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PROOF OF DAMAGES UNDER THE ANTI-TRUST LAW

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Since 1890, any person injured in his business or property by reason of anything forbidden by the Anti-Trust Laws "may sue therefor in any district court of the United States in the district in which the defendant resides or is found . . . and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee . . ." ¹

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1. Section 7 of the Sherman Law reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 STAT. 209 (1890).

Section 4 of the Clayton Act says:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 STAT. 731 (1914), 15 U. S. C. A. § 15 (1927).

Of interest, both to the practitioner and his client, is the provision of the statute that the person injured shall recover "a reasonable attorney's fee". The amount of "a reasonable attorney's fee" is for the determination of the trial judge in the exercise of a sound discretion. *Thomsen v. Cayser*, 243 U. S. 66 (1917); *William H. Rankin Co. v. Associated Bill Posters* (*Charles A. Ramsay Co. v. Same*), 42 F. (2d) 152 (C. C. A. 2d, 1930), *cert. denied*, 282 U. S. 864 (1930). But an appellate court may award an additional fee where an appeal has been taken. *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied*, 282 U. S. 899 (1930). In determining the amount of attorney's fees to be allowed, many elements must be considered, and some of these are the character of the services rendered, the manner in which rendered, the time occupied, and the result attained. Not the least important element

By the express terms of the Anti-Trust Laws recovery is limited to instances in which plaintiff has been injured "in his business or property". Consequently, there can be no recovery of damages for injury to other rights such as general credit and reputation.² But this does not mean that there may be no recovery for injury to the business credit and business standing of the plaintiff.

In the usual anti-trust case, the nature of plaintiff's damage makes it impossible to prove with certainty and exactness the amount of damage suffered. For example, the plaintiff has lost profits as a result of defendant's unlawful acts,³ his cost of doing business has increased,⁴ his plant has deteriorated in value,⁵ or his business is worthless as a going concern.⁶

In establishing such damage a plaintiff is limited "to the best proof obtainable". He must usually rely upon inference, estimate, comparison and opinion. While recognizing this inherent difficulty of proof, the courts have not always permitted recovery. In many of the early decisions the plaintiff was denied substantial recovery on the theory

is the responsibility which rests upon counsel. It has also been said that a "reasonable fee" is to be measured by the standards of the locality where the services were performed. This consideration is not based upon mere "geographical distinction in respect of the ability of attorneys", but upon differences in the cost of conducting a large practice in various localities. *Straus et al. v. Victor Talking Machine Co.*, 297 Fed. 791, 805-806 (C. C. A. 2d, 1924). The amounts which have actually been allowed as reasonable show the widest variation. For example:

<i>Case</i>	<i>Amount of Judgment</i>	<i>Attorney's Fee</i>
<i>Montague & Co. v. Lowry</i> , 193 U. S. 38 (1904)	\$ 1,500.00	\$ 750.00
<i>Chattanooga Foundry Co. v. Atlanta</i> , 203 U. S. 390 (1906)	4,500.00	2,500.00
<i>Thomsen v. Cayser</i> , 243 U. S. 66 (1917)	22,719.18	2,500.00
<i>Straus v. Victor Talking Mach. Co.</i> , 297 Fed. 791 (C. C. A. 2d, 1924)	101,684.13	30,000.00
<i>Charles A. Ramsay Co. v. Associated Bill Posters</i> , 42 F. (2d) 152 (C. C. A. 2d, 1930)	25,637.09	7,500.00
<i>William H. Rankin Co. v. Associated Bill Posters</i> , 42 F. (2d) 152 (C. C. A. 2d, 1930)	277,329.58	42,500.00
<i>American Can Co. v. Ladoga Canning Co.</i> , 44 F. (2d) 763 (C. C. A. 7th, 1930)	90,000.00	15,000.00
		plus \$3,500.00 for the appeal
<i>Baush Mach. Tool Co. v. Aluminum Co. of America</i> , 79 F. (2d) 217 (C. C. A. 2d, 1935)	2,868,900.00	300,000.00
2. <i>Gerli v. Silk Ass'n of America</i> , 36 F. (2d) 959 (S. D. N. Y. 1929); <i>Corey v. Boston Ice Co.</i> , 207 Fed. 465 (D. Mass. 1913).		
3. <i>Story Parchment Co. v. Paterson Parchment Paper Co.</i> , 282 U. S. 555, 560 (1931).		
4. <i>Chattanooga Foundry v. City of Atlanta</i> , 203 U. S. 390 (1906).		
5. <i>Story Parchment Co. v. Paterson Parchment Paper Co.</i> , 282 U. S. 555, 567 (1931).		
6. <i>Id.</i> Loss of value as a going concern was treated inferentially as an item of damages. In his charge to the jury the trial judge had said: "I think it must be said that the property has diminished. It is worth less with the company out of business than it would be with the company in business." Same case, at 37 F. (2d) 537, 543 (C. C. A. 1st, 1930).		

that the extent of damage was left to speculation and conjecture.⁷ But that general conclusion is reached less frequently today. Recent cases reflect a trend toward permitting recovery in all instances where a wrong has been definitely established and the only uncertainty relates to the quantum of damage. It is the purpose of this article to examine the decisions which have dealt with this problem under the anti-trust laws.

