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Supreme Court of the United States

October Term 1961

No. 4

728

BROWN SHOE COMPANY, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Appellant Brown Shoe Company, Inc. ("Brown") appeals from the final judgment of the United States District Court for the Eastern District of Missouri (Hon. Randolph H. Weber, D. J.), holding the acquisition by Brown of G. R. Kinney Co., Inc. ("Kinney") to be in violation of amended Section 7 of the Clayton Act (T. 77).*

* Numerical references preceded by the letter "T" are to the printed pages of the transcript of Testimony. Government's Exhibits are referred to by number and are preceded by the designation "Gx". Defendant's Exhibits are referred to by letter and are preceded by the designation "Dx". The page number of the volume of exhibits at which the exhibit referred to appears follows the exhibit description and is preceded by the letter "R". The page number of the transcript of Testimony at which the exhibit was offered in evidence is indicated last. For example, Government's Exhibit 1 would be referred to as Gx. 1, R. 1, T. 108.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, including findings of fact and conclusions of law, is reported at 179 F. Supp. 721 (T. 42).

JURISDICTION

This civil action was brought under Section 15 of the Act of October 15, 1914, 38 Stat. 736, as amended (15 U.S.C. §25), commonly known as the Clayton Act, alleging a violation of amended Section 7 thereof (15 U.S.C. §18). Final judgment was entered by the District Court on December 8, 1959. Notice of appeal was filed in the District Court on February 2, 1960.

Jurisdiction is conferred upon this Court by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended (15 U.S.C. §29). On June 21, 1960, this Court noted probable jurisdiction, 363 U. S. 825.

STATUTES INVOLVED

The statutes involved are Sections 7 and 15 of the Clayton Act. These statutes, together with Section 7 as it existed prior to its amendment in 1950, are set forth in full in the Appendix at pages 1a-5a.

The pertinent part of amended Section 7 provides:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisi-

tion may be substantially to lessen competition, or to tend to create a monopoly."

PROCEEDINGS BELOW

This action was brought on November 28, 1955 to enjoin appellant Brown from acquiring Kinney on the ground that the proposed acquisition would violate amended Section 7 of the Clayton Act. After a hearing, a motion for a preliminary injunction was denied, and an order was entered allowing the acquisition upon condition that the acquired business be operated separately (T. 38). On May 1, 1956, G. R. Kinney Co., Inc. was merged into Brown. Its business has since been operated separately by G. R. Kinney Corporation, a wholly owned subsidiary of Brown.*

QUESTIONS PRESENTED

The questions presented by this appeal concern the probable competitive effects of the merger of two firms, Brown and Kinney.

The firms—against the background of the highly competitive shoe industry—may be briefly described as follows:

Appellant Brown is principally a manufacturer of medium price,** nationally advertised, branded shoes. 56% of the shoes it manufactures, in pairs, are women's shoes, 14% are men's shoes and the remaining 30% are infants', babies', misses', childrens', youths' and boys' shoes.

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* References to "Kinney" are to the continuing business entity, and unless otherwise noted, this brief will speak in terms of the operations of Brown and Kinney in 1955, which is the year preceding the merger and the year this action was commenced.

** At retail, the medium price range for men's shoes is basically \$8.95-\$14.95, for women's \$7.95-\$14.95 and for children's \$5.45-\$7.95.

In 1955, Brown produced 25.6 million pairs of shoes, constituting 4% (in pairs) of the shoes shipped by all domestic shoe manufacturers.* In that year, Brown was the fourth largest shoe manufacturer, in terms of pairs produced, in the United States. Brown sells the shoes it manufactures in competition with a large number of firms, both large and small. It sells primarily to independent retailers with outlets in various cities and towns throughout the United States. These independent retailers are Brown's most important customers.

In addition, Brown is a retailer of shoes. Its retail operations are conducted by its retail subsidiaries, Regal Shoe Company ("Regal") and Wohl Shoe Company ("Wohl").** These subsidiaries sell shoes manufactured by more than 394 shoe manufacturers, of which Brown is one.

Regal is a retailer of medium price men's shoes under the name Regal in 98 Regal stores, which are located principally in large cities on the Eastern Seaboard.

Wohl primarily operates leased departments in 163 independent department and specialty stores operated by others. It also operates 18 family shoe stores and 9 women's

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* The district court's statements with respect to the percentages of national shoe production of Brown and Kinney are inconsistent and incorrect. At one point the combined share of Brown and Kinney is said to be 5% (T. 49). Later, in its opinion, the district court erroneously states that the combined share is 5.5% (T. 71). Upon the undisputed facts, Brown's share is 4% and Kinney's 0.4%, while the combined share is 4.4%.

** In this Brief references to Brown are to the parent company and its subsidiaries. Unless otherwise noted, references to Brown's sales to independent retailers include both Brown's manufacturing sales and Wohl's wholesale sales to them; and references to Brown's retail operations are to the operations of both Regal and Wohl.

shoe stores. In its retail operations, Wohl specializes in the sale of women's shoes (80%) and also sells some children's (16%) and a few men's shoes (4%). 70% of Wohl's sales, in dollars, are at retail.

In 1954, national sales of footwear at retail amounted to \$3,464,000,000.* Wohl and Regal together sold about 1.1% of this amount.

Wohl, which manufactures no shoes itself, is a wholesaler of women's shoes only which bear its own brand names. 30% of Wohl's sales, in dollars, are at wholesale.

Kinney, on the other hand, is principally engaged in the sale at retail of less expensive shoes in the popular price field.** In 1954, it sold about 1.1% (in dollars) of all shoes sold at retail nationally. Thus, Brown and Kinney combined sold about 2.3% (in dollars) of all shoes sold at retail nationally.

In 1955, Kinney manufactured 2.9 million pairs of shoes. This amounted to 0.4% (in pairs) of domestic production. Kinney's factories supply its retail stores with about 20% of their shoe requirements. Kinney also sells shoes to other volume retailers. Kinney purchases the remaining 80% of the shoes and the other items which it sells at retail from 329 other manufacturers and suppliers including Brown.

Kinney's retail operations are conducted in approximately 352 family shoe stores in over 315 cities and towns throughout the country.

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* 1954 figures are used here because this was latest available year for which the Census published figures of national retail shoe sales. Estimates of 1955 national retail sales are slightly higher—in excess of \$3.5 billion. Based on such estimates, Kinney's share of national retail sales was 0.9%.

** Men's shoes in the popular price field generally retail at \$8.99 and below, women's at \$5.99 and below, and children's at \$3.99 and below.

In its family stores, Kinney sells men's, women's and children's shoes. Women's shoes constitute 33% of Kinney sales at retail, men's shoes 22%, and children's shoes 45%.

In only 77 of the 315 communities where Kinney sells shoes at retail, do either Wohl or Regal have a retail outlet.

The Ultimate Question

The ultimate question presented is:

> Whether, upon the entire record, the district court erred in concluding that the effect of the acquisition by Brown of Kinney may be substantially to lessen competition, or tend to create a monopoly in any line of commerce in the shoe industry in any section of the country.

The District Court's Opinion

The principal questions included in the ultimate question presented are most meaningful in the context of the district court's opinion which we summarize here.

Line of Commerce

The district court held that the relevant lines of commerce were " 'men's', 'women's' and 'children's' shoes, each considered separately"—"regardless of quality, style, price and intended use" (T. 58).

In reaching its conclusion, the district court rejected one line of commerce contended for by appellee—a line made up of all shoes—observing the "noticeable fact" that shoes are distinct as to the sexes except for children's shoes (T. 57).

The district court also rejected appellant's argument that "quality, style, price and intended use" must be considered if a true line of commerce is to be marked out. The court cited four "interchangeability" factors it found to obtain in the shoe industry to justify its conclusion that these differentiating features could be ignored: (1) the possible interchangeability in the manufacturing process; that the same shoe machinery could be used to make shoes of a similar basic construction for a number of different age/sex groups; (2) the possible interchangeability in shoe appearance; that clever merchandising could disguise shoe quality so as to make shoe prices insignificant; (3) the possible interchangeability of use; that shoes bought for one occasion (as for dress) could be used for other occasions (worn "to the woods"); and (4) the possible interchangeability of trade classifications; that some shoes which could be defined as "casuals" might also be considered as dress or sport shoes by others in the trade or by some purchasers (T. 56-7).

Section of the Country

With respect to *shoe manufacturing,* the district court found, as the parties agreed, that the relevant section of the country was the nation as a whole (T. 59).

With respect to *shoe retailing,* the district court found the relevant section of the country to be a city "of 10,000 or more population and its immediate and contiguous surrounding area . . . in which a Kinney store and a Brown (operated, franchise or plan) store are located" (T. 64-5). The district court found that there are 141 such cities. The district court did not make clear whether each such city is to be considered a "section of the country" separate and apart from other such cities or whether the aggregate of all 141 such cities is to be so considered.

In the district court's holding on "section of the country", each city was apparently found to be a separate section of the country. However, in appraising the effect of the merger, the district court lumped all 141 cities together.

The district court did not consider market or competitive conditions in shoe retailing in any of the 141 cities.

Within the group of 141 cities it selected, the district court included 64 cities where Brown did not sell shoes at retail at all. In these cities, there was an independent retailer purchasing shoes from Brown (and others) whose operations the court assigned to Brown because the retailer received merchandising advice and assistance from Brown.

The district court did not define the "immediate and contiguous surrounding area" to be annexed to the political boundaries of any particular city area to form a section of the country.

Competitive Effect of the Merger

The district court arrived at three separate conclusions, which it held justified the ultimate conclusion that Brown's acquisition of Kinney will "substantially lessen competition and tend to create a monopoly".

1. Elimination of a Substantial Competitive Factor

Describing Kinney as the "most aggressive retail chain in the nation" and as a "potent competitor of Brown", the district court found, without analysis of competition in any of the 141 cities or in any section of the country, that the merger would eliminate Kinney as a substantial competitive factor to Brown in the shoe retailing field (T. 73, 75).

2. The Establishment of a Manufacturer-Retailer Relationship Depriving Other Firms of a Fair Opportunity to Compete

The district court found that the acquisition would establish "a manufacturer-retailer relationship which deprives all but the top firms in the industry of a fair opportunity to compete" (T. 75).

At the retail level, the district court found that Kinney would obtain "buying and pricing advantages" from the merger which would have an impact upon independent retailers (T. 72). The district court did not explain what these "advantages" were or how they could come about. The district court stated, however, "that independent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets" (T. 70).

At the manufacturing level, the district court found that independent manufacturers would be injured in that they would be deprived of a share of Kinney's shoe purchases as "Brown continues to supply more and more shoes to Kinney" (T. 73), without noting that Kinney's purchases of shoes amounted to approximately 1% of national shoe production and that Kinney's purchases from manufacturers other than Brown had actually increased. This finding, which relates to injuries to competitors, apparently rests on two subsidiary findings: (1) an increase in intercompany sales between Brown and its subsidiaries, and (2) a trend in the shoe industry of other large manufacturers doing the same thing.

The district court cited Brown's increasing share of Wohl and Kinney purchases to support the first of these subsidiary findings (T. 70). For the second finding, the court simply declared, without citing any supporting evidence, that "once manufacturers acquire retail outlets they definitely increase the sale of their own manufactured product to these retail outlets" (T. 69).

3. Increase in Concentration

The third underlying conclusion upon which the district court relied was that the merger "would increase concentration in the shoe industry, both in manufacturing and retailing" (T. 74). The district court cited for this conclusion a finding that Brown's rank would move from fourth to third as a manufacturer, from third to second in net sales, would become "the largest operator of retail shoe stores in the nation", and "would become the dominant shoe firm in the country" (T. 71, 74).

The district court adverted to the very slight increases in market shares which the record showed would be temporarily effected by the merger: at the manufacturing level, Brown's share of national production increases by 0.4%; at the retail level, Brown's share of national retail sales increases by about 1.1%.* The district court said: "What difference can it make . . . Does it then make sense to say that this is imperceptible because the percentages are small?" (T. 68).

Evidently, the district court was unconcerned by the fact that the increases in market shares effected by the merger were very slight, because it viewed the acquisition as part of a trend which, if it persisted, would culminate in monopoly. It found "a definite trend in the shoe industry of manufacturers . . . obtaining retail outlets" and then vertically integrating their operations. The effect of this was seen as "drying up the available outlets for independent manufacturers" and making it "harder and harder" for independent shoe retailers to compete (T. 68, 69, 70).

