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THE ROBINSON-PATMAN ACT AND A PRIMA FACIE CASE

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AFTER almost thirteen years of enforcement Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,[1] remains pretty much of an enigma from an interpretative standpoint.

In 1936 when this anti-price discrimination law was passed it was prophesied it would disturb and change the buying and selling practices

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1 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946). Summarized: subsection (a) of section 2 makes it unlawful for a seller of any commodity to discriminate in price between different purchasers of commodities of like grade and quality "where the 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."

. . . but price differentials are permitted 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." However, the Federal Trade Commission may fix and establish quantity limits "where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce".

. . . and sellers may select their own customers "in bona fide transactions not in restraint of trade."

. . . and price changes are permitted "in response to changing conditions affecting the market for or the marketability of the goods concerned, such as . . . actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business".

Subsection (b) provides that upon proof of discrimination in price or services 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".

. . but 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".

Subsection (c) prohibits the use of brokerage commissions or their equivalents as discounts from selling or buying prices.

Subsection (d) prohibits the payment of advertising allowances or their equivalents unless such payment "is available on proportionally equal terms to all other customers competing in the distribution of such products."

Subsection (e) forbids the seller to discriminate between purchasers for resale by sup-

of all manufacturers, jobbers and merchants, large and small.[2] This prophesy is fairly well on its way to fulfillment but unhappily there has not been a corresponding clarification of its several provisions by administrative or judicial construction.

Uncertainty as to its meaning is not confined to the niceties of presumptive evidence and burden of proof which are the subject matter of this paper, but extends to such major merchandising questions as the uniform delivered price, the "mill net" theory, functional classification of customers, basing points, allocations of costs to various customers or classes of customers, quantity discounts, and advertising allowances.

These fundamental questions are receiving much attention and comment from anti-trust lawyers both in and out of government. But from a legalistic viewpoint one of the most provocative questions of interpretation arises from the burden of proof or prima facie case provisions of Section 2(b), particularly in their application to a buyer of commodities; a large corporate buyer, for example, who brought to the attention of its supplies certain economies created by its methods of doing business and its quantity purchases, and who requested the sellers to pass such savings on to it by way of lower prices.

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price prohibited" by the act. It supplements Section 2(a) which is aimed at the seller but which permits the seller to grant price differentials reflecting cost differences.

Section 2(b) provides that "Upon proof being made . . . that there has been a discrimination in price . . . the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation . . . , and unless justification is affirmatively shown the Commission is authorized to issue an order terminating the discrimination."

Based upon the legislative history of Section 2(b) it had been thought that Congress had attempted to shift to the seller—but not to the buyer—the burden of proof. It was said with assurance that where the

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plying services or facilities "upon terms not accorded to all purchasers on proportionally equal terms."

Subsection (f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section".

The provisions for enforcement of this section are those contained in the Clayton Act: cease and desist orders issued by the Federal Trade Commission, which may be enforced in civil proceedings in the courts.

[2] Fortune Magazine, November 1936.

Federal Trade Commission in a proceeding against the seller proved price differentials, interstate commerce, and effect on competition it thereby established a prima facie case and the burden of justifying the differentials under 2(a) of the act then shifted to the seller.[3]

It was generally believed, however, that the Commission would not seek to apply Section 2(b) to a buyer. But faint heart never won increased administrative jurisdiction. And accordingly the Commission ruled on January 6, 1948 that the provisions of Section 2(b), relating to prima facie case, apply in a proceeding against the buyer under Section 2(f), and in effect ruled that 2(b) shifted to the buyer the burden of showing the sellers' cost justifications.[4]

This was a case where a large buyer induced and received price differentials in the following manner: It brought to the attention of various sellers certain economies that were created by its methods of doing business and its quantity purchases and requested the sellers to pass such savings on to the respondent by way of a lower price. From these facts the Commission, seeking to apply Section 2(b) to a buyer, presumed (1) that such differentials were in excess of the seller's savings in cost, and (2) that respondent had knowledge of this fact.