APPLICABLE COMMON LAW RULES AS TO DAMAGES

There are certain fundamental common law principles relating to the measure and proof of damage in litigation generally which have influenced, if they have not controlled, the decisions arising under the anti-trust laws.

The "most fundamental general rule is that of Certainty. Damages must be certain, both in their nature and in respect to the cause from which they spring".⁸ This conforms to the usual rules of legal proof. For, aside from any question of damages, it is well settled that a verdict which is based on speculation or hypothesis will not be affirmed.⁹ It must be based upon proof which is of certain nature. And to be admissible, evidence normally must be factual in character.¹⁰ The same rule is true of damages. The extent and origin of the injury must be proved with such reasonable certainty as is permitted by the nature of the case.¹¹

But even at common law, where the existence of a loss was established, absolute certainty in proving its quantum was not required. Expediency impelled the courts eventually to concede that "when, from the nature of the case, the amount of damages cannot be estimated with certainty . . . we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show

7. *Central Coal and Coke Co. v. Hartman*, 111 Fed. 96, 102 (C. C. A. 8th, 1901); *Locker v. American Tobacco Co.*, 218 Fed. 447, 450 (C. C. A. 2d, 1914); *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 80 (C. C. A. 2d, 1915); and cases cited note 18 *infra*.

8. *Griffin v. Colver*, 16 N. Y. 489, 495 (1858); SEDGWICK, *ELEMENTS OF THE LAW OF DAMAGES* (2d ed. 1909) 13. To similar effect see 1 SEDGWICK, *DAMAGES* (9th ed. 1912) 317-18; 1 SUTHERLAND, *DAMAGES* (4th ed. 1916) 207.

9. *Gulf, Mobile and Northern R. R. v. Wells*, 275 U. S. 455, 459 (1928); *Pennsylvania R. R. v. Chamberlain*, 288 U. S. 333, 343 (1933); *Scotten v. Metropolitan Life Ins. Co.*, 336 Mo. 724, 81 S. W. (2d) 313 (1935). "Food for speculation will not serve as the basis of a verdict", quoted with approval by Cardozo, C. J., in *Von Reitzenstein v. Tomlinson*, 249 N. Y. 60, 67, 162 N. E. 584, 586 (1928).

10. SEDGWICK, *ELEMENTS OF THE LAW OF DAMAGES* (2d ed. 1909) 23; 1 WIGMORE, *EVIDENCE* (2d ed. 1923) §§ 148-154.

11. *Boston & Albany R. R. v. O'Reilly*, 158 U. S. 334 (1895); *Western Union Telegraph Co. v. Ivy*, 177 Fed. 63 (C. C. A. 8th, 1910); *Calkins v. F. W. Woolworth Co.*, 27 F. (2d) 314 (C. C. A. 8th, 1928), *cert. denied*, 278 U. S. 645 (1928); *Littlehale v. Osgood*, 161 Mass. 340, 37 N. E. 375 (1894); *Pauley v. Steam Gauge & Lantern Co.*, 131 N. Y. 90, 29 N. E. 999 (1892); 1 SEDGWICK, *DAMAGES* (9th ed. 1912) 322, 323; SEDGWICK, *ELEMENTS OF THE LAW OF DAMAGES* (2d ed. 1909) 23; 15 AM. JUR. (1938) 796.

damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."¹² The common law cases most frequently cited as precedents in the anti-trust field are those dealing with tortious interference with business. Perhaps the most common type of damage suffered in such instances is loss of profits. Most of the early cases refused to permit recovery for this item of damage.¹³ But it is now established at common law that recovery may be had for such loss of profits as is proved with reasonable certainty.¹⁴ "The allowance of profits . . . is wholly a question of certainty."¹⁵ At common law there might also be recovery for the additional expense in conducting a business made necessary by the wrongful act of another.¹⁶ And it is clear that one whose property is injured or destroyed is entitled to compensation therefor.¹⁷

With these general principles in mind, we turn to the anti-trust cases.

THE REQUIREMENT OF CERTAINTY UNDER THE ANTI-TRUST LAWS

The Federal courts have repeatedly indicated in their anti-trust opinions that there must be proof certain as to the nature and extent of plaintiff's damage.¹⁸ These pronouncements have been vigorously applied wherever the question of proximate cause has arisen.¹⁹ All of

12. *Christianity, J.*, in *Allison v. Chandler*, 11 Mich. 542, 555 (1863), quoted with approval by the Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 564 (1931). See *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359, 379 (1927); *Gilbert v. Kennedy*, 22 Mich. 117, 129 (1871); *Taylor v. Bradley*, 4 Abb. App. Dec. 363, 366, 367 (N. Y. 1868); 1 SEDGWICK, DAMAGES (9th ed. 1912) 321-322.