Brown and Kinney were found to be "a definite part of this trend in the industry" (T. 70). Indeed, Brown was described as having been "the moving factor in this trend",

* The percentages given are the correct percentages as shown in the record, not the incorrect percentages used by the district court.

which the district court found to be heading "toward the eventual elimination of small manufacturers and independent retailers" (T. 73).

The district court took the view that any increase in market share, no matter how slight, increases market power (T. 74):

> "Such increase, regardless of percentage amount, gives them power. Such power not only tends to create a monopoly, but substantially lessens competition by eliminating the effectiveness of the independent retailer and the smaller manufacturer."

Accordingly, the district court was of the opinion that any acquisition, however small, would be illegal (T. 73):

> "We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves, three-quarters, or the whole, and is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same."

The Major Questions

The major questions presented by the district court's opinion and holdings may be summarized in terms of the key phrases of amended Section 7: "line of commerce", "section of the country", and "substantially to lessen competition, or to tend to create a monopoly".

These questions are:

(1) Whether the district court in reaching its conclusion as to "line of commerce" erred:

(a) in holding that substantial differences in types, qualities, prices, styles, and intended uses of shoes, substantial differences in the way in which shoes are sold and substantial differences between the customers of the two firms should be disregarded as immaterial and irrelevant; and

(b) in ignoring the actual markets in which shoe manufacturers sell and the quite different markets in which shoe retailers sell.

(2) Whether the district court in reaching its conclusion as to "section of the country" erred:

(a) in holding that each of 141 individual local areas constitutes a section of the country notwithstanding the 1950 amendment to Section 7 which eliminated "community" from the statute; or

(b) in holding that an aggregate of 141 cities with no economic relationship to one another as regards shoe retailing constitutes a section of the country;

(c) in holding that a vaguely defined area concerning which there are no market data may constitute a section of the country; and

(d) in holding that Brown should be considered as a part of a retail market in a local area where in fact Brown does not sell at retail.

(3) Whether the district court in reaching its conclusion with respect to the probable effect of the acquisition as being "substantially to lessen competition" and to "tend to create a monopoly" erred:

(a) in holding that an appraisal of the nature, extent and vigor of competition in shoe manufacturing and shoe retailing was not required;

(b) in holding that an appraisal of the nature, extent and vigor of competition in each section of the country as found by the district court was not required; and

(c) in ignoring the 1950 amendment to Section 7 which eliminated as the test the requirement that there be a substantial lessening of competition between the acquiring and acquired companies and substituted therefor the requirement that there be a substantial lessening of competition generally.

STATEMENT OF THE CASE

A fundamental contention of appellant is that the highly competitive nature of the shoe industry at every level precludes the possibility that the acquisition by Brown of Kinney would substantially lessen competition in any part of that industry. The district court completely ignored the relevant evidence of the highly competitive nature of the shoe industry and thus failed to assess the effects of the merger upon competition.

In order to put the merger in perspective, we first review the competitive factors operating at various levels in the shoe industry and then describe the operations of Brown and Kinney against this industry background.

As a preliminary matter, we note that all of the facts which we recite were undisputed at the trial. Nearly all are derived from the regular business records of the two firms or from generally accepted government and industry statistics.

A. Competitive Nature of the Shoe Industry

1. *Shoe Manufacturing*

Large Number of Firms

There are a large number of shoe manufacturing firms. United Shoe Machinery Corporation, which is the largest domestic supplier of shoe machinery, has over 1,000 customers manufacturing shoes (T. 1637).

The Senate Subcommittee on Antitrust and Monopoly lists 970 shoe (excluding slipper) companies which had no "affiliation" with any other companies in 1954 (Gx. 207, R. 928, T. 1205). The Census for 1954 lists 1,196 shoe manufacturing "establishments" (Dx. GG, R. 3343, T. 2002). A report from a private source listed 820 shoe and slipper manufacturers and 1,065 units or plants (Gx. 174, R. 694, T. 1086).

Great Growth in Shoe Production

The production of shoes in the United States has grown greatly from 506 million pairs in 1947 to over 646 million pairs in 1956. The following table shows national production in 1947 and in 1950 through 1956:

Year	Total Production All Footwear (pairs)	Shoes and Slippers Except Rubber (pairs)	Production of Canvas-Upper Rubber-Soled Footwear (pairs)
1947	505,827,000	482,224,000	23,603,000
1950	550,633,000	522,532,000	28,101,000
1951	512,710,000	481,930,000	30,780,000
1952	570,212,000	533,162,000	37,050,000
1953	582,133,000	532,031,000	50,052,000
1954	581,474,000	530,367,000	51,107,000
1955	642,507,000	585,369,000	57,138,000
1956	646,619,000	588,479,000	58,140,000

Sources: Dx. II, R. 3345, T. 2003; Dx. JJ, R. 3346, T. 2003

Absence of Tendency Toward Concentration

The shoe manufacturing industry shows no tendency toward an increase in concentration. The share of national production of the four largest firms in the industry was exactly the same in 1956 as it was in 1939. The shares of each of the classifications of the largest 8 through the largest 45 declined, and the share of the largest fifty actually declined by 5.8 per cent. The changes in shares of national production of various size groupings are shown on the following table:

	Percent of Total Produced*					
Company Class	1939	1947	1952	1954	1955	1956
Largest 4	23.2	25.9	23.4	22.8	22.0	23.2
Largest 8	28.8	31.4	29.2	28.4	27.0	28.3
Largest 15	34.7	36.2	34.4	34.0	32.5	33.6
Largest 20	38.0	38.7	36.8	36.3	34.7	35.9
Largest 25	40.8	41.0	39.0	38.2	36.7	37.8
Largest 30	43.3	42.9	41.0	40.0	38.6	39.6
Largest 35	45.5	44.6	42.9	41.7	40.3	41.2
Largest 40	47.6	46.2	44.6	43.2	41.9	42.7
Largest 45	49.5	47.6	46.2	44.6	43.4	44.1
Largest 50	51.3	48.9	47.7	46.0	44.8	45.5
All Others	48.7	51.1	52.3	54.0	55.2	54.5

Source: Dx. LL, R. 3349, T. 2004

Shifts in Industry Rankings

Not only did the share of national production of the four largest firms fail to increase, but the share of each

* This table, the text which follows, and the table which appears on page 16, do not include canvas-upper, rubber-soled shoes, since there were no available statistics showing how the production of such shoes would affect the rankings. Leading producers of such shoes include U. S. Rubber Company and Goodrich Rubber Company. Neither Brown nor Kinney produces such shoes but both sell them at retail. Indeed, 6 to 7% of Kinney's retail sales are of such shoes (T. 1501).

of the four firms in this grouping has fluctuated considerably. From 1947 to 1956, the share of the largest shoe manufacturer, International, fell from 10.68% to 8.26%. The share of Endicott-Johnson, the second largest shoe manufacturer, fell from 7.66% to 5.62%. On the other hand, General increased its share from 3.19% to 4.36%, and Brown, with the inclusion of Kinney, increased its share from 3.86% to 4.16%. The percentage shares of the four largest firms in 1947 and 1950 through 1956 were as follows:

	Largest Four						
Year	Brown	General	Endicott-Johnson	International	Total[1]	All Others	Total All Firms
1947	3.86%	3.19%	7.66%	10.68%	25.40%	74.60%	100%
1950	4.02	3.06	6.40	9.36	22.84	77.16	100
1951	3.82	3.12	7.32	9.62	23.68	76.32	100
1952	3.77	3.15	5.85	9.35	22.13	77.87	100
1953	4.13	3.35	6.08	9.54	23.10	76.90	100
1954	3.86	4.36	5.45	8.73	22.42	77.58	100
1955	3.99	4.20	5.41	8.14	21.75	78.25	100
1956	4.16	4.36	5.62	8.26	22.41	77.59	100

[1] Total may not equal sum of components because of rounding.
Source: Dx. KK, R. 3348, T. 2004

Shifts in production shares also took place among firms smaller than the largest four. New firms have continually entered the business and grown rapidly in size and importance. For example, Sudbury Shoe Company, which began business in the 1940's with only one plant, had become the ninth largest shoe producer in the United States by 1955 (T. 1652; Gx. 58, R. 435, T. 544). Georgia Shoe Manufacturing Corporation, which also started production in the 1940's, had become one of the twenty-five largest shoe producers in the United States by 1956 (T. 1650; Gx. 58, R. 435, T. 544). Deb Shoe Company opened its first plant in 1948, another in 1951 and a third in 1953, and by 1957 had sales of about $9 million (T. 968, 978).

Size Distribution

There are great variations in the size of shoe manufacturing firms. The shoe industry includes both multi-unit firms with a number of factories and many firms with a single factory (T. 1660-1667).

A comparison between the number of shoe factories of different sizes (as measured by number of employees) in the years 1947 and 1954 shows that the larger factories of over 500 employees are getting fewer. The only size of establishment which increased in number was that employing 250 to 499 employees.

ESTABLISHMENTS PRODUCING FOOTWEAR EXCEPT RUBBER BY EMPLOYEE SIZE CLASSES, 1947 and 1954

	Number of Establishments		Per Cent of Total Establishments	
Employee Size Class	1947	1954	1947	1954
1–99 employees	668	563	52%	47%
100–249 employees	299	286	23	24
250–499 employees	220	266	17	22
500–999 employees	86	71	7	6
1000–2499 employees	13	9	1	1
2500 employees and over	2	1		
Total	1,288	1,196	100%	100%

Source: Dx. GG, R. 3343, T. 2002

A comparison between the value added by manufacture by shoe factories of different sizes in the years 1947 and 1954 shows that there has been a decline in the value added by both the largest and the smallest groupings while there has been a striking growth in the relative importance of the medium size establishments employing 250 to 499 employees.

VALUE ADDED BY MANUFACTURE OF ESTABLISHMENTS PRODUCING FOOTWEAR EXCEPT RUBBER BY EMPLOYEE SIZE CLASSES, 1947 and 1954

	Value Added by Manufacture (thousands $)		Per Cent of Total Value Added by Manufacture	
Employee Size Class	1947	1954	1947	1954
1–99 employees	$ 72,570	$ 70,546	10%	7%
100–249 employees	156,355	192,648	21	20
250–499 employees	253,765	410,489	34	44
500–999 employees	190,076	200,357	25	21
1000 employees and over	73,229	66,660	10	7
Total	$745,995	$940,704	100%	99%[1]

[1] Does not add to 100% because of rounding.
Source: Dx. GG, R. 3343, T. 2002

The average size of shoe factories has tended to decrease —not increase—over the years. Large factories with production of 20,000 pairs of shoes per day have proved uneconomical and have been replaced by units producing 3,000 to 5,000 pairs per day (T. 1645).

Conditions of Entry and Expansion

Entry into the shoe manufacturing industry is relatively easy (T. 2633). The rate of entry into the industry has been consistent for many years (T. 1652, 1669).

The most important factor in easy entry into shoe manufacturing is the modest capital investment required.

The optimum size plant has from 300 to 500 employees and produces 3,000 to 5,000 shoes per day (T. 1645, 2142, 2528-2533).

Local communities may build a factory to attract a new shoemaking firm to their area (T. 978). Factory premises may, of course, also be leased (T. 1334).

Machinery may be leased from over a dozen shoe machinery producers, including United Shoe Machinery and Compo Shoe Machinery (T. 1637). The maximum machinery rental costs on the most expensive process, Goodyear welt men's dress, are only $.18 to $.20 per pair, and the average cost for all types is only 5% of manufacturing costs (and less, of course, of retail price) (T. 1643-1644).

It is estimated that a new manufacturer should have about $50,000 of working capital to start production, and, in addition, a firm may have to spend $5,000 to $10,000 for equipment (T. 1646).

Many successful entrants in recent years have started in business with much lower capital. For example, one firm (Vaisey-Bristol) started business in 1944 with only $4,484-.17 (Dx. V, R. 3291, T. 1922). Today the firm has several factories, and produces 7,500 to 10,000 pairs of children's shoes per day under the well-known brand name Jumping Jacks (T. 1647).

Entry is not inhibited by patents or secrecy of know-how. Indeed, shoe machinery suppliers make available their services to all new entrants at a modest fee (T. 1644).

