INTRODUCTORY STATEMENT

by

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BEFORE THE NEW YORK STATE BAR ASSOCIATION

SECTION ON FOOD, DRUG AND COSMETIC LAW

SYMPOSIUM ON ROBINSON-PATMAN ACT

at

MEETING HALL OF THE ASSOCIATION

OF THE BAR OF THE CITY OF NEW YORK

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10 A. M.

This is my second appearance in the role of Symposium curtain raiser. Again there is present a blue ribbon audience of the Section on Food, Drug and Cosmetic Law of the New York State Bar Association. Again, too, the Symposium's cast includes headliners of first magnitude. The analytical spotlight again to be focused on conflicting views by this cast of speakers assures an intellectual pageant.

It is a real pleasure for me to have this second opportunity of opening your Symposium on the Robinson-Patman Act. Perhaps no addition to our Federal substantive law in recent times has provoked, on a comparable line for line basis, as much discussion, interest and controversy as the Robinson-Patman Act. Reading the Congressional debates and the Committee reports, one is impressed by the respect which Congress accorded this problem of laying down rules of fair conduct in business transactions. The past decade has vindicated that respect. It also has demonstrated the fact that even apparently simple tinkering with the free play of competitive forces leads to a host of difficult and complex problems.

By way of a glossary of terms, these discussions concern a statute which Congress avowed was to strengthen the antitrust laws and to preserve competition in interstate commerce. It supplements the Sherman Antitrust Act of 1890, and the Clayton and the Federal Trade Commission Acts of 1914. The Robinson-Patman Act prohibits discriminations in price where the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly; or where the effect may be to injure, prevent or destroy competition. It further prohibits other classes of discriminations not directly involving price itself. For example, the furnishing of services or of facilities to customers on terms not proportionally equal.

A word which will be repeated often during the Symposium is the word, "discrimination." I have used it already. In doing so, I used it in the sense in which it was defined in the legislative hearings, as follows:

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other."

In many instances Congress enacts principles and general standards under which a quasi-judicial commission is to carry out legislative policy by a series of proceedings. These proceedings are designed "to fill up the details," as Chief Justice Marshall expressed it. The commission's judicial determinations apply the principles and standards of the law to specific facts. Necessary determinations evolve slowly and, at times, tortuously, under this judicial process of inclusion and exclusion. Whether a newly enacted statute becomes dynamic and vital law of the land or dead and stagnant legal literature depends, among other things, upon Congress's continued approval of its legislative handiwork, and a general acceptance of the spirit and terms of the law by the public for whose benefit it was enacted.

Here in New York last year at the opening session of the Trade Practice Conference for the Cosmetic and Toilet Preparations Industry, I expressed my personal philosophy as to industry practices logically falling within the framework of the Robinson-Patman Act, as follows:

"* * * the Commission is not vested with any authority to modify, ignore or repeal any of the provisions of the laws the Congress has entrusted to its administration, and * * * no rule /trade practice/ can or will be approved on the subject of 'proportionally equal terms' which does violence to the intended meaning of Congress. It can serve no purpose for us to here consider rules which would evade or change the Congressional enactment. This does not mean that the Commission is disposed to give a narrow, distorted or unreasonable construction of any of the provisions of the Robinson-Patman Act. * * *"

In a government of laws and not of men, I have always believed that the Commission's primary obligation is to uphold and administer the laws which the Commission was created to administer and those subsequently committed to it for administration. To exceed the authority granted by those laws, in my opinion, is as severe a dereliction of duty as to not enforce the laws pursuant to the intent of Congress. If, in the opinion of the Commission, the existing law is inadequate to prevent the impairment of our competitive enterprise, there is an appropriate way for it to react to such inadequacy. That is to go to Congress and to present a recommendation for supplemental legislation. The constitutional, legal and moral duty of the Commission is to adhere to the expression of Congress's will as manifest in the legislation it enacts. There should be no legislation by the Commission by way either of nullification through non-action or of attempted extension of powers beyond those granted. Enactment and repeal of Federal legislation is the exclusive right of Congress. To usurp that privilege in either particular would be to pilfer the rights of American citizens and to betray the sacred trust of public duty.

In less than five months the Robinson-Patman Act will have been upon our statute books a dozen years. In that time the Federal Courts have made numerous interpretive decisions in litigation between private parties and in review of Commission proceedings. There are, however, now pending in the reviewing courts a number of Commission cases involving very important interpretations of the Act, and some fundamental problems raised by the Act have not even been presented in formal cases coming before the Commission for decision.

You ladies and gentlemen participating in this Symposium are demonstrating the very best of our democratic processes. I feel a sense of personal obligation, which is shared by other members of the Commission, for the real advantages to be derived from frank and open discussion of these problems. We hope to find guidance in resolving some of the troublesome problems presented in administering the provisions of the Act from your meetings.

In conclusion, I am reminded of the following statement of Chief Justice Hughes:

> "With a sound, courageous, and independent Bar, a foe of demagogy but a friend to rational improvement, vindicating its expert leadership by intelligent conception of the interests of the community, and by its zeal for the better administration of justice which is its especial care, democracy will not essay its tasks in vain."

In this Symposium the Bar will express freely opinions with respect to the manner in which the Courts and the Federal Trade Commission are interpreting and administering a Federal law. This is exactly the function of the Bar which I am sure Chief Justice Hughes had in mind. It is a function of the Bar which is the very essence of our democratic system of government. There are few enough countries left in this troubled world where such complete freedom of expression and interchange of thought and criticism are so preserved.

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