13. 1 SEDGWICK, DAMAGES (9th ed. 1912) 332; 15 AM. JUR. (1938) 557 and cases cited n. 19.

14. 1 SEDGWICK, DAMAGES (9th ed. 1912) 334-36. "If a regular and established business is wrongfully interrupted the damages thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of." 1 SUTHERLAND, LAW OF DAMAGES (4th ed. 1916) 266 and cases cited n. 65.

15. 1 SEDGWICK, DAMAGES (9th ed. 1912) 332.

16. 15 AM. JUR. (1938) 542 and cases cited n. 16.

17. *Id.* at 513 *et seq.*

18. *Thomsen v. Cayser*, 243 U. S. 66 (1917); *Keogh v. C. & N. W. Ry.*, 260 U. S. 156 (1922); *Locker v. American Tobacco Co.*, 218 Fed. 447 (C. C. A. 2d, 1914); *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77 (C. C. A. 2d, 1915); *Eastman Kodak Co. v. Blackmore*, 277 Fed. 694 (C. C. A. 2d, 1921); *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F. (2d) 217 (C. C. A. 2d, 1935); *Lowry v. Tile Ass'n*, 106 Fed. 38 (N. D. Cal. 1900); *Ebeling v. Foster & Kleiser Co.*, 12 F. Supp. 489 (W. D. Wash. 1935).

19. *Keogh v. C. & N. W. Ry.*, 260 U. S. 156 (1922); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (C. C. A. 3d, 1910); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 Fed. 574 (C. C. A. 2d, 1916); *Jack v. Armour & Co.*, 291 Fed. 741 (C. C. A. 8th, 1923); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F. (2d) 678 (C. C. A. 4th, 1926), *cert. denied*, 278 U. S. 757 (1927); *Peterson v. Borden Co.*, 50 F. (2d) 644 (C. C. A. 7th, 1931); *Peto v. Howell*, 101 F. (2d) 353 (C. C. A. 7th, 1938); *Quittner v. Motion Picture Producers*, 50 F. (2d) 266 (S. D. N. Y. 1931); *Seaboard*

the decisions insist that there can be no recovery under the anti-trust laws unless the plaintiff definitely establishes that the wrongful act of the defendant was the proximate cause of the injury. In fact, this requirement is inherent in the wording of Section 7 of the Sherman Law and Section 4 of the Clayton Act.²⁰ And not only must the illegal acts have caused the damage, but it has been indicated they must have caused it with reasonable directness.²¹

The cases also disclose that the courts have not been equally insistent that the plaintiff introduce definite and certain proof of the amount of his damage. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery".²²

*Story Parchment Co. v. Paterson Parchment Paper Co.*²³ is the leading case. There the plaintiff sought to recover damages resulting from a conspiracy to monopolize trade in vegetable parchment. The Supreme Court held that two items of damage had properly been submitted to the jury.

The first of these was the difference, if any, between the amounts actually realized by the plaintiff and what would have been realized from sales at reasonable prices except for defendant's unlawful acts. With respect to this damage, the proof showed the prices received by the plaintiff before the injury complained of and those received thereafter. Upon this proof the trial court had instructed the jury that if they were satisfied that the old prices were reasonable and would not have been changed by reason of any economic condition, they might consider as an element of damage ". . . the difference between the prices actually received and what would have been received but for the unlawful conspiracy."²⁴

Terminals Corp. v. Standard Oil Co., 3 C. C. H. Tr. Reg. Serv. ¶ 25013 (S. D. N. Y. 1936); *cf. Lawlor v. Loewe*, 235 U. S. 522, 536 (1915); *United Mine Workers v. Coronado Coal Co.*, 258 Fed. 829 (C. C. A. 8th, 1919), *rev'd on other grounds*, 259 U. S. 344 (1938).

20. See note 1 *supra*.

21. *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (C. C. A. 3d, 1910); *Seaboard Terminals Corp. v. Standard Oil Co.*, 3 C. C. H. Tr. Reg. Serv. ¶ 25013.

22. *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 802 (C. C. A. 2d, 1924). See also *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254 (C. C. A. 2d, 1908); *Frey & Son, Inc. v. Welch Grape Juice Co.*, 240 Fed. 114 (C. C. A. 4th, 1917), *cert. denied*, 251 U. S. 551 (1919); *William H. Rankin Co. v. Associated Bill Posters (Charles A. Ramsay Co. v. Same)*, 42 F. (2d) 152 (C. C. A. 2d, 1930), *cert. denied*, 282 U. S. 864 (1930); *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied*, 282 U. S. 899 (1931); *Hansen Packing Co. v. Swift & Co.*, 27 F. Supp. 364 (S. D. N. Y. 1939).

23. 282 U. S. 555 (1931).

24. *Id.* at 562.