Assistance and know-how may also be offered to a promising new entrant by large chain retailers which purchase shoes in volume and which are often interested in developing new sources of supply (T. 1546). These volume purchasers purchase 30% of all the shoes produced by the shoe industry (Dx. DDDDDDD, R. 7845, T. 2593). Since these large purchasers bear the expense of developing consumer acceptance of shoes to sell at a specified retail price, the new entrant can go into business without incurring the expense of developing brand names, carrying large inventories, developing a merchandising organization, or bearing an advertising budget (T. 2528).

There are no technological barriers to new entry into shoe manufacturing. Indeed, there have been significant technological changes in the shoe industry since the beginning of this century.

In the early 1900's both men and women wore predominantly high button shoes. Children's shoes, before the advent of modern transportation, were heavy and stiff; some had copper toe plates. In general, types of construction were heavier than they are today (T. 1354-5). Most of the shoes of that era were of welt construction.*

In the early 1920's there was a women's fashion revolution and shoe styles changed dramatically to lighter, smarter dress shoes such as high-heeled pumps. This change in style was accompanied by new, lighter methods of construction (T. 1355-6).

The cemented shoe,* which is lighter, closer edged and dressier than the welt shoe, was introduced in the late

* The principal difference between various methods of shoe construction is in the way the shoe upper is attached to the sole. In welt construction, the upper and the insole are stitched to a rib, then the outsole is stitched on (T. 2116-17). In cement construction, the outsole is cemented directly to the upper (T. 2119). In lockstitch construction, a liner is stitched to the upper before the outsole is cemented on (T. 2121). In stitchdown construction, the upper is turned out at the bottom and stitched to a liner, then a welt is stitched to the upper, the liner and the outsole (T. 2140). Other constructions in use today are the bon welt and pre welt method (T. 2132, 2136). In addition, many moccasins and casuals are still hand sewn (T. 2138).

1920's (T. 1413, 1642). More shoes are made today by the cement process than by all other methods combined (T. 1641).

The stitch-down shoe* grew in favor during the 1920's, reached its peak in the 1930's, and since then has been gradually losing ground to cements (T. 1642-3). The lock-stitch shoe* is another type in use today.

With the advent of the automobile, central heating, electric power and automatic machinery, and the increase in urbanization with the concomitant increase in office work, men's shoes have also changed away from the heavier types, towards lighter types of construction (T. 1359). Types of work shoe construction which were once important, such as peg and nailed, have become practically non-existent (T. 1642).

The most important recent event in shoemaking has been the dramatic growth of the vulcanized canvas-upper, rubber-soled shoe not made on conventional shoe machinery.

Since 1947, the production of canvas-upper, rubber-soled footwear has more than doubled as is shown on the following table.

Year	Domestic Production of Canvas-Upper, Rubber Soled Shoes in Pairs
1947	23,603,000
1950	28,101,000
1951	30,780,000
1952	37,050,000
1953	50,052,000
1954	51,107,000
1955	57,138,000

Source: Dx. JJ, R. 3346, T. 2003

* See footnote on page 20.

Effect of Imports

Imports are also a significant factor in appraising the competitive nature of the shoe manufacturing industry.

Shoe imports into the United States have risen sharply from 1,734,000 pairs in 1947 to 12,443,000 pairs in 1956. In addition, the types of shoes (Mexican sandals, English men's shoes, etc.) which comprise imports vary greatly from year to year (Dx. FF, R. 3340, T. 2002).

As an example of the growth in imports, Regal's imports of Italian and English men's shoes increased by about four times between 1955 and 1957, as follows (T. 2258-9):

1955	39,000 pairs	$ 295,000
1956	101,000 pairs	789,000
1957	155,580 pairs	1,384,000

Imports of thong sandals from Japan selling for less than the manufacturing cost of domestic sandals caused inventory losses to purchasers of domestic sandals and forced domestic manufacturers of sandals to cease production of such sandals with substantial losses (T. 815, 958).

The entry of imports can occur swiftly because foreign producers are already in business and willing and able to take advantage of any profit opportunities. Thus, their competitive importance is magnified by their quick sensitivity to consumer preferences (T. 2524).

2. *Shoe Distribution*

In the shoe industry there are a wide variety of distribution channels from factories to ultimate consumers. Shoes at the wholesale level are handled in many instances by the manufacturer's own wholesale division, in others by the buying divisions of retail firms and in some cases by independent wholesalers or jobbers (T. 2541).

The most important distribution method in the shoe industry, however, is the sale by manufacturers directly to independent retailers. This method accounts for about 38% of all shipments measured in dollars and 30% in pairs. Sales to wholesalers and jobbers, who in turn sell primarily to independent retailers, accounted for 21% of shipments in dollars and 25% in pairs. Thus, independent retailers ultimately accounted for 59% in dollars and 55% in pairs of all shipments by manufacturers.

To the total accounted for by independent retailers there should be added shipments to department stores who are also independent retailers. These shipments accounted for 8% in dollars and 7% in pairs.

Shipments to chain retailers and mail order houses which perform the wholesale function accounted for 23% of all shipments in dollars and 30% in pairs.

DISTRIBUTION OF SHOES AND SLIPPERS SALES BY MANUFACTURERS IN 1954

Type of Shipment by Manufacturer	Percent of Total Dollars	Pairs
Outside Retail Outlets		
Independent Retailers	38	30
Wholesalers, Jobbers, etc.	21	25
Department Stores	8	7
Chains, Mail Order Houses	23	30
All Others	3	3
Outside Total	93%	95%
Owned Retail Outlets	7	5
Total Shipments	100%	100%

Sources: Dx. DDDDDDD, R. 7845, T. 2593; Dx. EEEEEEE, R. 7847, T. 2593

Vertical integration of the manufacturing function with the retail function has existed in the shoe industry for many years.* Nevertheless, shipments by manufacturers to owned retail outlets were only 5% of total pairs and 7% of dollars shipped.

3. *Shoe Retailing*

In the United States, the shoe retailing field is a vast and varied one. In 1954, there were over 70,000 shoe outlets of every type which regularly handled shoes. More than 22,000 of these outlets were primarily shoe stores (T. 2541).**

Defendant's Exhibit MMMMM 2 (R. 7134, T. 2593), which appears at page 25, shows the approximate number and the 1954 sales of a variety of shoe retail outlets.

In addition to the 22,000 shoe stores, there are 3,000 department stores, 29,000 dry goods, general merchandise and general stores, 2,000 men's and boys' furnishing stores, 5,000 men's and boys' clothing stores, 2,000 women's ready-to-wear stores, and 7,000 family clothing stores which sell shoes.

About three-sevenths of the 1954 footwear sales of $3,464,000,000 were made by shoe stores. A seventh of total sales were made in shoe departments in department

* Long standing examples of firms with both manufacturing facilities and retail outlets, aside from Kinney and Regal, include Florsheim (International), Endicott-Johnson, French, Shriner & Urner and Hanover (T. 443, 452, 2277; Gx. 59, R. 436, T. 547).

** The Census Bureau classifies a store selling shoes as a "shoe store" only when over 50% of its sales are shoe sales.

APPROXIMATE NUMBER AND SALES BY TYPE OF OUTLET

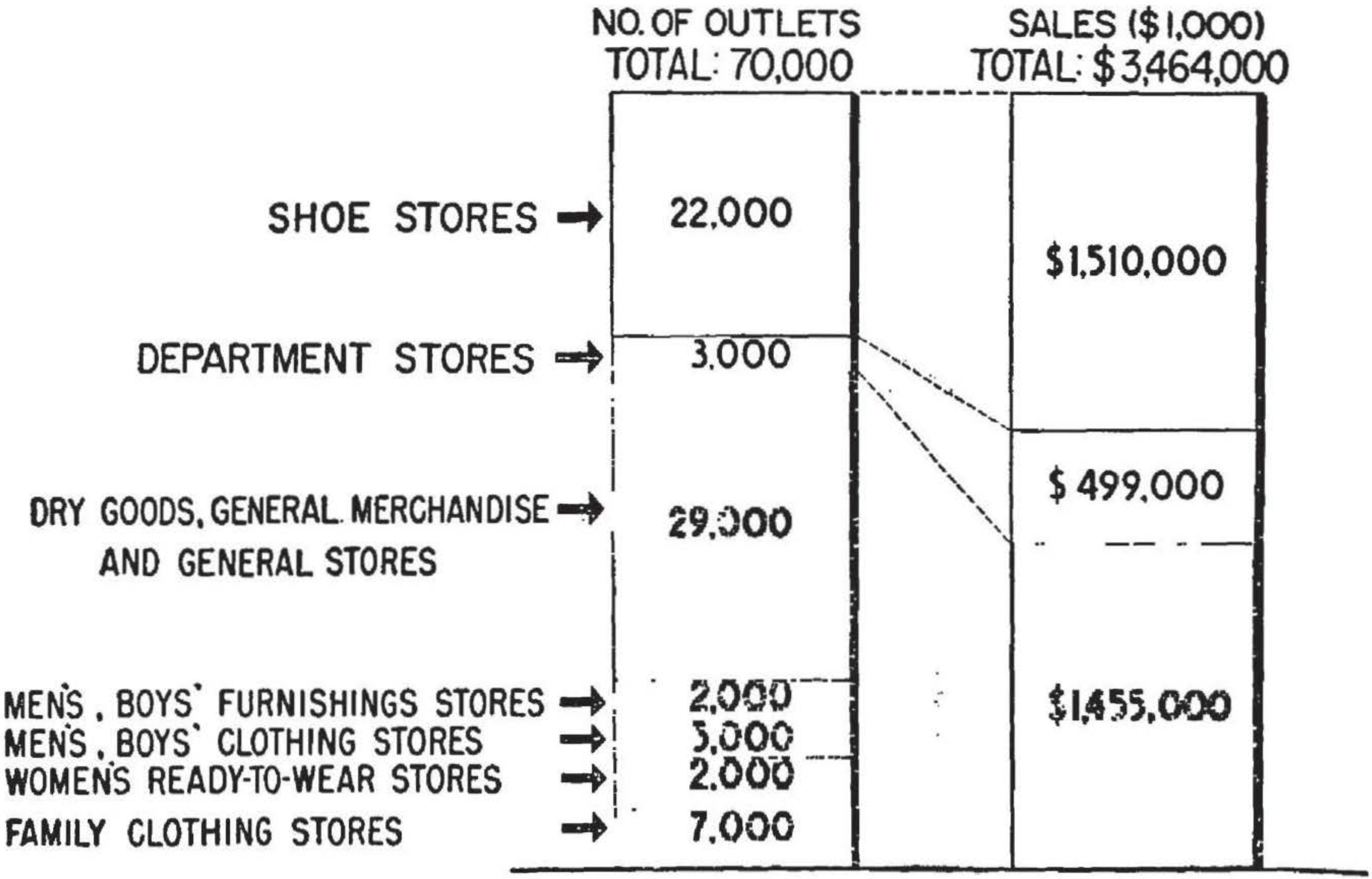


Exhibit MMMMM 2

stores. The remaining three-sevenths ($1,455,000,000) were made by all sorts of outlets including dry goods, general merchandise, and general stores, clothing and furnishing stores. To these categories in recent years must be added variety stores and discount houses (T. 1539).

Size Distribution

Shoe stores differ greatly in the size of their annual sales. The shoe store of median size has sales ranging from $50,000 to $100,000 annually—this is the equivalent to daily sales of 25 pairs of $10 shoes (T. 2573). There are 7180 stores of this size throughout the country (Dx. YYYY, R. 7058, T. 2326).

About half of the shoe stores have an annual sales volume under $50,000. The number of shoe stores with a sales volume in excess of $300,000 annually account for only 3% of the total number of shoe stores (Dx. YYYY, R. 7058, T. 2326).

Variety of Types of Shoe Outlets

The shoe retailing field is dynamic. The number, type and location of outlets is constantly shifting to meet new consumer demand as the population grows and shifts, as incomes change, as tastes and marketing methods and shoe styles change, and as new means of transportation develop (T. 2544).

Defendant's Exhibit MMMMM 1 (R. 7133, T. 2593), which appears at page 27, shows some of the different types of retail outlets in which shoes are sold in this country. It does not purport to represent distribution quantitatively, but shows the variety of retail channels through which shoes flow.