This presumption upon a presumption, or double presumption, seems to be quite unreasonable. Nor is it rational to presume that when a buyer sought only the savings it in fact received something more, and then to go and presume further that it did so with knowledge. It is believed that if Section 2(b) has any application where a violation of Section 2(a) has not been shown,[5] it applies to the seller only and was not meant to apply in a case brought against the buyer under 2(f); or, in the alternative, if it does so apply to the buyer it amounts to a legislative presumption which constitutes a denial of due process of the type condemned in the case of *Tot v. United States*,[6] and in an impressive line of earlier decisions.[7]

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[3] A majority of the United States Supreme Court recently "agreed"; they said the Commission does not have the burden of proving that the seller's "quantity discount differentials were not justified by its cost savings." FTC v. Morton Salt Co., 334 U. S. 37 (1948).

[4] Order denying motion to dismiss, Automatic Canteen Company of America, FTC Docket No. 4933 (Jan. 6, 1948).

[5] FTC v. Morton Salt Co., 334 U. S. 37 (1948).

[6] 319 U. S. 463 (1943).

[7] See discussion *infra*, beginning page 19.

THE PRIMA FACIE CASE PROVISIONS OF SECTION 2(b) WERE NOT MEANT TO APPLY TO SECTION 2(f)

In discussing Section 2(b) Mr. Gilchrist of the House said: "Something has been said in argument about the burden of proof, and it has been asserted that the bill is not constitutional because those who have specific and certain knowledge of their own good faith are permitted to prove it. We should distinguish between the duty of going forward with the evidence and the burden of proof. It is often wise to place the burden of producing evidence on the party best able to sustain it. It is very often held that where the party who does not have the original burden of proof, but who does possess positive and complete knowledge concerning the existence of facts which his opponent is called upon to negative; or, where, for any reason, the evidence to prove a fact chiefly, if not entirely, within the control of the party who does not have the general or orginal burden of proof. Then the burden of going forward with and producing this evidence rests upon him who does have the facts primarily and chiefly within his possession.

Paragraph (e) of Section 2 of the bill (enacted as Section 2b) does not provide that the burden of proof shall shift at any stage of the proceedings. On the other hand, it provides that, after it has been shown that a discrimination in price has really occurred, then the duty of going forward with the evidence to show justification and good faith rests upon the party who has almost exclusive possession of such evidence of good faith, and who has easy means of proving it."[8]

It is obvious from the foregoing that Congress had the seller in mind. This is also apparent from the wording of Section 2(b) which provides "Upon proof being made . . . that there has been a discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with the violation of this section, and unless justification shall be affirmatively shown the Commission is authorized to *issue an order terminating the discrimination.*"[9] The buyer does not have it within his power to terminate the discrimination. Any such order would have to be directed against the seller who granted the price concessions to the different purchasers.

That Congress referred to the seller is further strengthened by the proviso in Section 2(b) which specifically mentions the seller and provides that nothing shall "prevent *a seller* rebutting the prima-facie case

[8] 80 CONG. REC. 8241 (1936).

[9] Italics supplied.

thus made by showing that his lower price . . . to any purchaser . . . was made in good faith to meet an equally low price of a competitor. . . ."

And we have the per curiam opinion of Messrs L. Hand, Augustus Hand and Clark, U. S. Circuit Judges for the Second Circuit, in the case of *Samuel H. Moss, Inc. v. FTC*,[10] where they said "It is true that Section 2(a) makes price discrimination unlawful only in case it lessens . . . competition with the merchant who engages in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price. . . . But that is often hard to prove. . . . Hence Congress adopted the common device in such cases of *shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result.*"[11] Only the seller can set "two prices".