The second item of damage allowed was the extent to which the property of the plaintiff had depreciated in value as a result of the defendant's acts. The plaintiff introduced evidence, through its treasurer, that its plant had cost \$235,000 of which \$90,000 had been used to purchase and install a parchmentizing machine. As a result of defendant's unlawful activities, the plant closed and was never thereafter operated for the purpose for which it was built. The treasurer of the company estimated the market value of the plant after it had been closed down at \$75,000.²⁵ Defendant's contention that the amount of such damages was based upon speculation and conjecture was rejected. The court stated that "there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount."²⁶ It was asserted that the rule which precludes the recovery of uncertain damages applies to damages which are not the certain result of the wrong, but not to those which are definitely attributable to the wrong and uncertain only as to amount. The general limitations of the requirement of definite and certain proof were outlined as follows:

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."²⁷

Subject to this modest requirement as to certainty, the courts have generally permitted recovery under the anti-trust laws for various

25. Cases dealing with recovery for depreciation in value of business or property are: *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254 (C. C. A. 2d, 1908); *Victor Talking Mach. Co. v. Kemeny*, 271 Fed. 810 (C. C. A. 3d, 1921); *Cilley v. United Shoe Machinery Co.*, 202 Fed. 598 (D. Mass. 1913). See also *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574 (C. C. A. 2d, 1916), and *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F. (2d) 217 (C. C. A. 2d, 1935). In the *Baush* case the proof of damage was held to be insufficient.

26. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931).

27. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 563 (1931). But the plaintiff must submit the best proof available. Otherwise it may be suspected that he has really suffered no injury, and recovery will be denied. *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96 (C. C. A. 8th, 1901); *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77 (C. C. A. 2d, 1915). See also Note (1930) 39 YALE L. J. 1035, 1037-38.

types of damage. In addition to the two items of damage considered in the *Story Parchment Company* case the decisions have involved chiefly damage resulting from increased cost of doing business and loss of profits.

The cases dealing with the first of these items can be briefly disposed of. It is well settled by the Federal anti-trust decisions that one whose cost of doing business is increased by virtue of the defendants' acts in violation of the Sherman or Clayton Act is entitled to recover damages. For example, where a party is required to pay more for an article as a result of a restraint of trade, damages consisting of the difference between the price paid and the market price under competitive conditions may be recovered.²⁸ These cases would seem to be in line with the common law authorities, which have been considered, holding that one whose cost of doing business has been increased as the result of the tortious act of another may recover damages for such increase.²⁹

RECOVERY FOR LOSS OF PROFITS³⁰

The most difficult problems involve claims for loss of profits. Recovery of such losses, however, is common under the anti-trust laws. It was permitted even in the more recent cases at common law although there was a somewhat strict adherence to the rule of certainty. The anti-trust authorities, on the other hand, are quite liberal in permitting recovery. The trend of the decisions becomes apparent from a brief consideration of the leading cases.

28. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390 (1906); *Thomsen v. Cayser*, 243 U. S. 66 (1917); *Straus v. Victor Talking Machine Co.*, 297 Fed. 791 (C. C. A. 2d, 1924); *Peto v. Howell*, 101 F. (2d) 353 (C. C. A. 7th, 1938); *United States Tobacco Co. v. American Tobacco Co.*, 163 Fed. 701 (C. C. S. D. N. Y. 1908); *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774 (C. C. W. D. Ky. 1908). In *Chattanooga Foundry & Pipe Works v. City of Atlanta*, *supra*, the city sought damages because it had been led to purchase pipe at a price much above what it was worth. The purchase was made after a pretended competition at a price fixed by the combination. Plaintiff obtained a verdict for the difference between the price paid and the estimated competitive price in the absence of the combination. The verdict and the resulting judgment were upheld by the Supreme Court which said that the city "... was injured in its property . . . by being led to pay more than the worth of the pipe". *Id.* at 396.

29. 15 AM. JUR. (1938) 542.

30. Some cases discussing recovery for loss of profits are: *Thomsen v. Cayser*, 243 U. S. 66 (1917); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96 (C. C. A. 8th, 1901); *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n*, 152 Fed. 864 (C. C. A. 3d, 1907); *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77 (C. C. A. 2d, 1915); *Frey & Son, Inc. v. Welch Grape Juice Co.*, 240 Fed. 114 (C. C. A. 4th, 1917), *cert. denied*, 251 U. S. 551 (1919); *Victor Talking Mach. Co. v. Kemény*, 271 Fed. 810 (C. C. A. 3d, 1921); *William H. Rankin Co. v. Associated Bill Posters* (Charles A. Ramsay Co. v. Same), 42 F. (2d) 152 (C. C. A. 2d, 1930), *cert. denied*, 282 U. S. 864 (1930); *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied*, 282 U. S. 899 (1930); *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F. (2d) 217 (C. C. A. 2d, 1935), *rev'g*, 72 F. (2d) 236 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 589 (1934).