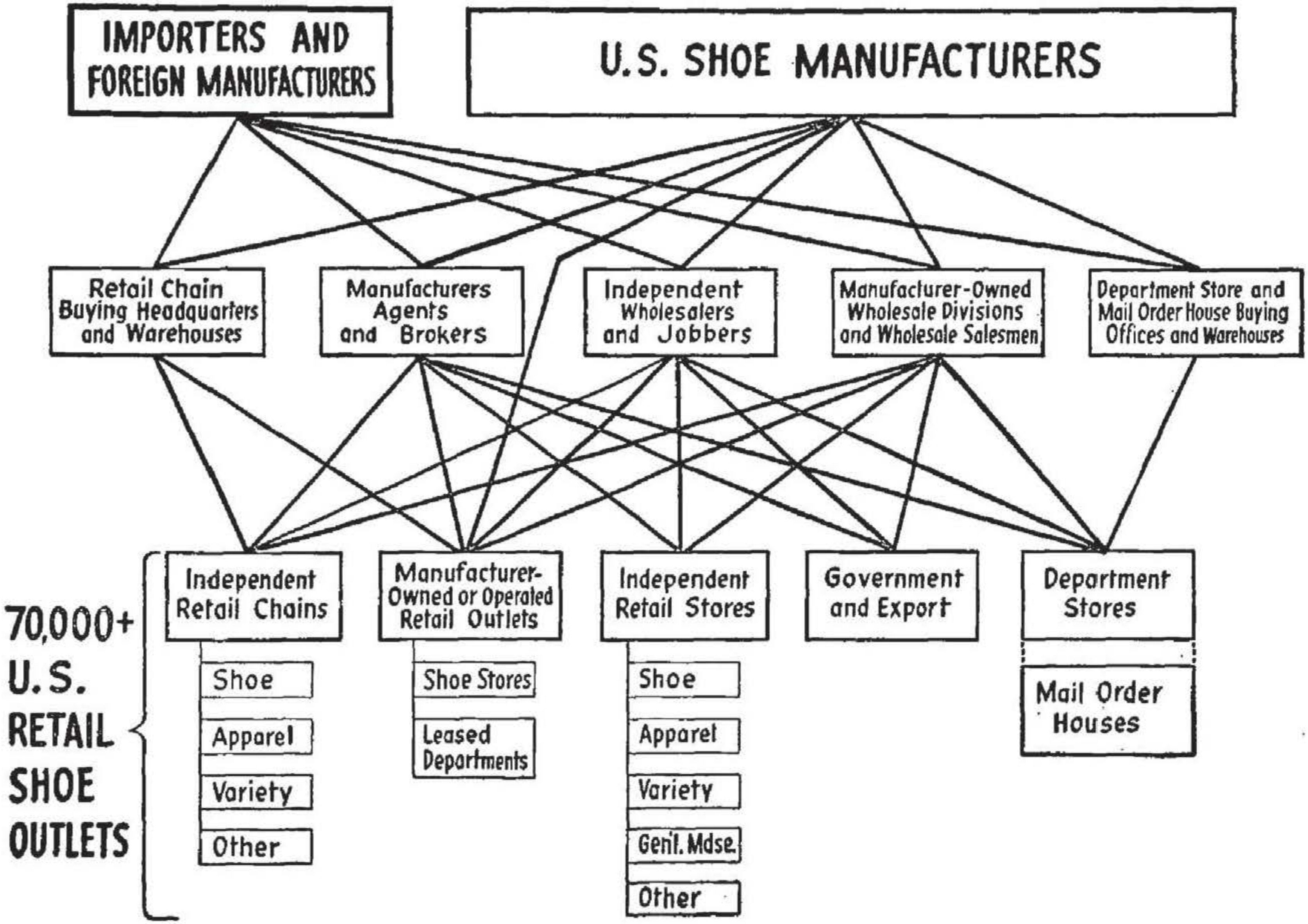


Exhibit MMMMM 1

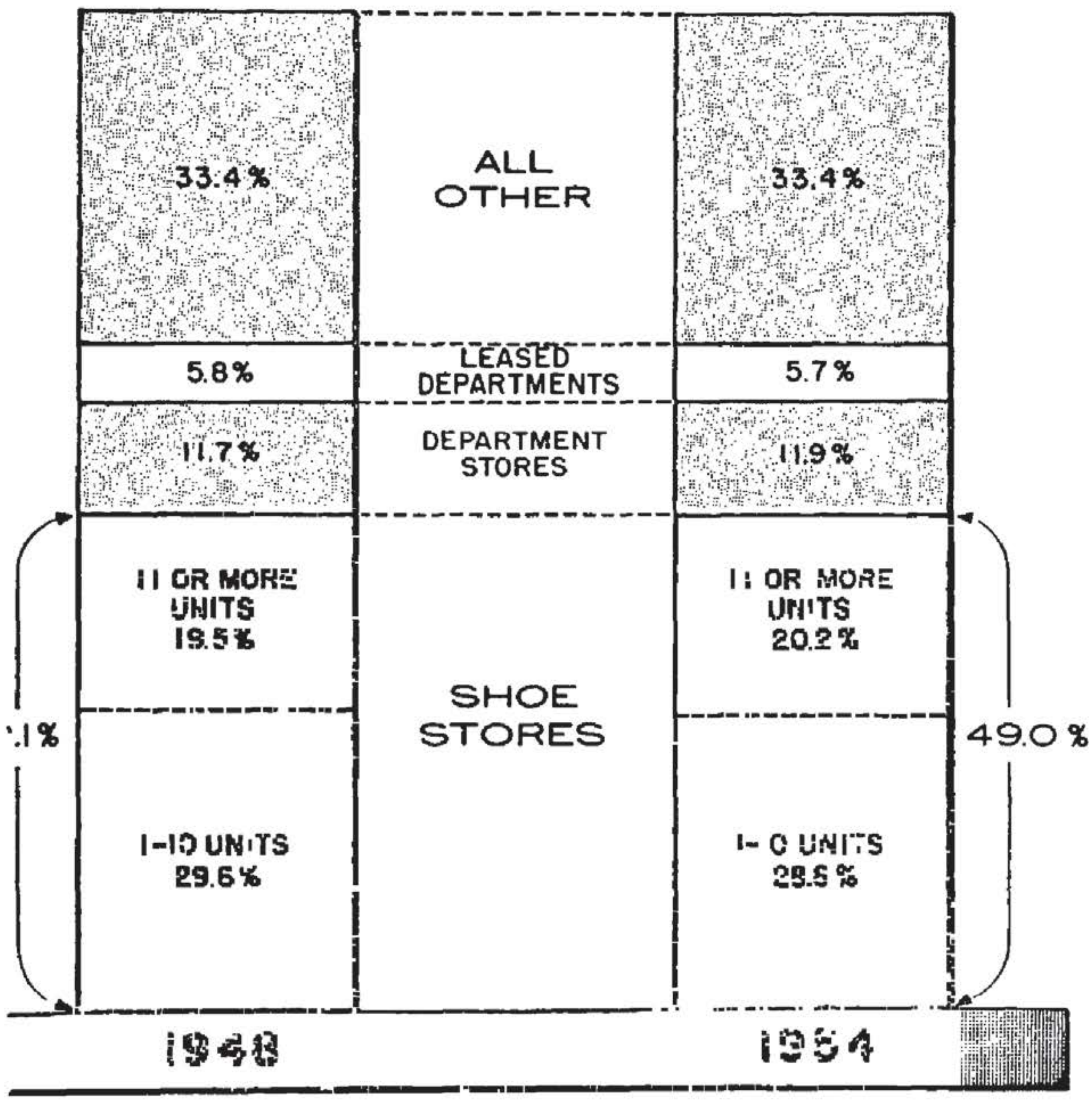
Some of these retail outlets perform the wholesale function themselves, buying from a large number of domestic manufacturers and importing shoes from abroad. Other outlets are parts of firms which manufacture some, and purchase the rest, of the shoes they sell. Still others buy from manufacturers' agents and brokers, independent wholesalers and jobbers, or from the wholesale divisions of manufacturers.

In spite of the rapidly changing conditions in shoe retailing, there has been very little change in recent years in the distribution of sales by major category of outlet. This is shown on Defendant's Exhibit NNNNN 3 (R. 7153, T. 2593) which appears at page 29 and which compares the distribution of footwear sales as among general categories of shoe outlets in 1948 and 1954.

Shoe stores and other retail outlets selling shoes each retained an almost constant percentage of total national retail shoe sales. While many outlets other than shoe stores added or dropped shoes over the period, the aggregate share of retail shoe sales by shoe stores stayed at about 51% between 1948 and 1954. Within the shoe store category, the percentages remained relatively stable also. Sales by leased departments and sales by department stores themselves changed only by an insignificant amount over the period. Similarly, the percentage of national retail sales attributable to firms with 11 or more units has increased only slightly from 19.5% to 20.2%.

Exhibit NNNNN 3

ISTRIBUTION OF FOOTWEAR SALES
BY TYPE OF OUTLET
1948 AND 1954



The Chain Store

The retail chain store has been a feature of the shoe business for many years. Kinney, for example, was in operation before the turn of the century (T. 1437).

There are a large number of national shoe chains which have outlets in most of the cities where Kinney is located. Among these are the Thom McAn and Miles chains of Melville Shoe Corporation, the Father & Son, Merit and other chains of Endicott-Johnson Corporation, The Burt's, Baker's, Leeds and Chandler's chains of Edison Bros. and the Schiff, Gallenkamp, R&F, Big Shoe Stores and Block chains of Shoe Corporation of America (T. 1444, 1527).

There are also many regional chains, such as National Shoe Stores, Spencer Shoe Stores, Triangle Shoe Stores and Dial Shoe Stores in the Northeast; Boyd, Butler and Cannon in the Southeast; Dan Cohen, Siff, Tradehome, Maling and Nobil in the Midwest; and chains such as Braisley-Cole and Karl's in the West (T. 1444, 1527).

Three very large retail organizations rate special note:

In 1955, J. C. Penney sold more than 18 million pairs of shoes with a retail value in excess of $85,000,000 in 1657 retail outlets (Dx. W, R. 3292, T. 1924). Sears, Roebuck had shoe sales of $67,897,000 at 387 outlets (T. 1600, Dx. L, R. 65, T. 1605; Dx. M, R. 68, T. 1601) and Montgomery Ward had shoe sales of $24,453,000 in 482 outlets (Dx. K, R. 51, T. 1594).*

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* The retail sales given here are exclusive of mail order sales. In 1955 Sears, Roebuck and Montgomery Ward together sold by mail order millions of pairs of shoes having a value in excess of $53 million (T. 1600, Dx. K, R. 51, T. 1594).

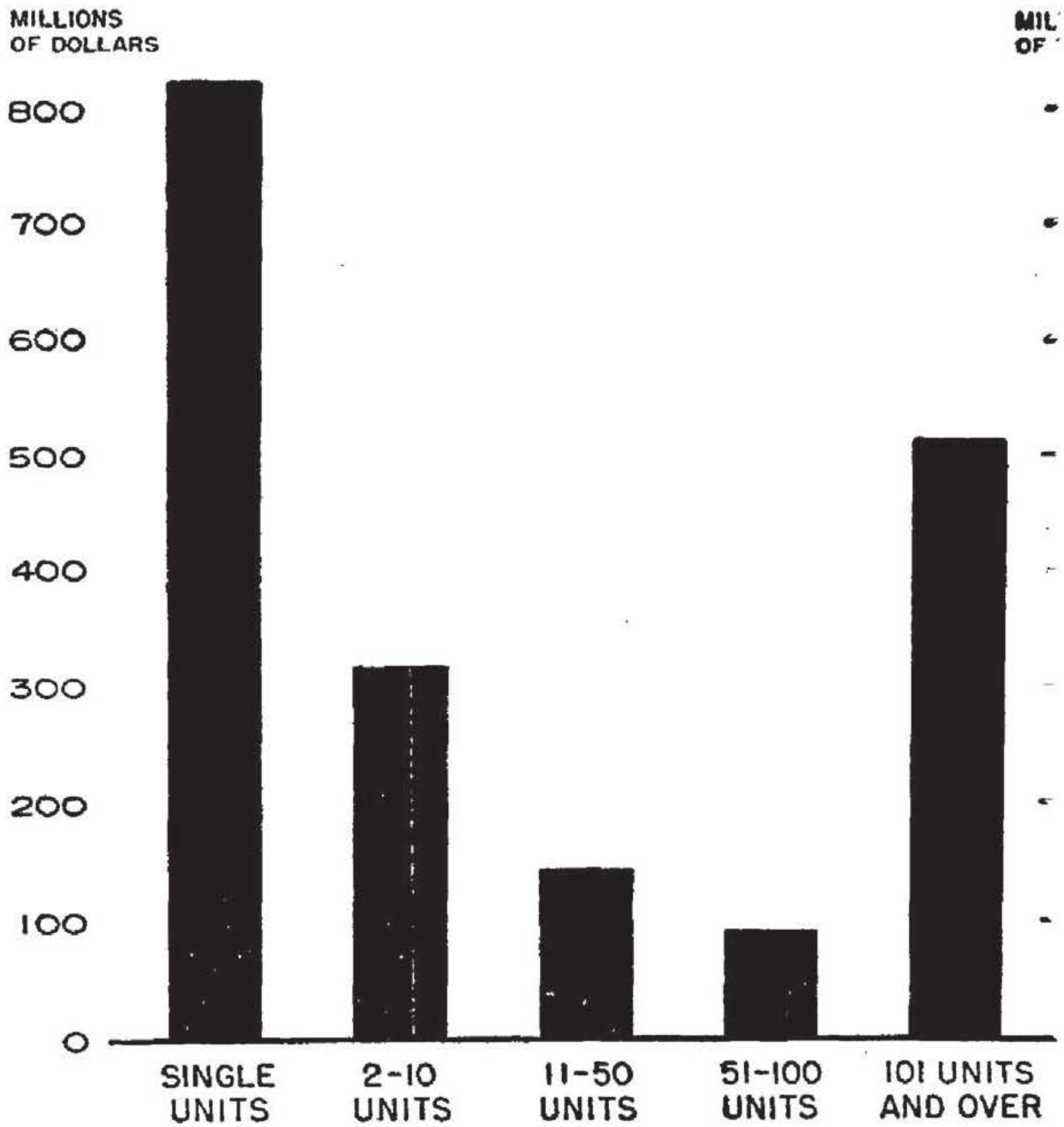
The important role of these large retailers is reflected in the fact that total 1955 retail shoe sales of Sears, Roebuck and J. C. Penney were each greater than the 1955 retail shoe sales of Brown and Kinney combined.