As stated by Congressman Utterback in presenting the Conference Report on the anti-price discrimination bill to the House, "There is no limit to the phases of production, sale and distribution in which . . . improvements may be devised and economies of superior efficiency achieved, nor from which those economies when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible."[12]

The legislative history of the act is replete with evidence of the intent of Congress to permit differentials that reflect cost differences "resulting from the differing methods or quantities in which . . . commodities are . . . sold or delivered." The House Committee Report stated: "Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—*none of them are in the remotest degree disturbed by this bill.* . . ."[13]

They would indeed be disturbed—in fact they would be precluded altogether—if the buyer is prevented from bargaining with the seller. Since it was the purpose of the act to preserve differentials which re-

[10] 148 F. 2d 378, 379 (C. C. A. 2d 1945).

[11] Italics supplied.

[12] 80 CONG. REC. 9417 (1936).

[13] H. R. REP. No. 2287, 74th Cong., 2d Sess.

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flected no more than the savings it seems wrong to urge that Congress intended, through Section 2(b) and 2(f), to assert that where a buyer induced or received such a differential he thereby prima-facie committed an illegal act.

These sections were not meant to destroy the time honored principles of bargaining and selling between buyer and seller. This is a natural human law that is not subject to congressional or administrative repeal.

"The positions of buyer and seller are by nature adverse."[14] "The seller of necessity seeks the highest price obtainable for his goods and under conditions of sale most favorable to himself. The buyer seeks to make his purchase at the lowest possible price and under conditions most favorable to the buyer. It is elemental that the position of a seller and a buyer in the same transaction are at opposite poles. Their interests are fundamentally opposed to each other."[15] "Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities."[16]

And yet when a respondent buyer sought to occupy its elemental and natural position as a buyer, and make the best deal it could within the limits of Section 2 of the Act, the Federal Trade Commission said it prima-facie committed an illegal act.

The interpretation urged by the Federal Trade Commission might make prima-facie illegal parts of the recent voluntary anti-inflation campaign which had the strong support of the President of the United States. Macy's Department Store of New York, for example, took the lead in this campaign by announcing in full page advertisements all over the United States, that prices are "too high" and "must come down". The Macy's statement which was remarkable for both its tone and text received the approbation of the entire nation including its competitors. It covered such subjects as: Why Prices Must Come Down, Why Prices Can Come Down, What You The Consumer Can Do About Prices, and What Macy's Has Done About Prices. Under the latter heading Macy's said:

> "For many months, Macy's has constantly waged a campaign under the heading, 'It is Macy's job to keep prices down.' This campaign we will continue.
>
> "We have told all our suppliers that Macy's stands ready to buy large quantities of merchandise when prices and qualities represent values which we believe

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[14] *Id.*, in discussing the brokerage provision of anti-price discrimination bill.

[15] *House Comm. Hearing on anti-price discrimination bills,* February 3-7, 1936, p. 512.

[16] Great Atlantic & Pac. Tea Co. v. FTC, 106 F. 2d 667, 674 (C. C. A. 3rd 1939).

> our customers need and want. Many manufacturers cooperated with us. These special purchases have been many and in large volume . . .
>
> 'We at Macy's recognized that we had the obligation to cut our own profit ratio, and we have done so. But at best a store's margin of profit is a small part of the total price of the article which it sells. Back of the store's price is the pyramiding of costs and profits from raw materials through processors and finishers to the completed article. All alike must make their proportionate contributions."[17]

Cost of selling, as pointed out by the Federal Trade Commission on December 14, 1934, is generally in inverse ratio to the quantity sold to a given customer.[18] This means, said the Commission, that both quantity and cost of selling tend to support a lower price to large buyers than to small competitors.[19]

Differentials in prices "justified by differences in . . . costs . . . have not heretofore been considered as iniquitous, wrongful, or unfair, nor as having any tendency to destroy competition or to foster monopoly. In fact, such price differentials have been regarded as beneficial to the public and not harmful to anyone, . . . The effect upon competition of differences in prices honestly based on differences in selling costs is the normal and natural result of fair competition between merchants whose overhead expenses differ. This type of competition is to be encouraged in the public interest rather than restrained."[20]