The first case to reach the Supreme Court involving loss of profits by reason of a violation of the Anti-Trust Laws was *Thomsen v. Cayser*.³¹ It clearly appeared in that case, however, that the profits were not left to the speculation of the jury.³² In establishing the amount of lost profits "There were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the jury."³³ This, then, was a case where the amount of lost profits was established with as much certainty and exactness as is possible in any claim to recover for such an injury. Yet, in affirming the judgment of the trial court, the Supreme Court was careful to point out that the members of the jury ". . . were told that they 'ought not to allow any speculative damages,' that they were not 'required to guess' as to what damages 'plaintiffs claim to have sustained.' And, further, that the burden of proof was upon plaintiffs and that from the evidence the jury should be able to make a calculation of what the damages were. Besides, plaintiffs alleged an overcharge, and the verdict of the jury was for its amount and interest."³⁴

A plaintiff will derive little comfort from this case. It is not always possible to trace loss of profits to particular purchasers whose custom has been diverted by the combination. A victim of a combination may retain all of his customers, yet suffer a serious diminution of profits due to the conspiracy. That was the situation presented to the Supreme Court in *Eastman Kodak Co. v. Southern Photo Materials Co.*³⁵ There the plaintiff attempted to recover profits allegedly lost over a period of four years. "The plaintiff's claim was that under these circumstances it was entitled to recover, as the loss of profits which it would have realized had it been able to continue the purchase of defendant's goods, the amount of its gross profits on the defendant's goods during the four years preceding the period in suit, which was shown, less the additional expense which it would have incurred in handling the defendant's goods during the four years' period in suit, which was estimated."³⁶ The Supreme Court rejected the claim that plaintiff's damages were purely speculative, and held that the proof submitted afforded a proper basis from which to calculate loss of

31. 243 U. S. 66 (1917).

32. "The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. . . . The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion." *Id.* at 88.

33. *Id.* at 89.

34. *Ibid.* (Italics supplied.)

35. 273 U. S. 359 (1927).

36. *Id.* at 376.

profits.³⁷ It quoted with approval the observation of the Court of Appeals that "It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate."³⁸ Then followed its own conclusion that ". . . a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."³⁹

The trend indicated in these cases reached its ultimate conclusion in *William H. Rankin Co. v. Associated Bill Posters (Charles A. Ramsay Co. v. Same)*.⁴⁰ There, two separate actions were tried together by consent of the parties. In the first action, the plaintiff Rankin Co. put its treasurer on the stand. Over objection and exception he showed the net profits of the business in 1911, and then stated what he considered would have been the normal increase in the plaintiff's business from year to year. On this basis he was permitted to estimate the company's probable yearly net earnings from July 1913 to June 1918, and to explain how such estimates were reached. In the second case, the plaintiff Ramsay Co. did not introduce any estimate of probable future earnings. It was content to leave the matter on proof of past earnings, expenses and net profits. In each case the plaintiff obtained

37. Even more striking is the case of *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied*, 282 U. S. 899 (1930). The plaintiff in that case was engaged in canning and selling foodstuffs. Its chief competitor was the Van Camp Packing Company. The proof established that beginning in 1921 the defendant Can Company, in violation of section 2 of the CLAYTON ACT, 38 STAT. 730 (1914), 15 U. S. C. A. § 13 (1927) sold cans to the Van Camp Packing Company at lower prices than it sold them to the plaintiff. The evidence relied upon by the Court in affirming the judgment for the plaintiff is thus summarized in its opinion at p. 769:

"The instant case well illustrates the difficulty of fairly fixing damages or in stating a rule for the intelligent guidance of the jury in deliberating on this question. Plaintiff's business for five or six years was conducted at a loss, after it had been for years previously conducted profitably. Its officers attribute such loss to price cutting by Van Camp made possible by defendant's discriminations in the sale of cans to Van Camp. The business involved large turnovers on a small percentage of profit. When plaintiff showed a loss of customers due to Van Camp's underselling it, and supplemented this proof with evidence that Van Camp's underselling was made possible by the discrimination made by defendant in the sale of its tin cans, it was (proof as to other issues appearing) entitled to recover at least nominal damages.

"But this was not all the proof. The usual profit under normal operations on a case of canned goods is shown by the testimony of numerous witnesses. The profit which various canners were able to make prior to the price cutting of Van Camp also appears. The effect of the Van Camp price cutting on plaintiff's business is clearly inferable. The jury's award is lower than any theory of plaintiff's witnesses.

"The case is one for the application of the rule which denies defendant's right to take refuge behind the alleged uncertainty of indefiniteness of the plaintiff's proof of damages which were occasioned by defendant's own wrongdoing and its concealment of such fact from the injured party."

38. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927).

39. *Ibid.*

40. 42 F. (2d) 152 (C. C. A. 2d, 1930), *cert. denied*, 282 U. S. 864 (1930).

a judgment for damages resulting from plaintiff's exclusion from the business of soliciting billboard advertising.