The Bureau of Census has compiled information with respect to the volume of retail sales of multi-unit shoe stores. The term "multi-unit" includes not only chain organizations such as Kinney but also those independent retailers who operate two or more units. Six of the independent retailers who testified at the trial operated more than one unit and would be in this class, and the record reveals many other instances of independent retailers who are multi-unit operators (T. 142, 310, 458, 1117, 1173, 1608).

Sales volume by number of units is depicted on Exhibit NNNNN 2 (R. 7152, T. 2593), which appears at page 32. This exhibit shows that over half the retail sales by all shoe stores, in dollars, were by multi-unit firms. At the same time, the single units, which outnumber any other size group, accounted for more sales, in dollars, than any other single size group (T. 2575). The exhibit also shows that the small and medium sized multi-units (2-100 units) account for slightly more sales volume than the multi-units with 100 or more stores and make up a significant part of the total chain store volume.

Exhibit NNNNN 2

U.S. RETAIL SALES OF SINGLE AND MULTIUNIT SHOE STO 1954



* NOTE: DOES NOT INCLUDE DATA FOR SHOE OUTLETS OTHER THAN SHOE STORES

Independent Retailers

The independent merchant with one or more outlets is the backbone of shoe retailing (T. 1349; see discussion at page 23). There are many examples of successful and expanding retail shoe businesses operated by individual owners (T. 1766-7, 2086-9). These include merchants who have been in business for years, as well as energetic newcomers.

Capitalizing on the advantages of community identification, personal relationship, and accurate shoe fitting (which is not possible in chains which do not carry a broad range of widths and sizes), it is often the independent shoe store which conducts the outstanding shoe operation in a community (T. 1562, 1702, 1766). In addition to the vigor imparted by owner management, the fact that shoe retailing is essentially personal and local in character aids the independent. Chain stores and centrally managed leased departments must transfer personnel among units and are unable to establish the close personal customer relationship which can be so valuable in building a clientele of repeat customers.

Independent shoe retailers typically sell footwear in the broad middle price field in which a great number of nationally advertised brands of good quality are readily available from a large number of shoe manufacturers (T. 1348). Appellee's witnesses in the course of their testimony referred to over 100 different brands of women's shoes, 47 different brands of men's shoes and 27 different brands of children's shoes.

Despite the fact that shoe retailing is highly competitive and has been made more complex by the increased significance of the style factor, the record shows that an able independent retailer not only can survive, but will prosper and grow (T. 1348-9). Many independent retailers have been highly successful and in recent years have opened additional units (T. 2086-9).

Suburban Trend

Following World War II, an exodus from the cities to the suburbs got under way throughout the United States (T. 1509). These suburban areas at the time were without adequate retailing facilities (T. 1509). Retailers began to develop and move into shopping centers and other suburban outlets to take advantage of the opportunities presented by this new and untapped market. By the 1950's, this movement had become "practically revolutionary" (T. 1311).

The new shopping areas in the suburbs typically stay open in the evening to give commuting consumers an opportunity to shop after work. In addition, with the advent of the 5-day week, men who formerly shopped downtown (in the city) on Saturdays after work, now shop with their families at night during the week and do their buying to a large extent in their neighborhood shopping areas rather than downtown (T. 1311-2). This has naturally affected adversely established downtown business.

Shopping Centers

There are, in general, two types of shopping centers: the large regional type and the community type.

The regional centers are similar to the downtown areas of metropolitan cities, in that they feature a wide selection in type and quality of merchandise and draw their customers from a wide geographical area (T. 2404).

The community type is more comparable to the older suburban shopping districts which draw their customers mainly from the adjacent areas (T. 2404). The primary trading areas of centers of the community type are often defined in terms of radii representing five minutes driving time (T. 2391).

Great Variations in Markets

The number and types of shoe retail outlets in the local shoe retailing markets throughout the United States vary greatly. The structure of the market depends on its general geographic location, since temperature, climate and income levels (type of occupation and amount of leisure time), among other factors, differ widely in various parts of the country. The markets also vary with the size of the local area, its population and market reach as well as with its character as an urban, suburban, or rural area.

At the trial of this action, sufficient facts concerning shoe retailing in several different areas were developed to demonstrate that each area had its own individual character and had to be considered separately. However, only one area in the United States was subjected to the searching geographical analysis required to assess competition in shoe retailing, and there was no Kinney outlet in that area. This was St. Louis, Missouri—the place of trial. Expert testimony was introduced by appellant, showing the geographical structure of competition in shoe retailing in that area.

373 shoe retail outlets were identified within the St. Louis area (T. 2389; Dx. AAAAA, R. 7060, T. 2412). These outlets are spotted throughout the St. Louis area, but most are clustered in more than 56 "retail buying centers" in different sections of the St. Louis area (T. 2390-4).

These centers compete in varying degrees with certain other centers and do not compete with others. Whether or not there is competition between two particular centers depends on the distance between them and their merchandising characteristics (T. 2407-11).

In the typical case, a small shopping area would attract only those persons within a 5 minute driving range (T. 2391). However, a center with a wide variety of items and a broad range of prices will draw customers from a much greater distance. Such is the case of the downtown shopping area—which contains separate segments specializing in a single type or quality of shoes; it competes to a degree with relatively distant outlets in the suburban centers selling shoes of comparable grades (T. 2411-2).

In St. Louis, six of these buying centers are modern shopping center developments. The two largest shopping centers are of the large regional type, while the others are of the community type (T. 2395).

In all these buying centers, shoes are sold in a wide variety of types of stores—including five and ten cent stores. Indeed, there are four separate places in the F. W. Woolworth outlet in Crestwood Plaza in St. Louis where shoes may be purchased (T. 2398). Moreover, in the large department store operated by Famous-Barr at Northland in the St. Louis area, shoes may be purchased at eleven different locations (T. 2402).

Capital to Enter Retailing

Entry into the shoe retailing business is relatively easy. This can be explained in part by the relatively small volume of sales required to support a going concern. About half of the 22,000 shoe stores in the country have a volume of sales of less than $50,000 annually (Dx. YYYY, R. 7058, T. 2326).

The attention, help and services which manufacturers make available to a new entrant also encourage entry, but the principal reason why entry into shoe retailing is relatively easy is the low capital requirement. One can enter shoe retailing by carrying a children's line of shoes with $10,000 to $12,000 in capital. To start a family shoe store, one would need a minimum of $20,000 in capital, and in order to do a volume of $100,000 in annual sales, from $40,000 to $60,000 of capital would be required (T. 2084-5).

B. The Operations of Brown and Kinney

We now turn to a description of the operations of Brown and Kinney.

We first review Brown's manufacturing operations. We then describe Brown as a wholesaler (jobber) through the wholesale division of its subsidiary, Wohl. Next we discuss Brown's operations as a retailer through its subsidiaries, Wohl and Regal.

Following this description of Brown's operations, we turn to Kinney. We first describe Kinney's operations as a manufacturer of shoes. We follow this with a description of Kinney's retail operations.

In each instance, we note the price, quality and style of shoes sold by Brown and Kinney at each level as well as describe briefly the disparate customers of the two firms.

Having described the operations of the two firms, we then compare and contrast those operations in Section C at pages 70 through 100.

1. *Brown's Operations*

Brown's Manufacturing Operations

Brown and its predecessors have been engaged in the manufacture of shoes since 1878 (Gx. 205, R. 911, T. 1204).

Brown operates 29 shoe factories in the Midwest, and its subsidiary, Regal, has one factory at Whitman, Massachusetts (T. 2141-2, 2255).

In 1955, Brown was the fourth largest shoe manufacturer in the United States, producing 25.6 million pairs of shoes, or 4% of the 642,507,000 pairs of footwear shipped by domestic manufacturers in that year (Dx. JJ, R. 3346, T. 2003).

In addition to its shoe manufacturing facilities, Brown has a number of auxiliary plants which process raw materials before they are shipped to the manufacturing plants (T. 2115). These plants include two tanneries, one for upper leather and one for sole leather, which are operated as the Moench Tanning Company, which Brown has owned since 1926 and which sells substantially all of its production to Brown (T. 2335-7).

About 85% of Brown's production in dollars is of its nationally advertised branded lines, and the remaining 15% of its production consists of "make-up" shoes which are produced to the purchaser's specifications and bear the purchaser's own private brand name (T. 1673, 2076).

In 1955, Brown's total manufacturing sales were $113 million, of which over $91 million were to independent retailers; sales to subsidiaries, and make-up sales (excluding sales to subsidiaries) were $10.9 million and $10.8 million, respectively (T. 1706).

Brown's nationally advertised branded lines include Naturalizer, Air Step, Life Stride and Risque for women, Roblee and Pedwin for men, and Buster Brown and Robin Hood for children (T. 1673). Brown sells its branded shoes to 6500-7000 independent shoe retailers, including department stores, throughout the country (T. 1673, 1700).

Each of Brown's distinct brands is sold by a separate selling division with its own sales manager and sales organization (T. 1281). Each selling division is operated independently and is responsible for styling and merchandising the shoes it sells (T. 1281).

Brown is an "in stock house". This means that it maintains a continuous inventory of Brown's branded lines. From this reservoir of stock which Brown carries at its own risk and expense for the independent retailer, he can order and reorder as he perceives demand in his local community. He can, therefore, carry less inventory than he would otherwise be required to do, thus, keeping his inventory, capital requirements, and risk of loss on unsold items low (T. 1699-1700).

The magnitude of Brown's branded business is shown by the following table of sales by its selling divisions (T. 1674):

Division	1955
Air Step	$12,567,000
Buster Brown	22,354,000
Life Stride	6,394,000
Naturalizer	20,315,000
Risque	2,554,000
Robin Hood	5,324,000
Roblee	8,838,000
United Men's (Pedwin)	13,597,000
Westport	3,388,000

A brief description of Brown's nationally advertised branded lines follows:

The Naturalizer line is a complete line of women's conservatively styled good-fitting shoes retailing principally at $10.95 and $11.95 (T. 1676; Dx. YYY 2, R. 4759, T. 2318).*

Air Step is also a complete line of women's conservatively styled good-fitting shoes similar in concept and price range to the Naturalizer line (T. 1677).

The Life Stride line is a very high fashion line styled for young women retailing principally at $8.95 and $9.95 (T. 1678).

The Risque line is a line of casual platform sport shoes retailing principally at $8.95 and $10.95 (T. 1680).

The Westport line is a line of women's casual and sport shoes retailing principally at $7.95 and $8.95 (T. 1679).

