be the case²⁹ and which the present Supreme Court decision does not disturb. But, in attacking the evidence in this case as insufficient, it virtually required a showing of actual injury.³⁰ Such a conclusion clearly finds no support either in the language of the Act or in the cases construing it. The courts have quite generally considered the phrase "may be substantially to injure, etc.", as used in these Clayton Act sections, as requiring a finding simply of reasonable probability of injury described.³¹ In reversing the lower court, however, the Supreme Court saw the statute as requiring of the Commission no more than a finding of reasonable *possibility* of requisite injury, a conclusion which itself constitutes a substantial departure in the other direction from the interpretation hitherto considered fairly well established.³²

²⁸ Remarks of Congressman Utterback, 80 CONG. REC. 9417 (1936). This is generally conceded. But see McLaughlin, *supra* note 3, at 415 (belief that the Amendment did not substantially extend the area already covered by the Clayton Act).

²⁹ Austern, *Required Competitive Injury*, SYMPOSIUM (CCH) 63, 68 (1947); Haslett, *Price Discriminations and Their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 474 (1948). F. T. C. Brief in Opposition, p. 8, Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d 378 (C.C.A. 2d 1945) reprinted in Austern, *supra*, at 73 ("The Commission has always construed the Act to require it as a part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition.").

³⁰ Or so it seems, if the evidence must reveal that a competitor of a favored buyer was forced to "re-sell at a substantially reduced profit" before the court can detect a violation. Morton Salt Co. v. Federal Trade Commission, 162 F. 2d 949, 956 (C.C.A. 7th 1947). See 15 U. OF CHI. L. REV. 384, 387 (1948) and Haslett, *Price Discriminations and Their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 466-7 (1948).

³¹ Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 738 (1945); International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 298 (1930) (§7 Clayton Act); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-7 (1922) (§3 Clayton Act). *But cf.* United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 411 (1914) (Food & Drug Act).

³² See cases cited note 31 *supra*. The Court relied solely upon certain language in the *Corn Products* case, *supra* note 31, which was forcefully demonstrated by Mr. Justice Jackson to be in conflict with other, more carefully considered language in the same case, and presumably to have been used inadvertently, 68 Sup. Ct. 822, 833-4 (dissenting opinion).

The advisability of announcing the "possibility of injury" test as a standard for the future is open to question, not merely because it was unnecessary in order to sustain the Commission in this case,³³ but particularly as a matter of sound administrative policy. By invoking the new standard here, considerable doubt is cast upon the prospective status of other Clayton Act sections which contain substantially the same language.³⁴ More fundamentally, the Federal Trade Commission, being an expert and specialized agency with broad powers of subpoena and investigation should be in a position to demonstrate with adequate evidence that a given discrimination will probably result in the effect required.³⁵ As a matter of fact, the Commission has made at least this showing in the §2(a) cases which have gone before the courts in recent years.³⁶ Whether the Commission will now avail itself of this more liberal standard, or will continue its apparent policy, is a question of great importance to all concerned with the Act, because a practical result of the test announced could be to shift a large portion of the burden of proof in this matter to the defendant, who is least able to meet it. That is, in order to defend on the ground that the required competitive effect is not inherent in his pricing schedule, the respondent must rebut the slender showing of possible effect, presumably with proof that injury cannot or will not result. Moreover, it is but a short logical step from this to the point of shifting the entire burden by allowing an inference that injury is possible from the existence of a price discrimination.³⁷ Already this result has been reached in two instances³⁸ by invoking the prima facie case provision of §2(b), and

³³ *Id.* at 828 ("There are specific findings that such [actual] injuries had resulted from respondent's discounts although the statute does not require the Commission to find that injury has actually resulted."); *id.* 835 ("It is not merely probable but I think it is almost inevitable that the cumulative discounts [tend to injure competition]") (dissenting opinion).

³⁴ Will the same standard apply to §3 concerning tying clauses and §7 concerning stock acquisitions?

³⁵ Oppenheim, *Should the Robinson-Patman Act Be Amended?*, SYMPOSIUM (CCH) 141, 152 (1948).

³⁶ Federal Trade Commission v. Cement Institute, 68 Sup. Ct. 793, 815 (1948); Corn Products Refining Co. v. Federal Trade Commission, 144 F. 2d 211, 215 (C.C.A. 7th 1944); A. E. Staley Mfg. Co. v. Federal Trade Commission, 144 F. 2d 221, 223-4 (C.C.A. 7th 1944) (reversing its earlier conclusion, 135 F. 2d 453, 455, that injury was not shown); E. B. Muller & Co. v. Federal Trade Commission, 142 F. 2d 511, 518 (C.C.A. 6th 1944); Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d 378 (C.C.A. 2d 1945) on which see Austern, *supra* note 29, at 70-1.

³⁷ Morton Salt Co. v. Federal Trade Commission, 162 F. 2d 949, 960 (C.C.A. 7th 1947) ("The fact of the discrimination itself, it seems to me, would have supported an inference that the effect may be to lessen competition.") (dissenting opinion of Judge Minton).