The appeal presented the anomalous situation where in one case the defendants took ". . . the position in respect to one plaintiff that it was error to introduce evidence of estimated future earnings because it is too speculative, and the position in respect to the other plaintiff that it was fatal to a recovery not to do so."⁴¹

The Court affirmed the judgment in each action, specifically holding that the evidence as to damage was, in view of all the facts and circumstances, sufficiently definite and certain. In the case of the Ramsay Co., it observed:

"Had there been no evidence from which damages could be fixed by the jury, of course this plaintiff could not recover. But there was evidence. The financial history of the Ramsay business was in the case. Perhaps the jury was not as competent to analyze that evidence as some financial and business expert might have been, but it could draw its own reasonable conclusions from it. That is what a jury is to do anyway in arriving at the amount of damages in any case. The jury had the data before it, and was left to determine the damages from that in what may be called its raw state. Perhaps the testimony of some one competent to have estimated the business loss resulting from the defendants' acts would have helped, but it was not indispensable."⁴²

Thus, the requirement of certainty, if it ever existed in fact, was virtually abandoned in this case. A mass of technical data in the "raw state" was literally dumped into the lap of the jury. From that material the jury was required to estimate the amount of future profits without the aid of expert advice or opinion. But a plaintiff who failed to introduce "some one competent to have estimated" probable earnings would be running an unnecessary risk. The requirement that a plaintiff must submit the best proof obtainable might lead some other court to insist upon such proof.

The doctrine of the *Ramsay* case finds some support in *Frey & Son, Inc. v. Welch Grape Juice Co.*⁴³

In that case the Circuit Court of Appeals for the Fourth Circuit, found that there was evidence to show that the defendant had an understanding with the jobbers and wholesalers to whom it sold Welch's grape juice that they should sell to retailers at not less than a fixed price. Plaintiff, a wholesale grocer with a considerable trade in defendant's goods, sold at a lower price than that required by defendant.

41. *Id.* at 156.

42. *Ibid.*

43. 240 Fed. 114 (C. C. A. 4th, 1917), *cert. denied*, 251 U. S. 551 (1919).

Thereupon, defendant refused to sell to plaintiff except at its required price. As a result, plaintiff lost (1) the profits which it would have made in the regular course of its sales of Welch's grape juice and (2) a certain amount of trade in other commodities, since customers who desired Welch's grape juice transferred their general accounts to other jobbers. The trial court limited the measure of damages to (1) the profit plaintiff would have made on two particular orders proved to have been given to plaintiff and which it was unable to fill, and (2) the profit plaintiff would have made but for the alleged discrimination on 200 cases which it bought from another dealer at a higher price than that charged to other wholesalers by defendant.

The Circuit Court of Appeals found this to be error and reversed the case. It held that the damages recoverable were those arising from the unlawful interruption of plaintiff's business in selling Welch's grape juice. This damage could not as a matter of law be limited to the loss of profit on specific sales. Ordinarily, it is impossible for a merchant whose business is broken up to prove all the specific sales he has lost. But ". . . the plaintiff testified that in the year 1911, before the alleged discrimination began, it sold 190 cases of Welch's grape juice, and it also proved the average increase of its general business for the succeeding years. This average increase of general business was evidence from which the jury could have inferred the probable increase of the sale of this brand of grape juice, had the plaintiff been able to purchase it on the same terms as other jobbers. This evidence, together with that offered by the plaintiff of the per cent. of profit made by it on sales of the grape juice, should have been submitted to the jury as data from which in connection with any other relevant facts they could arrive at the damage which the alleged combination and discrimination caused the plaintiff."⁴⁴ The court paid formal homage to the rule of certainty by stating that it would not permit the jury merely to guess at damages and by holding that the damages arising from the incidental loss of general business in other commodities were too remote and uncertain.

From the cases that have been considered, it appears that recovery for lost profits may be had in spite of inherent uncertainties of proof.⁴⁵ But recovery has not been permitted in every anti-trust case. The plaintiff must offer at least the best proof available.

Thus, in *Central Coal & Coke Co. v. Hartman*,⁴⁶ plaintiff claimed damages for loss of some of the expected profits of the business of buy-

44. *Id.* at 117.

45. *A fortiori*, recovery will be permitted in the case of specific proof. See *Thomson v. Cayser*, 243 U. S. 66, 89 (1917), where sums resulting from the loss of specified customers were proved.

46. 111 Fed. 96 (C. C. A. 8th, 1901).

ing and selling coal between certain dates. It appeared that both the plaintiff and the defendant had previously belonged to an organization that had allegedly controlled the price of coal in violation of the Sherman Law. The plaintiff withdrew from the organization. Thereupon the defendants refused to sell any coal to plaintiff except at retail prices. The Circuit Court of Appeals reversed a judgment for the plaintiff on the ground that the damages had been established by speculation, guessing and estimates of witnesses. The court said that as a general rule the expected profits of a business are too speculative to permit recovery.

"He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. . . . And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation."⁴⁷

On its facts the case is distinguishable from those previously considered. The plaintiff had previously participated in the alleged conspiracy. His only record of past earnings was during the time when he had belonged to the combination. Obviously net profits during such a period afforded no reasonable base from which to compute subsequent loss of profits. This situation probably led the court to believe that there had been no real damage.⁴⁸

But what of the statement that "He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced." This doctrine was applied in *Baush Machine Tool Co. v. Aluminum Co. of America*⁴⁹ by the same court which had previously permitted recovery in the *Rankin* and *Ramsay* cases. In the *Baush* case it appeared that although the plaintiff had been in business for some years, he had never realized a profit from the business. The trial court had nevertheless permitted the plaintiff to show by a witness his estimate of the loss of profits dur-

47. *Id.* at 99.