In men's shoes, Brown has two brands: Roblee and Pedwin. The Roblee line is conservatively styled and in 1955, retailed principally at $10.95 and $12.95 (T. 1681). The Pedwin line, which is styled primarily for the younger man and the college man, sells below Roblee, and in 1955, retailed principally at $8.95 and $9.95 (R. 3046).

Brown's best-known children's line is Buster Brown. Included in the line are infants', children's, misses', youths' and girls' shoes. In 1955, this high quality line retailed principally as follows: infants' shoes at $4.45 and $5.45; children's shoes at $6.45; misses' shoes at $6.95; youths'

* The retail mark-up which retailers normally use on branded shoes is as follows: on women's shoes, the mark-up amounts to 42 to 43 percent of the retail price; on children's shoes, it ranges from 40 to 41 percent; and on men's shoes it ranges from 40 to 42 percent (T. 2094). The retail prices indicated on this and the following pages have been calculated on the basis of such mark-ups.

shoes at $7.45; and girls' shoes at $6.95 to $8.95 (Dx. YYY 2, R. 4759, T. 2318).

Brown also manufactures a line of children's shoes under the Robin Hood brand which parallels the Buster Brown line in style but is lower grade, made of less expensive materials, and sells at lower prices (T. 1285). In 1955 the line retailed principally as follows: infants' shoes at $3.95 and $4.45; children's shoes at $5.45; misses' shoes at $5.95 and $6.95; youth's shoes at $5.95 to $6.95; and girls' shoes at $5.95 and $6.95 (Dx. YYY 2, R. 4759, T. 2318).

In general, Brown does not sell its nationally advertised branded shoes to chains which sell in different price categories (T. 1272). Chains, which generally prefer to sell under their own brands, do not want the services Brown supplies. For example, most chains do not buy in as many widths as an independent (T. 1274). Chains have the capital for carrying stock and are accustomed to taking inventory risks. More importantly, chains want to sell the shoes they buy in all of their outlets. In many instances Brown has adequate distribution in the areas served by chains. It would not want a new and additional outlet to be selling its nationally advertised branded lines in communities which are already served by independent retailers satisfied with Brown's products and giving Brown good distribution (T. 1272).

The only exception to Brown's general policy of not selling branded shoes to chains is the sale of the Robin Hood children's line to Kinney's suburban stores (T. 1369). This exception was made because Brown had a limited distribution of this line, and Kinney had experienced a demand in its suburban locations for a somewhat higher priced children's line than its own* (T. 1369).

In addition to branded shoes, 15% of Brown's production consists of make-up shoes produced to the purchaser's specifications bearing the purchaser's own private brand name at a specified price (T. 1673, 2076). Brown's sales of make-up shoes include sales to retail stores, mail order houses, and other volume purchasers. Brown's sales of made-up shoes have not been profitable (T. 1320).

Brown's make-up shoes are made by three of its divisions—Mound City, Capitol, and United Men's—and by Regal (T. 2076).

Capitol makes a line of women's high style dress shoes retailing principally at the 1955 price of $8.95 and $9.95 (T. 2076-7).

Mound City manufactures principally flats, casual and sport shoes for girls, women and children. In 1955, children's shoes retailed at $3.00 to $4.00; women's sport shoes primarily at $5.00 and women's flats primarily at $4.00 (T. 2079-80).

Brown's United Men's division, in addition to manufacturing men's shoes for the Pedwin line, also manufactures some shoes on a make-up basis. About 5% to 10% of its total dollar sales represent sales of make-up shoes (T. 2082).

Regal sales of make-up shoes were approximately $685,000 in 1955. Over half of these sales were of hand-sewn moccasins (T. 2257-8).

* Kinney's basic 1955 retail price range for children's shoes was $2 to $5 a pair with the bulk selling at $3 and $4 (T. 1441-2). Thus Brown's Robin Hood line retailed at about $1 to $2 per pair higher than Kinney's regular lines.

Brown's Principal Customer: The Independent Retailer

The independent retailer purchasing Brown's nationally advertised branded lines, is Brown's "life-blood" (T. 1267). Brown's manufacturing operations are keyed to him. As Mr. Gamble, President of Brown, testified: "We think it is essential to our business to sell to the independent and keep him in business" (T. 1268).

To build its business, Brown has concentrated its efforts on helping the independent retailer to improve his merchandising (T. 1348, 1689). In order to encourage consumer demand, Brown advertises its branded lines extensively in national media (T. 1270-1).

Brown attempts to educate the merchant in the principles of successful merchandising (T. 1264). Advertising and window display assistance is offered to the retailer (T. 1265). Brown has a store planning division which makes architectural services available to all Brown's accounts and a marketing research division whose services are also available to all of its accounts (T. 1690).

Brown has extended financial assistance in the form of loans to various independent retailers (T. 2068). Occasionally, Brown has assisted a retailer in entering business, but usually this assistance has been given to merchants who have proven themselves and wish to expand into an additional store (T. 2068).

The importance of careful inventory control is also emphasized by Brown for this is crucial for retailers who operate on limited capital and cannot risk large inventory losses (T. 2068). They cannot stock every line of shoes in all sizes and patterns, however attractive the line may be (T. 1266).

If a retailer disperses purchases over too many lines of shoes, he will be unable to do a proper fitting or merchandising job in any particular line and will end the season with a badly broken stock requiring severe mark-downs (T. 1266). Proper merchandising requires that purchases be concentrated in the fields in which the merchant can do the best job (T. 1266). In these fields the merchant should carry a particular style in a complete range of sizes and widths (T. 1273).

Brown's Franchise Program

Brown has a Franchise Program (the "Program") designed to help independent retailers with their merchandising (T. 2067).

There are approximately 645 independent retailers operating on the Program (T. 2071). Brown's sales to retailers on the Program were $19.8 million (T. 2068).

Brown has written agreements with only 321 of the 645 dealers on the program; with the remaining 324 the arrangements are oral (T. 2069).

The written agreements provide, among other things, that the retailer will "concentrate my business within the grades and price lines of shoes covered by Brown Shoe Company Franchises, and will have no lines conflicting with the Brown Shoe Company brands" (Gx. 24, R. 248, T. 344). A conflicting line is a line having the same types of shoes in the same price ranges as shoes sold by Brown: it does not mean all other lines (T. 2069). This provision reflects the recognized merchandising principle that carrying duplicating lines results in excessive inventory. The importance of inventory control, which may mean the difference between success and failure for the independent retailer, has been referred to at pages 43 and 44.

Independent retailers on the Program usually carry shoes of other manufacturers of different types and quality and indeed in some instances carry conflicting lines (T. 2069-70). Some merchants on the Program buy as much as 40% of their shoes from manufacturers other than Brown, and overall, about 25% of the shoes sold by independent retailers operating on the Program are purchased from manufacturers other than Brown (T. 2070).

Brown makes no attempt to control the buying of the independent shoe merchant on the Program: "He buys what he wants and the way he wants it and when he wants it" (T. 2072). He is not obliged to purchase a given amount of shoes from Brown, he receives no special credit terms or discounts, and, in these respects, is treated exactly as any other dealer (T. 2076).

Retailers are free to leave the Program at any time (T. 2076). Even if the retailer has a written agreement with Brown it is cancellable on 30 days notice (Gx. 24, R. 248, T. 344). During the period October 31, 1955 to May 1, 1958, 116 retailers joined the Program (Gx. 212, R. 1161, T. 1221). During the same period, 79 retailers left the Program (Dx. CCC, R. 4600, T. 2072).

After a retailer has left the Program (for other than credit reasons), he almost invariably continues as a Brown customer (T. 1280).

An independent retailer on the Program is offered the opportunity to join a group life insurance plan, and 425 retailers out of the 645 retailers on the Program have taken advantage of this opportunity (T. 2073). In addition, 260 of these retailers have fire and extended coverage insurance which is made available under the Program (T. 2074).

Independent retailers operating on the Program may also purchase rubber footwear from U. S. Rubber through Brown (T. 1094-5). Of the 645 independent retailers on the Program in 1955, 461 purchased rubber footwear in this manner. Under this arrangement, Brown, for a fee, assumes the credit risk of the account, and while in form guaranteeing the account, actually pays U. S. Rubber in advance against shipments and bills, administers and collects the account (T. 1097-9).

Brown's Wholesale Operations

While primarily a retailer, Wohl is a wholesaler of women's shoes, selling to independent retailers (T. 1815). Its wholesale operation is completely independent from its retail operation (T. 1815). It deals only in women's shoes and sells only Wohl-branded shoes made up to its specifications (T. 1815, 1817). In 1955, its wholesale sales were about $15,630,000 (Dx. VV, R. 4358, T. 2009).

Wohl's wholesale division purchases its shoes from a large number of "make-up" manufacturers in various parts of the United States (T. 1816). The style and quality of these shoes is specified by Wohl (T. 1816).

In 1955, Wohl's wholesale division had 3,000 independent retail customers (T. 1835). In 1958, its accounts were distributed according to the population size of the cities in which they were located as follows: 39.46% were in cities with a population of 5,000 and under; 20.16% were in cities with a population of between 5,000 and 10,000; 14.84% were in cities with a population of 10,000 to 20,000; and the remaining 25.54% of the accounts were distributed throughout cities with more than 20,000 population (T. 1837-8).

A brief description of Wohl's wholesale brands follows:

The Marquise line is a very high-fashion line of women's dress shoes. It is a very short line having normally only about ten styles. The 1955 retail price range was from $12.95 to $14.95 (T. 1818).

The Jacqueline line, too, is a high-fashion line of women's dress shoes. Its 1955 retail price range was $8.95 to $10.95 (T. 1819).

The Natural Poise line is a counterpart of the Jacqueline line. Its retail price range in 1955 was $8.95 to $10.95 (T. 1820).

The Connie line consists of women's dress and sports shoes in the popular price field. Its 1955 retail price range was $5.95 to $7.95. Connie casuals were priced at $5.95 and $7.95 retail (T. 1821-2).

The Petite Deb line is a counterpart of the Connie line. In 1955, the dress retail price range was $5.95 to $7.95; the sports retail price was $3.95 to $6.95; the flats retail price was principally at $4.95; and the casuals retailed in the price range of $2.99 and $4.99 (T. 1823-4).

The Paris Fashion line includes women's sport shoes in the 1955 retail price range of $3.95 to $5.95; flats selling at $4.95 and $5.95 retail; casuals from $2.99 to $5.99 retail; and a few dress shoes selling at $5.99 retail (T. 1824-5).

Wohl Plan Accounts

For many years, Wohl's wholesale division, which as noted above sells only women's shoes, has had a dealer assistance program which it calls the Wohl Plan (the

"Plan"). The Plan is designed to make it possible for shoe retailers (usually young men) of ability and experience but a limited amount of capital to go into business for themselves (T. 1842). There is no written agreement between Wohl and the independent retailers on the Plan, and the relationship may be terminated by either party at will (T. 1843).

The minimum capital required is \$5,000, or \$1,000 for every \$10,000 of expected retail volume, whichever is greater (T. 1842). Wohl supplies the credit necessary to the opening of the business in the form of merchandise or merchandise credit (T. 1843).

Once an account is under way, the retailer remits to Wohl weekly on a sales-less-expenses basis (T. 1846). Each January and July, the retailer settles his account with Wohl (T. 1846). Wohl has found that a successful retailer will not need its financial support after a year or two (T. 1847).

Even so, the retailer usually continues on the Plan, because in addition to financial assistance, Wohl furnishes merchandising assistance to the retailers operating on the plan (T. 1847). From the weekly reports received Wohl can give the retailer the benefit of Wohl's broad merchandising experience (T. 1847). The retailer is not obligated to adopt the suggestions Wohl might make, but he can follow them if he wishes to do so (T. 1848).

The business of the retailers who are on the Plan is highly concentrated in women's shoes (T. 1848). The retailers buy shoes from suppliers other than Wohl, but generally they do not do so in Wohl's price ranges (T. 1848). Wohl advises them against duplicating the Wohl line with comparable shoes in a similar price range sold by others, for Wohl believes that a policy of concentrating on as few lines as possible is vital to the success of the retailer, particularly, the beginner.

In 1951, there were 175 Plan accounts in operation; in 1955, 223; and in 1958, 226 (T. 1844). Each season there are a number of retailers who leave the plan as well as a number who join (T. 1844). In 1956, 17 Plan accounts were opened and 28 closed; in 1957, 34 opened and 23 closed (Gx. 212, R. 1161, T. 1221; Dx. Q, R. 3240, T. 1856).