And according to the Supreme Court of South Carolina it is unreasonable, arbitrary, and capricious in effect, and not in the public interest to forbid an allowance based on the quantity sold, since, not only is the "distinction between a wholesale price and a retail price universally recognized as a proper basis for a price differential," but "manifestly a quantity sale, whether wholesale in the ordinary sense or not, would justify a lower price because of the lowered cost of handling, the increased volume of business, and other obvious considerations."[21]

The term discrimination is sometimes used in the neutral sense which makes it apply to any distinction in price, terms, or service made between two customers of the same vendor. Such a discrimination, said J. M. Clark in his *Studies in the Economics of Overhead Costs* (p. 3) (1923), "has been an ever-present fact, and far from being a violation of

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17 New York Times, April 5, 1947, p. 7.

18 FTC Report on Chain-Store Investigation, p. 64.

19 *Ibid.*

20 Great Atlantic & Pac. Tea Co. v. Ervin, 23 F. Supp. 70, 78 (D. Minn. 1938).

21 State v. Standard Oil Co. of N. J., 195 S. C. 267, 10 S. E. 2d 778 (1940).

any natural economic laws of competition it is one of the natural forms which competition takes." Some kind of discrimination (differential) is inevitable in business. If, for example, a seller were to charge equal prices to all customers, then it would be discriminating against those whose orders involve lower costs or smaller service.

When, therefore, the complaint of discrimination is raised in any other than a frivolous sense it must be on some ground other than the mere fact that different or unequal prices are charged to different customers.

The discrimination which is improper lies not merely in difference of price, but in differentials which are not related to some inequality in cost or economic return in the two transactions. A difference in price reflecting such difference in cost is not undue discrimination even though it may handicap the less favored buyer in competing with the other.

The conclusion follows that a buyer may seek lower prices for goods which involve a difference in costs. But if Section 2(b) is made applicable to the buyer in the manner contended by the Commission it would outlaw such practice. It is no answer to say that it is merely prima facie illegal and the buyer has an opportunity to rebut it, because the buyer does not have access to rebutting evidence. He is not in a position to know when, how, or to what extent the sale to him may be in violation of Section 2(a) of the Act because he cannot know the amount of cost differences reflected on the books of his vendors.

The buyer would thus be prevented from seeking to cut down distribution costs which, even back in 1936 when the Robinson-Patman Act was passed, amounted to about 50 percent of the dollar paid by the consumer over the counter.[22] While production costs have fallen in most every line this has not been accompanied by any similar economy of distribution. On the contrary, distribution costs have increased. The costliness and wastefulness of the distribution system of the entire nation have frequently been pointed out. Every advance in productive efficiency makes the contrast more obvious.

According to Professor McNair, who was then head of the Harvard Bureau of Business Research, the salvation of the capitalistic system depends upon getting merchandise into the hands of the consumer at lower and lower prices, and one of the great advantages in the reduction of distribution costs is achieved by large scale distribution.[23]

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[22] Malcolm G. McNair, Harvard, *Senate Committee Hearings on anti-price discrimination bills,* March 24-25, 1936, p. 3.

[23] *Id.* at 5. *Hearings before a subcommittee of the Committee on the Judiciary on S. 4171,* 74th Cong., 2nd Sess. 3 (1936).

The purpose of Section 2(f) is clearly set forth in the legislative history as follows: "The closing paragraph of the Clayton Act amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass buyer-customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers."[24]

"Knowingly" means "with a knowledge of the facts which, taken together, constitute the failure to comply with the statute."[25] It must be shown therefore that the buyer had knowledge that the price differentials it induced or received were in excess of such differences in cost. The buyer had no access to the sellers' books and had no way of measuring the amount of the savings of each manufacturer. If such knowledge were to come to the buyer it necessarily had to come from each seller.