48. The same may be said to be true of a decision in *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77 (C. C. A. 2d, 1915), wherein a decision of the trial court for the plaintiff was reversed on the ground that the damages for loss of profits were based upon pure speculation. In this case there was no evidence to support the contention that the concerns whose business plaintiff claimed to have lost would have bought as much of the commodity in question during the period for which plaintiff claimed damages as they had in earlier years. See also *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F. (2d) 217 (C. C. A. 2d, 1935), *cert. denied*, 293 U. S. 589 (1934).

49. 79 F. (2d) 217 (C. C. A. 2d, 1935), *cert. denied*, 293 U. S. 589 (1934).

ing the period for which recovery was permitted. The Appellate Court reversed the judgment of the trial court on the ground that "As there had never been any profits and no reasonable prospects that any would be made . . . his estimate was nothing but a guess based on conditions contrary to fact. It was too speculative to be admissible."⁵⁰ The court distinguished its decision in the *Rankin* case by stating that ". . . there was a proper basis for estimate in that case afforded by a period of profitable operation prior to the defendants' unlawful interference which prevented a continuance of the former success."⁵¹

In spite of such decisions, the trend is toward awarding damages to every plaintiff who has suffered a legal wrong under the Anti-Trust Law. In *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*,⁵² we find the Circuit Court of Appeals for the Second Circuit suggesting that even a plaintiff who has not previously engaged in business may be entitled to some recovery:

"The defendants next contend that the complaint fails to state a cause of action, because it appears that the plaintiff was not engaged in business at the time of the conspiracy; that it had no established business to injure. But in the very recent case of *Thomsen v. Union Castle Mail Steamship Co.* (decided October, 1908) 166 Fed. 251, this court said: 'It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business.' A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the federal statute. He may be unable to prove substantial compensatory damages, but in stating the infringement of his legal rights he states a cause of action at least for nominal damages, and may, perhaps, so state it as to call for exemplary damages.

". . . It is averred that the plaintiff had been engaged in interstate commerce, had temporarily ceased to do business, had built a new refinery at great expense, and was prepared and intended to resume business as before. Something more than a mere mental intention to engage in interstate commerce is involved when a corporation spends millions of dollars in building a sugar refinery which is only of use when operated and which can only be operated by engaging in interstate commerce. The amount of money actually lost in the enterprise cannot be regarded as wholly speculative and problematical."⁵³

50. *Id.* at 227.

51. *Ibid.*

52. 166 Fed. 254 (C. C. A. 2d, 1908).

53. *Id.* at 260. The same approach is apparent in the *Story Parchment Company* case, where the Supreme Court, in sustaining a verdict for the plaintiff, ignored the statement of the Circuit Court of Appeals for the First Circuit [37 F. (2d) 537, 540 (C. C. A. 1st, 1930)], that "Obviously in the case at bar there could be no evidence on

It thus becomes increasingly clear that the courts will some day award substantial damages for loss of profits to a company which has never previously engaged in business.

CONCLUSION

From the decisions we have discussed, the following conclusions seem warranted:

1. Threefold damages may be recovered in private suits under the Sherman Law and the Clayton Act by persons who have been injured in their *business* or *property*. There may be no recovery for injury to other rights.

2. The usual common law standards are to be applied in establishing the fact and extent of the injury.

3. As at common law, there can be no recovery unless it be definitely established that the wrongful acts of the defendants were the proximate cause of plaintiff's damage.

4. The chief of the common law requirements as to damages—that of certainty—is applied somewhat more liberally in favor of the plaintiff in the federal anti-trust cases than is usual at common law.

5. While "the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done" most of the anti-trust decisions insist that the plaintiff produce the best proof available.

6. The principal items of damage which have been allowed under the anti-trust laws are loss of profits, increased cost of doing business and depreciation in the value of property or business.

7. A plaintiff who has never previously engaged in business or who has never previously operated his business at a profit, may not recover compensatory damages for loss of prospective profits. The courts have also indicated, however, that such a plaintiff is clearly entitled to nominal damages and under certain circumstances may be awarded exemplary damages.

In providing for treble damages under the anti-trust laws, Congress had clearly in mind the extreme difficulty of maintaining a private suit under those laws. The experience over the past 70 years suggests that Congress underestimated the enormity of the task assumed by a plaintiff seeking threefold damages. Even a cursory examination of the cases will show that most combinations have been cleverly concealed

which to base an estimate of any actual loss of profits during the period the plaintiff operated, based on previous experience, since plaintiff never operated under what it claims are fair and reasonable prices for a sufficient length of time to furnish a standard as the plaintiff had in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 378 . . . and the jury were so instructed."

behind an exterior of plausible legality. The initial problem merely of proving their existence is one which few persons can afford to undertake. If the existence of the combination is shown, the complicated factual and economic problems presented are equally disturbing to a private litigant. In establishing the nature of the combination and the cause of his injury, the Court holds the plaintiff to a high degree of definite proof. It is therefore not surprising that in spite of the liberal trend of the decisions dealing with proof of damage the number of recoveries has been small.