Sales to independent retailers on the Plan constitute between 25% and 28% of Wohl's dollar wholesale sales (T. 1844).

Wohl's wholesale division has only a few customers in shopping centers (T. 1862). The basic reason for this is that Wohl sells at wholesale nothing but women's shoes and most of them are high-fashion shoes (T. 1862). These shoes do not appeal to the family group that shopping centers specialize in (T. 1862).

Brown's Retail Operations

Brown's retail operations are conducted by its two retail subsidiaries, Regal Shoe Company and Wohl Shoe Company.

Regal Shoe Company

Regal is primarily a retailer of men's shoes sold under the Regal name (T. 2255). In 1955, the price range was $9.95 to $14.95, with the bulk at $10.95 and $12.95 (T. 2257). Total retail sales in 1955 were $8,102,976. This total included $6,283,585 of men's shoes, $776,923 of women's shoes, $89,781 of children's shoes, and $952,687 of accessories and slippers (Dx. GGGG, R. 5688, T. 2321).

Over 90% of the shoes sold by Regal in 1955 were men's shoes (T. 2265). This proportion became even higher there-after, because whereas in 1955 Regal had 25 stores where women's shoes were sold, the experiment in women's shoes proved a failure and only one Regal store now sells women's shoes (T. 2265). Regal's men's shoes are high-style shoes and Regal is an important style innovator, both in imported shoes and its own shoes made along Continental lines (T. 2269).

In 1955, Regal had 98 retail outlets including four leased departments (T. 2264).* Regal's outlets are usually located in "downtown hundred percent metropolitan locations" (T. 2264). Most of these outlets are in the East. There are 32 in the New York metropolitan area (T. 2264). Others are in a number of large cities, including Boston, Philadelphia, Washington, D. C., Chicago, Detroit, St. Louis and Los Angeles.

Wohl Shoe Company

Wohl's principal business is the operation of leased shoe departments in department stores (T. 1736). These departments feature nationally advertised branded shoes (T. 1740).

The most important departments are those carrying women's high-fashion shoes selling in the medium to high price range ($10.95-$32.00). Wohl is a specialist in this type of

* At the time of the trial (1958) Regal had 92 outlets, including five leased departments (T. 2264).

In addition to its regular Regal stores, Regal also operates five Curtis stores. Four of these stores are in New England and the other is in Rockville, Maryland. They are highway semi-self-service stores selling discount merchandise. Curtis operated entirely separately from the Regal retail stores, but Regal's Whitman Factory supplies Curtis with men's shoes made from its leftover stock. Women's shoes and children's shoes are purchased in job lots, as well as on a make-up basis. Curtis' sales in 1955 were $441,000 (T. 2266-8).

operation and brings to a leased shoe department its broad know-how in both buying and merchandising (T. 1762-3). Wohl also operates some children's departments and a few men's departments (T. 1738-9).

In 1955, Wohl operated retail outlets in 190 different store locations (T. 1739). Of these, 18 were family shoe stores, 9 were women's shoe stores, and the rest were leased departments in department and specialty stores.

Wohl's total retail sales of footwear in 1955 amounted to $34,784,916 (Dx. PP, R. 3826, T. 2007). Sales of women's shoes constituted 80% of the total dollar sales; children's, 16%; and men's, 4% (T. 1736).

Several types of departments are operated: better grade women's departments and better grade children's departments, both of which are generally located on the main or upper floors of the department store; popular price women's departments and children's departments, which are usually in basements; and better grade men's departments which, with one or two exceptions, are located on the main or upper floors of the store (T. 1736-7).

70% of Wohl's dollar sales at retail in 1955 were in better-grade departments and 30% in the popular price departments (T. 1740).

Wohl Merchandising in Leased Departments

Each of Wohl's leased departments is governed by the particular department store in which it is located for Wohl must conform to the character of the department store (T. 1741). For this reason, Wohl's merchandising and advertising differ from location to location as do the style, brand and price range of the shoes carried (T. 1743).

The advertising of shoes is controlled by the department store, and is usually tied in with the advertising of other merchandise offered by the store (T. 1741). The return policy is fixed by the store also (T. 1742). The store also handles the charge accounts and assumes the credit risk (T. 1741).

Wohl's policy is to maintain its place in a store by performance rather than by legal agreement (T. 1742). Consequently, most of Wohl's leases or licenses are cancellable by the store on short notice (60 to 90 days) (T. 1742).

In 1957, which was a typical year, Wohl closed 14 of its retail outlets (Dx. N, R. 154, T. 1742). In the same period it opened 25 (Gx. 212, R. 1161, T. 1221).

Wohl Retail Price Lines

Better Grade Departments

Wohl does 70% of its retail business in its better grade departments. In these departments, women's dress shoes fall in the price range of \$10.95 to \$32.00; women's casual shoes in the range of \$6.95 to \$12.95 with a few sports at \$5.95 (T. 1737).

The Wohl brand shoes sold in these departments are: Marquise, a very high-fashion, nationally advertised women's dress shoe selling in the 1955 price retail range of \$12.95 through \$14.95 (T. 1743); Jacqueline, principally high-fashion dress shoes selling in the 1955 price retail range of \$9.95 through \$10.95, with some sport and casual shoes in the 1955 retail price range of \$6.95 through \$8.95 (T. 1744); Connie sports and casuals retailing at \$5.95 through \$6.95 and an insignificant number of Connie dress shoes at \$7.95 through \$8.95 retail (T. 1744-5); and Natural Poise, principally dress, arch-type shoes appealing to the more mature customer, selling at \$9.95 retail with an insignificant number of casuals in this line selling at \$7.95 through \$8.95 retail (T. 1745).

In the children's better grade departments, Wohl carries its own brand Young America in the 1955 retail price range of \$5.95 to \$7.95, and outside lines in the range of \$6.95 to \$8.95 (T. 1738). In the popular price departments, children's shoes are in the 1955 retail price range of \$3.99 to \$7.95 (T. 1738-9).

In the better grade men's departments, the 1955 retail price range is \$9.95 up, with a few at \$7.95 retail; and in the popular price men's departments, the 1955 retail price range is \$6.95 to \$8.95 (T. 1739).

Wohl also sells some Brown branded shoes in its better grade women's departments, including Naturalizer, Air Step, Life Stride and Risque, and, in 1955, a few Westport shoes. Brown branded shoes comprise about 18% of the total Wohl better-grade women's dollar shoe sales (T. 1745-6).

Wohl also carries, in its better grade women's departments, some thirty other nationally advertised branded lines made by manufacturers other than Brown, including Martinique (\$18.95-\$20.95), Palizzio (\$18.95-\$22.95), Capezio (\$6.95-\$14.95), and De Liso Deb (\$16.95-\$18.95) (T. 1746-7). Sales of such brands comprised about 16% to 17% of Wohl's total pair sales in its better grade women's departments in 1955 (T. 1748). These lines are very important to Wohl because they round out its merchandising and give it an opportunity to take account of the differences in the department stores in which Wohl's leased shoe departments are located (T. 1748).

We now examine all of Wohl's retail sales, listing the price range and type in each age/sex category in which Wohl sold in 1955. We set forth corresponding data for Kinney at pages 68 and 69. The data thus set forth is compared and contrasted at pages 84 through 90.

The following table shows how Wohl's 1955 sales of all women's shoes sold in its better grade departments were distributed by price class and shoe type. This table and similar tables that follow detailing Wohl's sales in other Wohl departments in 1955 are derived from Defendant's Exhibits P 1 through P 6 (R. 158-3239, T. 1997). These exhibits take into account *every* pair of shoes sold by Wohl in 1955, including the sale at severe mark-downs of shoes at the end of a season. This explains why some of Wohl's sales were in price categories well below Wohl's usual price range. The median retail price range in each category is indicated in bold face type and underlined on the following tables:

WOHL SALES IN BETTER GRADE DEPARTMENTS
WOMEN'S SHOES (Pairs)

Retail Selling Price	Samples*	Play	Dress	Sport	Total Pairs
Under $1.00	1,020	8	5		1,033
$1.01– 2.00	8,338	932	67	43	9,380
2.01– 3.00	17,792	46,617	3,018	7,243	74,670
3.01– 4.00	24,587	52,319	10,308	13,773	100,987
4.01– 5.00	21,913	41,220	15,434	11,959	90,526
5.01– 6.00	**31,941**	47,698	57,202	59,970	196,811
6.01– 7.00	17,950	**49,033**	60,687	**73,359**	201,029
7.01– 8.00	13,534	38,032	81,247	26,504	159,317
8.01– 9.00	11,702	50,900	108,481	8,871	**179,954**
9.01–10.00	5,823	22,320	162,289	11,455	201,887
10.01–11.00	8,784	67,529	**247,744**	4,322	328,379
11.01–12.00	1,558	7,937	94,727	1,932	106,154
12.01–13.00	2,943	1,997	69,196	1,209	75,345
13.01–14.00	222	58	3,740	36	4,056
14.01–15.00	2,076	1,196	79,881	49	83,202
15.01–16.00	283	175	4,245	1	4,704
16.01–17.00	1,104	1,014	26,061	18	28,197
17.01–18.00	144	3	4,929	10	5,086
18.01–19.00	431	67	13,787	1	14,286
19.01–20.00	935	63	37,763	55	38,816
20.01–30.00	875	11	32,140	20	33,046
Over $30.00	8	11	318	35	372
Total	173,963	429,140	1,113,269	220,865	1,937,237

* Wohl's "samples" include a wide range of shoes not subject to precise classification, including salesmen's samples, promotional shoes, mark-down and obsolete shoes (T. 1804).

In Wohl's better grade departments, all the children's shoes sold are nationally advertised, better grade shoes, including Wohl's own brand, Young America, which sells in the 1955 price range of $5.95 to $6.95 (T. 1749).

Brown's Buster Brown line constitutes over 50% of Wohl's children's better grade sales and sells in the 1955 price range of $5.95 through $8.95 (T. 1749, 1782).

Wohl also carries some 30 brands of children's shoes made by manufacturers other than Brown (T. 1749). Stride Rites, of the Green Shoe Co. line, are carried in 21 departments and sell in the 1955 price range of $5.95 through $9.50 (T. 1749).

Children's brands of other manufacturers which are carried are Jumping Jacks, Edwards, Simplex, Dr. Posner, Kali-Sten-Iks, and Alexis Dress-Ups (T. 1749).

The following tables show how Wohl's sales, in 1955, of all children's shoes sold in its better grade children's departments were distributed by price class and shoe type.

The breadth of the price ranges is accounted for by the fact that the prices of children's shoes increase as the size of shoes increase. The median retail price range is indicated in bold face type and underlined on the following tables:

WOHL SALES IN BETTER GRADE CHILDREN'S DEPARTMENTS

GROWING GIRLS' SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	3		3
$1.01– 2.00	99	3	102
2.01– 3.00	5,692	1,556	7,248
3.01– 4.00	2,424	**1,353**	3,777
4.01– 5.00	4,064	804	4,868
5.01– 6.00	3,989	133	4,122
6.01– 7.00	5,643	136	5,779
7.01– 8.00	**22,048**	33	**22,081**
8.01– 9.00	15,467		15,467
9.01–10.00	1,350		1,350
Over $10.00	316	7	323
Total	61,095	4,025	65,120

YOUTHS' & BOYS' SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	1		1
$1.01– 2.00	8	5	13
2.01– 3.00	4,011	164	4,175
3.01– 4.00	3,525	**485**	4,010
4.01– 5.00	3,055	245	3,300
5.01– 6.00	1,374	4	1,378
6.01– 7.00	4,091		4,091
7.01– 8.00	**12,115**	7	**12,122**
8.01– 9.00	10,655		10,655
9.01–10.00	1,234		1,234
Over $10.00	393		393
Total	40,462	910	41,372

CHILDREN'S & MISSES' SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	12	3	15
$1.01– 2.00	404	5,031	5,435
2.01– 3.00	8,553	**39,517**	48,070
3.01– 4.00	19,853	15,277	35,130
4.01– 5.00	25,843	4,913	30,756
5.01– 6.00	20,842	809	21,651
6.01– 7.00	**124,353**	169	**124,522**
7.01– 8.00	57,341	39	57,380
8.01– 9.00	8,702	3	8,705
9.01–10.00	1,732	53	1,785
Over $10.00	963		963
Total	268,598	65,814	334,412

BABIES' & INFANTS' SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00		2	2
$1.01–2.00	768	2,939	3,707
2.01–3.00	2,674	**7,187**	9,861
3.01–4.00	5,595	2,888	8,483
4.01–5.00	31,271	1,153	**32,424**
5.01–6.00	**42,468**	49	42,517
6.01–7.00	5,861	19	5,880
Over $7.00	793	4	797
Total	89,430	14,241	103,671

Wohl sells men's shoes in both its men's departments and in its children's departments (T. 1754). Wohl operates two popular price men's departments, but the bulk of its men's shoes are sold in 28 better grade men's departments (T. 1755). In these better grade departments Wohl sells its own brand, Rogers Hall, at $6.95 through $8.95 and some

32 other brands of nationally advertised branded men's shoes (T. 1753).