TO APPLY SECTION 2(b) TO THE BUYER WOULD BE TO DENY DUE PROCESS

Statutes like Section 2(b) of the Robinson-Patman Act creating artificial presumptions of fact and making one fact presumptive or prima-facie evidence of another are by no means new or even modern. Where they are reasonable and where there is a rational connection between the fact proved and the ultimate fact presumed, they have long been recognized and enforced by the courts.

On the other hand, where they are unreasonable or arbitrary the courts have been quick to strike them down.[26] The fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely arbitrary, or wholly unreasonable, unnatural, or extraordinary. There must be in each case a fair opportunity to make a defense and

[24] Mr. Utterback in the House upon submission of Conference Report, 80 CONG. REC. 9419 (1936).

[25] St. Joseph Stockyards Co. v. United States, 187 Fed. 104, 105 (C. C. A. 8th 1911).

[26] Tot v. United States, 319 U. S. 463 (1943), and cases discussed, *infra* beginning p. 26.

submit the whole case to the court, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. And the provision of this kind must not take away or impair the right of a fair trial.[27]

The function of such statutes has been said to be "to make it possible to convict where proof of guilt is lacking."[28] In fact, of recent years there has been such a marked increase in the creation of this statutory device as to suggest not only a design to minimize the labor of investigators and prosecutors but a trend—supported by some judicial dictum that there are no vested rights in rules of evidence—to consider the rights of individuals as secondary to the demands of society.[29]

Such statutes are of two general types: those creating conclusive presumptions of law or fact; and those creating rebuttable presumptions of fact or prima-facie proof. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.[30] Those of the second type have met a varying fate, some withstanding and others succumbing to attacks on diverse grounds. It would be redundant to undertake a complete review and analysis of the numerous decisions passing upon the validity of such statutes in view of the many exhaustive opinions and commentaries which can be consulted for that purpose.[31]

The test of rational connection in testing prima facie proof was first enunciated in the *Turnipseed* case[32] as follows:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact presumed.*" (Italics supplied).

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[27] People v. Cannon, 139 N. Y. 32, 34 N. E. 759 (1893).

[28] Pollock v. Williams, 322 U. S. 4 (1944).

[29] State v. Kelly, 218 Minn. 247, 15 N. W. 2d 554 (1944). See also Brosman, *The Statutory Presumption,* 5 TULANE L. REV. 178 (1931); Chamberlain, *Presumptions as First Aid to the District Attorney,* 14 A. B. A. J. 287 (1928); O'Toole, *Artificial Presumptions in the Criminal Law,* 11 ST. JOHN'S L. REV. 167 (1937).

[30] See 20 AM. JUR., Evidence 10; Juster Bros. v. Christgau, 214 Minn. 108, 7 N. W. 2d 501 (1943).

[31] See Note, 162 A. L. R. 495 (1946), 86 A. L. R. 179 (1933) and 51 A. L. R. 1139 (1927).

[32] Mobile, J. & K. C. R.R. v. Turnipseed, 219 U. S. 35 (1910).

The foregoing italicized sentence is directly in point. Where the attempt is made to apply Section 2(b) to the buyer and the main facts, viz., that the differentials (1) were in excess of the savings, and (2) the buyer knew it, are presumed, the buyer can make no defense thereto because it has no access to the books and records of its suppliers.

Since the *Turnipseed* case was decided in 1910, the test therein laid down has been applied by the United States Supreme Court, with varying results, in criminal as well as civil cases involving the validity of presumptions and prima facie cases created by state as well as federal statutes. The latest pronouncement by the court is *Tot v. United States, supra*. This decision laid down the clearest and best enunciation of the test of rational connection we have had so far and there can be but slight doubt that it will be quoted as the model formulation of the rule in many later cases just as the *Turnipseed* case has been quoted in countless cases during the last 35 years.