There have been approximately one hundred seventy-five reported decisions involving separate suits for damages under the anti-trust laws. They embrace nearly ninety different branches of commerce.⁵⁴ It is significant that in only thirteen of these cases was final recovery had by the plaintiff.⁵⁵ The disposition of suits in which no written opinion was handed down shows a similar small percentage of judgments for the plaintiff.⁵⁶ For example, in the two-year period

54. Advertising, Aluminum, Automobile, Banana, Banking, Basket Manufacturing, Book Publishing, Building and Construction, Cameras, Candy, Canning, Carbonic Gas, Cast Iron Pipe Fittings, Cereal, Cheese, Chinaware and Kitchen Equipment, Cleaning and Dyeing, Cleaning Powder, Coal, Common Carriers, Copper Mining, Corn Exchanges, Creamery Equipment, Disinfectants, Electrical, Electrical Supplies, Excelsior and Tow, Exhibition Baseball, Fish, Flour, Freight Transfer, Gas and Electric, Gasoline, Glass, Grape Juice, Hat Manufacturing, Hosiery, Ice, Iron Pipe, Leather, Liquor, Lumber, Meat Packing, Merchandise Brokerage & Commission, Milk, Motion Picture, Nails, Newspaper Publishing, Office Equipment, Oil, Oxyacetylene Apparatus, Paper Manufacture, Phonograph, Photographic Supplies, Potatoes, Power Manufacturing, Pullman Cars, Quick Silver Mining, Radio, Railroad, Radio Loud Speakers, Red Cedar Shingles, Retail Drug, Retail Grocery, Roofing Materials, School Furniture, Shipping, Shoe Machinery, Silk, Stove, Street Lighting Equipment, Sugar, Telegraph, Telephone, Tile and Grate, Tin Can, Tires, Tire Chains, Tobacco, Truck Gardening, Trucking, Vaudeville, Warehouse Storage, Watches, Wholesale Grocery, Wooden Doors.

55. *Montague & Co. v. Lowry*, 193 U. S. 38 (1904); *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390 (1906); *Lawlor v. Loewe*, 235 U. S. 522 (1915); *Thomsen v. Caysen*, 243 U. S. 66 (1917); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791 (C. C. A. 2d, 1924); *William H. Rankin Co. v. Associated Bill Posters (Charles A. Ramsay Co. v. Same)*, 42 F. (2d) 152 (C. C. A. 2d, 1930); *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930); *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp.*, 57 F. (2d) 96 (C. C. A. 1st, 1932); *Dextone Co. v. Building Trades Council*, 60 F. (2d) 47 (C. C. A. 2d, 1932); *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F. (2d) 79 (C. C. A. 2d, 1939); *Victor Talking Mach. Co. v. Kemeny*, 271 Fed. 810 (C. C. A. 3d, 1921).

56. The Annual Report of the Attorney General of the United States for the fiscal year 1935 shows that during that year there were seventeen private civil suits pending in the District Courts under the anti-trust laws. Three of these were disposed of by judgment on jury verdict; one was disposed of on directed jury verdict; one was disposed of by trial without a jury; two were disposed of on the pleadings; one was disposed of on stipulation, consent, confession or compromise; seven were disposed of by dismissal, discontinuance, withdrawal or non-suit, and two were remanded to the State Court. (Table 2H, p. 200.)

The Annual Report of the Attorney General of the United States for the fiscal year ended June 30, 1937, shows that during that year there were forty-two private civil suits pending in the District Courts under the anti-trust laws. Two of these were disposed of on the pleadings; three were disposed of by stipulation, consent, confession or compromise; thirty-five were disposed of by dismissal, discontinuance, withdrawal or non-suit, and one was dismissed for lack of jurisdiction. (Table 2H, p. 188-189.)

beginning June 29, 1936 there were 83 private suits pending in the District Courts under the anti-trust laws. Only one of these suits was disposed of by jury verdict. Those familiar with the subject realize, however, that many claims are settled before any suit is instituted or in any event before trial. It may therefore be significant to find that during the same period of time seventy-six such suits were disposed of on stipulation, consent, confession, compromise, dismissal, discontinuance, withdrawal or non-suit. In the face of such a record a plaintiff must welcome the more recent cases we have discussed.

The Annual Report of the Attorney General of the United States for the fiscal year ended June 30, 1938, shows that during that year there were forty-one private civil suits pending under the anti-trust laws. One of them was disposed of by judgment on jury verdict; one was dismissed for lack of jurisdiction; two were disposed of by stipulation, consent, confession or compromise; thirty-six were dismissed, discontinued, withdrawn, or non-suited; and one was otherwise disposed of. (Table 2H, p. 233.)