³⁸ Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d 378 (C.C.A. 2d 1945), *cert. denied*, 326 U.S. 734 (1944), *modified*, 155 F. 2d 1016 (1946) (Commission must show 1. differential in price, 2. competitors who could be injured; then the burden is on respondent to show either no injury to competition or a justification, *id.* 379); Standard Oil Co., CCH TRADE REG. SERV. ¶13,447 (FTC 1946).

the problem may soon be before the Supreme Court for determination in the *Standard Oil* case (now pending review before the Seventh Circuit Court of Appeals), wherein the Commission stated: "Based upon the *prima facie* case . . . shown the Commission may draw from such *prima facie* case a rebuttable presumption that the effect of such discrimination may be to . . . injure, destroy or prevent competition. The burden then shifts to the respondent."³⁹

Whether or not this view will be urged, and if urged sustained in the courts, it is quite certain the *Morton Salt* case is no authority for the doctrine. That the burden rests with the Commission to make whatever showing is required, is implicit throughout the opinion. And before the *Morton* case is used to go further in the direction of shifting the burden to the defendant, it would be well to bear in mind another consideration forcefully suggested by Albert Sawyer some eight years ago.

"The broad inference of injury from the fact of discrimination places before the Commission the strong temptation to depart from the realities of each individual case and write into these inferences economic doctrine which may or may not have the sanction of actual experience. The long range usefulness of the Act, depends to a large measure upon the extent to which the Commission works into the daily consciousness of American businessmen the rightfulness of the nondiscrimination policy. A factual determination of injury or tendency toward injury clearly presented in each case will do more than any other one thing to encourage business practice consistent with the objective of the Act."⁴⁰

The Supreme Court's unequivocal ruling in this case that neither actual injury to competition nor absence of cost justification is required of the Commission as a part of its case, is essential to effective Robinson-Patman Act enforcement. Since only limited funds and facilities are available to the Commission for the execution of its important and difficult regulative functions, to require more proof in establishing violations of laws within its jurisdiction than the laws apparently demand, is seriously to hinder their enforcement. To require less, however, as does the Supreme Court's possibility of injury standard, is to invite into the law a practice inconsistent with basic principles underlying

³⁹ *Id.* at (slip report) 14-15. This concerned whether the §2(b) proviso for meeting an equally low price of a competitor is a substantive or procedural defense, but this tendency to oversimplify the Commission's case comes "perilously close to converting the Commission's *prima facie* case into a virtual *per se* violation based upon a mere price difference." Oppenheim, *Should the Robinson-Patman Act Be Amended?*, SYMPOSIUM (CCH) 141, 152 (1948). Compare, Mr. Justice Jackson in *International Salt Co. v. United States*, 68 Sup. Ct. 12, 15 (1948).

⁴⁰ Sawyer, *supra* note 14, at 501.

the rules on burden of proof and procedural due process which obtain not only in the orthodox courts, but quasi-judicial, administrative proceedings as well.

ERNEST W. MACHEN, JR.

**Conflict of Laws—Divorce—Collateral Attack on—
Divisibility of—**

The United States Supreme Court recently decided four cases which have significant bearing on the degree of credit to which a foreign decree of divorce is entitled. The legal points dealt with in the first two cases are different from those in the last two; therefore, they will be treated separately.

**COLLATERAL ATTACK BY RESPONDENT WHO APPEARED IN
DIVORCE ACTION**

Respondent,¹ Sherrer, had appeared generally in a divorce action, brought by petitioner in Florida three months after she left respondent in Massachusetts where they had resided for twelve years. Petitioner there alleged, and the Florida court found, that she was a bona fide resident of Florida. Respondent did not challenge either the allegation or finding. The divorce was granted. Respondent brought this suit in Massachusetts in which he alleged that the petitioner was his wife and prayed that he might be allowed to convey his realty as if he were sole and living apart from her justifiably. The Probate Court granted the relief prayed for, and the Supreme Judicial Court of Massachusetts affirmed on the ground that petitioner was never domiciled in Florida. In reversing, the United States Supreme Court held that the requirements of full faith and credit bar a defendant from attacking collaterally a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, and where the defendant has been accorded full opportunity to contest the jurisdictional issues.²

The Supreme Court had held in *Williams v. North Carolina*³ that while the finding of domicile by the court that granted the decree is entitled to prima facie weight, it is not conclusive in the state of matrimonial domicile but might be relitigated there, in a bigamy prosecution. In *Davis v. Davis*,⁴ where the defendant had appeared and fully litigated the issue of the plaintiff's domicile, the Court held that the finding

¹ "Petitioner" and "respondent" are used throughout to refer to the petitioner and respondent in the divorce proceeding.

² *Sherrer v. Sherrer*, 68 Sup. Ct. 1087 (1948). The decision in this case applies also to the companion case of *Coe v. Coe*, 68 Sup. Ct. 1094 (1948), therefore the cases are treated as one. *Accord: In re Biggers*, 228 N. C. 743 (1948).

³ 325 U. S. 226 (1945). See Baer, *So Your Client Wants a Divorce*, 24 N. C. L. REV. 1 (1945).

⁴ 305 U. S. 32 (1938).