The court in the *Tot* case had under consideration the validity of a section of the Federal Firearms Act which provided: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."[33]

The Government's evidence was limited to proof of Tot's prior conviction on an assault and battery charge, his plea to a burglary charge, and that in 1938 he was found in possession of a loaded automatic pistol.

The question up for decision was the power of Congress to create the presumption that "From the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him, in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute."[34]

In sustaining the contention that the statute failed to meet the tests of due process Mr. Justice Roberts, speaking for a unanimous court, said: "The rules of evidence are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence

[33] 52 STAT. 1250 (1938), 15 U. S. C., 902 (F) (1946).

[34] Tot v. United States, 319 U. S. 463, 466 (1943).

is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. . . . The government seeks to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the facts presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of a lack of connection between the two in common experience."

There seems to be no rational connection in the Robinson-Patman Act case under discussion between the fact proved (price differentials induced by a buyer) and the facts presumed, namely, price discrimination in excess of the sellers' cost differences and knowledge thereof on the part of the respondent buyer.

While the test of comparative convenience of producing evidence was rejected as an alternative or independent test by the Supreme Court in the *Tot* case, it has received considerable discussion.[35] It has been applied only (a) where the defendant has more convenient access to the proof, and (b) where requiring him to go forward with such proof will not subject him to unfairness or hardship.

The buyer here had no access to the proof. He could not go forward with the cost justification evidence because it was hidden within the reaches of the accounting records of third-party manufacturers who sold articles to the buyer.

And ordinarily a presumption cannot operate against one who has neither possession nor control of the facts presumed. In the case of *Westland Oil Co. v. The Firestone Tire and Rubber Company*,[36] the plaintiff asked the court to presume that Firestone, who rented the storage tank from plaintiff but left it under plaintiff's control, was negligent. The court said: "There is no direct evidence as to how the gasoline which overflowed from the storage tank became ignited. . . .

[35] See Note, 162 A. L. R. 511 (1946).

[36] 143 F. 2d 326 (C. C. A. 8th 1944).

Proof of the fire cannot give rise to a presumption of negligence on the part of one (Firestone) who was neither in possession nor control of the instrumentality which produced the casualty."[37]

In *State v. Kelly*[38] the Supreme Court of Minnesota gave a brilliant and scholarly exposition of the entire subject of making one fact prima facie evidence of another. In the foregoing discussion the writer has drawn heavily on that case as well as the *Tot* case. The court there rejected a Minnesota statute which provided that "The finding of . . . intoxicating liquors in the possession of any person, by means of a search warrant, shall be prima facie evidence that such person had possession of such liquors for the purpose of selling . . . the same without first having obtained license therefore. . . . "

In a searching analysis of the *Tot* case, Professor Morgan concedes there is "ample justification" for the Supreme Court's holding, pointing out that "whether one fact forms a basis for a rational inference of another depends upon the relationship between them in human experience." He further says (56 *Harvard L. Rev.* 1325): "No doubt the court may be convinced that the legislature in a given case is not purporting to exercise a judgment as to the relationship in experience between two facts, but is using a formula expressing such relationship in order to accomplish quite another purpose. If so, then it may well ignore the expression and insist that, however desirable the purpose, it must not be accomplished by illegitimate means. That it would be a great benefit to society if agencies of the Federal Government had both the privilege and the duty to prevent convicts and fugitives from justice from possessing firearms . . . cannot justify Congress in requiring or permitting triers of fact to find all arms and ammunition so possessed to have been subject of recent interstate shipment."

In the case of *Great Atlantic & Pac. Tea Co. v. Ervin*,[39] the court had under consideration the validity of the Minnesota Unfair Trade Practices Act which provided, among other things, that "Any sale made by the retail vendor at less than 10 percent above the manufacturer's published list price, less his published discounts . . . shall be prima facie evidence of the violation of this act." The court rejected this presumption upon the ground that it subjected the merchant to an unreasonable hardship.

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[37] *Accord,* Lynch v. Ninemire Packing Co., 63 Wash. 423, 115 Pac. 838 (1911); Clark v. Detroit & M. Ry., 197 Mich. 489, 163 N. W. 964 (1917).

[38] 218 Minn. 247, 15 N. W. 2d 554 (1944).

[39] 23 F. Supp. 70 (D. Minn. 1938).

In *McFarland v. Amer. Sugar Co.*,[40] the Supreme Court had under consideration a statute of the State of Louisiana intended to prevent a monopoly in the sugar business. The statute provided, among other things, that "any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade. . . . " Mr. Justice Holmes, in delivering the opinion of the court, said: "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference shall not be so unreasonable as to be a purely arbitrary mandate'. . . . The presumption created here has no relation in experience to general facts."

In *Morrison v. California*,[41] the court considered a California statute which prohibited an alien, who was neither a citizen nor eligible for citizenship, from occupying land for agricultural purposes. The statute provided that where the state proved the occupation or use of the land by the defendant and the indictment alleged his alienage and ineligibility for citizenship, the burden of proving his citizenship or eligibility for citizenship should rest upon the defense. After pointing out that within the limits of reason and fairness the burden of proof may be lifted from the state and cast on a defendant, Mr. Justice Cardozo said: "The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon the balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." And said Justice Cardozo further: "Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not one hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of use or occupation. . . . "

And in *Western & A. R. Co. v. Henderson*[42] the Supreme Court set

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[40] 241 U. S. 79 (1916).
[41] 291 U. S. 82 (1934).
[42] 279 U. S. 639 (1929).

aside a Georgia statute which created a rebuttable presumption of negligence against the railroad company, "when it is made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railway company." The court said the presumption was arbitrary; that "the mere fact of collision furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company. . . . Reasoning does not lead from the occurrence back to its cause."[43]

In applying Section 2(b) to the buyer, the Federal Trade Commission pyramided its presumptions. It first presumed that the price differentials exceeded the cost differences. Based upon this first presumption it then presumed further or secondly that the buyer had knowledge of this fact. Ordinarily presumptions cannot be pyramided.[44] "A presumption must be based upon facts proven by direct evidence and cannot be based upon nor inferred from another presumption."[45]

But more important is the fact—and the courts can take judicial notice of it—that the buyer has not and cannot obtain access to the detailed data required to make cost justifications.

Manufacturers are very jealous of their costs which are trade secrets. No manufacturer is going to give a customer the right to roam freely through its books, records and business secrets. This is stressed in order to show that if Congress, in Section 2(b), intended to say that when price differentials have been proved they shall constitute prima facie evidence that the buyer knowingly induced and received prices which were in excess of the savings in cost, then the statute seems arbitrary and unreasonable. The buyer would not have a fair opportunity to make a defense. In fact, he could make no defense whatsoever because the facts with reference to the sellers' costs are beyond his reach.

If Section 2(b) is to be held valid by the courts it would seem they must adopt the view that it does not apply to a Section 2(f) case.

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[43] *Accord,* Manly v. Georgia, 279 U. S. 1 (1929), and Bailey v. Alabama, 219 U. S. 219 (1911).

[44] Allen v. Trust Co. of Georgia, 149 F. 2d 120 (C. C. A. 5th 1945); Standard Accident Ins. Co. v. Nicholas, 146 F. 2d 376 (C. C. A. 5th 1944).

[45] Westland Oil Co. v. Firestone Tire & Rubber Co., 143 F. 2d 326, 330. *See also* Greer v. United States, 245 U. S. 559 (1918); Chicago, M. & St. P. R.R. v. Coogan, 271 U. S. 472 (1926); Manning v. John Hancock Mutual Life Ins. Co., 100 U. S. 693 (1879).