Brown's nationally advertised Roblee and Pedwin lines are carried in some departments (T. 1754). Wohl also carries brands made by other manufacturers including Florsheim, Nunn-Bush, French, Shriner & Urner, Allan Edmonds, Winthrop, and Jarman (T. 1754).

The following table shows how Wohl's sales, in 1955, of men's shoes were distributed by price class and shoe type (with the median retail price indicated in bold face type and underlined):

WOHL SALES OF MEN'S SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	1		1
$ 1.01– 2.00	75	21	96
2.01– 3.00	531	861	1,392
3.01– 4.00	576	**3,550**	4,126
4.01– 5.00	2,155	1,299	3,454
5.01– 6.00	13,006	443	13,449
6.01– 7.00	8,529	56	8,585
7.01– 8.00	19,060	117	19,177
8.01– 9.00	16,289	3	16,292
9.01–10.00	19,891	4	**19,[illegible]**
10.01–11.00	**15,936**	14	15,950
11.01–12.00	11,200*	2	11,202
12.01–13.00	13,584		13,584
13.01–14.00	5,312		5,312
14.01–15.00	6,320		6,320
15.01–16.00	2,713		2,713
16.01–17.00	4,449		4,449
17.01–18.00	4,342		4,342
18.01–19.00	5,047		5,047
19.01–20.00	5,675		5,675
Over $20.00	8,320		8,320
Total	163,011	6,370	169,381

* 7,454 pairs of shoes included in this figure in either the 11.01–12.00 category or in a higher category.

Popular Price Departments

Wohl does 30% of its retail business, in dollars, in its popular price departments. These departments are generally located in the basements of department stores and cater to the customer seeking bargain merchandise (T. 1750). Wohl's basement operations are generally "extremely promotional"; well-advertised bargain specials are used as a means of attracting customers (T. 1751).

79% of Wohl's dollar sales in its popular price departments are accounted for by women's shoes (T. 1750). 90% of the women's shoes sold are Wohl-branded shoes (T. 1780). The most important Wohl brand of women's shoes is Paris Fashion. The dress shoes of this line sell in the 1955 price range of $4.95 through $5.95; and the sports and casuals sell in the 1955 price range of $2.99 through $5.95 (T. 1750-1). Connie dress shoes are next in importance, selling in the 1955 price range of $6.95 through $7.95 (T. 1752).

Women's arch-type shoes in the Natural Poise line are also sold in Wohl's popular price shoe departments, selling in the 1955 price range of $9.95 through $10.95 (T. 1752).

In its popular price women's departments, Wohl also sells a substantial number of nationally advertised women's shoes made by other manufacturers. Among these are conservative lines, Enna Jettick and Heel Hugger by Dunn & McCarthy (T. 1752-3).

The following table shows how Wohl's total sales, in 1955, of all women's shoes sold in its popular price department were distributed by price class and shoe type (with the median retail price indicated in bold face type and underlined):

WOHL SALES IN POPULAR PRICE DEPARTMENTS
WOMEN'S SHOES (Pairs)

Retail Selling Price	Samples	Play	Dress	Sport	Total Pairs
Under $1.00	3,398	263	39	4	3,704
$ 1.01– 2.00	56,223	86,040	2,942	1,960	147,165
2.01– 3.00	**64,893**	**309,171**	37,954	103,743	515,761
3.01– 4.00	44,912	132,256	95,591	**70,910**	**343,669**
4.01– 5.00	18,605	36,837	74,338	40,987	170,767
5.01– 6.00	13,001	12,412	**83,763**	35,471	144,657
6.01– 7.00	8,731	50,574	55,628	5,234	120,167
7.01– 8.00	2,886	1,435	52,362	2,033	58,716
8.01– 9.00	5,808	1,085	33,629	183	40,705
9.01–10.00	977	258	27,813	1,197	30,245
10.01–11.00	251	66	14,898	317	15,532
Over $11.00	106	7	2,054	50	2,217
Total	219,801	630,404	481,011	262,089	1,593,305

In its children's popular price departments, Wohl sells principally its own brand, Tick Tock, in the 1955 price range of $3.99 through $4.99 (T. 1753). In some departments, Wohl also carries Brown's Robin Hood line which basically retailed in 1955 at $5.45 and up (T. 1753; Dx. YYY 2, R. 4759, T. 2318).

The following tables show how Wohl's total sales, in 1955, of all children's shoes sold in its popular price departments were distributed by price class and shoe type (with the median retail price indicated in bold face type and underlined):

WOHL SALES IN POPULAR PRICE DEPARTMENTS
BABIES' & INFANTS' SHOES (Pairs)

Retail Selling Price	Dress	Other	Total Pairs
Under $1.00	188		188
$1.01–2.00	3,191	**5,730**	8,921
2.01–3.00	3,997	2,769	6,766
3.01–4.00	**11,056**	158	**11,214**
4.01–5.00	13,791	3	13,794
5.01–6.00	2,257		2,257
Over $6.00	207		207
Total	34,687	8,660	43,347

CHILDREN'S & MISSES' SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	152	12	164
$1.01–2.00	6,074	19,137	25,211
2.01–3.00	29,434	**18,084**	47,518
3.01–4.00	35,090	2,809	**37,899**
4.01–5.00	**21,106**	34	21,140
5.01–6.00	37,434	23	37,457
6.01–7.00	12,419		12,419
7.01–8.00	2,368	28	2,396
Over $8.00	176	3	179
Total	144,253	40,130	184,383

YOUTHS' & BOYS' SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	2		2
$1.01–2.00	75	1	76
2.01–3.00	9,626	116	9,742
3.01–4.00	9,282	**277**	9,559
4.01–5.00	**3,158**	51	**3,209**
5.01–6.00	6,740	3	6,743
6.01–7.00	4,581		4,581
7.01–8.00	3,277	1	3,278
8.01–9.00	1,789	4	1,793
Over $9.00	168		168
Total	38,698	453	39,151

GROWING GIRLS'* SHOES (Pairs)

Retail Selling Price	Dress	Play	Total Pairs
Under $1.00	48		48
$1.01–2.00	595	99	694
2.01–3.00	5,713	**73**	5,786
3.01–4.00	626	44	670
4.01–5.00	**1,846**	4	**1,850**
5.01–6.00	2,123	1	2,124
6.01–7.00	2,520	1	2,521
7.01–8.00	363		363
8.01–9.00	1,089		1,089
Over $9.00	151		151
Total	15,074	222	15,296

* Growing girls' shoes are shoes manufactured for girls in women's sizes.

Wohl's Shoe Stores

In addition to its leased department operations, which constitute over 75% of its retail business, Wohl also oper-ates six women's high-fashion, popular price shoe stores (T. 1734, 1756). All of these stores carry only very high-styled women's nationally advertised Wohl brand shoes, including Paris Fashion and Connie dress (T. 1756). The dress shoes in the Paris Fashion line sell in the 1955 price range of $4.95 to $5.95; Paris Fashion sports and casuals sell at $2.99 through $5.95; and Connie dress shoes at $6.95 through $7.95 (T. 1750-2).

Wohl also operates 19 better grade family shoe stores under various names in 12 communities (T. 2013, 2029). Eight of these stores are in the Los Angeles, California area (T. 2029). 17 of these stores sell men's, women's, and children's shoes; one sells only men's and women's shoes and two sell only women's shoes (T. 2032).

All of the stores are better grade stores, selling nationally advertised branded shoes, including some Brown brands (T. 2032). Customers may charge their purchases (T. 2033). In women's shoes, the prices begin at $10.95 and run up to $35.00; in men's shoes, the prices begin at $10.00 and run up to $50.00 a pair; in children's shoes, the prices fall in the $4.95 to $8.95 range (T. 2032-3).

2. *Kinney's Operations*

Kinney's Manufacturing Operations

Kinney is primarily a shoe retailer, but also manufactures shoes. Its factories supply its retail stores with about 20% in pairs of their shoe requirements (T. 1439). In 1955, Kinney's four factories produced 2.9 million pairs of shoes (T. 1438). Sixty per cent (in pairs and in dollars) of this production was taken up by Kinney's retail divisions (T. 1439).

Kinney manufactures no branded shoes for others. Its total production consists of "make-up" shoes, shoes produced to the purchaser's specifications and bearing the purchaser's own private brand name. The purchasers are mail order houses, such as Montgomery Ward chains and a few wholesalers (T. 1928). Kinney carries no shoes in stock for any of these customers (T. 1943-4).

Kinney's total manufacturing sales increased slightly between 1955 and 1957 as did sales to outside purchasers, to Kinney retail, Wohl and Brown (Dx. X, R. 3299, T. 1928):

Year	Outside Customers	Kinney	Brown (and Wohl)	Total
1955	$4,249,874	$6,124,851	$ 23	$10,374,748
1956	4,519,331	6,103,900	12,450	10,635,681
1957	4,796,010	6,983,672	34,680	11,814,362

Kinney's Retail Operations

Kinney began business in 1899 as a retailer of shoes and has been primarily a shoe retailer ever since (T. 1437-8). Today, over 90% of its dollar sales are sales at retail (Gx. 211, R. 1159, T. 1219).

Kinney's retail operations consist of a chain of family shoe stores selling in the popular price field (T. 1442).* Men's shoes in the popular price field generally retail at $8.99 and below, women's at $5.99 and below, and children's at $3.99 and below.

As a family shoe chain, Kinney carries men's, women's and children's shoes in each of its stores (T. 1502). 51% of its business in pairs is in children's shoes, 35% in women's, and 14% in men's (T. 1443). The number of retail outlets operated by Kinney has fluctuated. In 1931 there were 410 (T. 1439). In 1955 there were 352 outlets located in 315 cities (T. 1440).

In 1955, Kinney had total retail sales of about $48 million (T. 1440). Total footwear sales amounted to over $41 million (including slippers) (Dx. NNNN, R. 5780, T. 2322; Dx. OOOO, R. 5819, T. 2323). The remaining $7 million was accounted for by the sale of non-footwear items such as handbags, hosiery and shoe findings, such as shoe laces (T. 1440).

In 1955, Kinney sold approximately 8 million pairs of leather shoes and over 1 million pairs of canvas-upper, rubber-soled shoes (T. 1499). Kinney's purchases of canvas-upper, rubber-soled shoes in that year amounted to $1,556,353.78 (Dx. AAA, R. 4573, 4593, T. 2012). Kinney's sales of canvas-upper, rubber-soled shoes, which made up 6% to 7% of Kinney's dollar sales in 1955, have been steadily increasing so that, with an increase to almost 2

* Kinney also operated three stores in Philadelphia, Baltimore and Newark under the name Enzel, which are entirely different in character from the other Kinney outlets (T. 1445). These stores, which are operated as a completely separate operation, feature women's high-fashion shoes selling in the price range of $7 to $15 (T. 1445). In 1955, 57,122 pairs of women's shoes were sold in the Enzel stores (Dx. OOOO, R. 5819, T. 2323). The Enzel operation has not been profitable (T. 1445-6).

million pairs, they constitute about 10% of Kinney's dollar sales (T. 1501).

Kinney Locations

Kinney typically does not operate in the downtown areas of large cities (T. 1504). In large cities where it does have outlets, Kinney's stores are principally in neighborhood centers of moderate income residential districts. In Washington, D. C., Kinney has one outlet on 7th Street, north of Constitution Avenue, and another on H Street, off 11th Street, and in New York City, it has outlets in Astoria, Queens (across the East River from Manhattan), and in the Yorkville section on the upper East side of Manhattan.

In smaller cities Kinney does have locations downtown (T. 1503). In such cities "We try always to be a hundred percent located in the popular price area, family area" (T. 1507). The testimony was that in many instances Kinney had locations of this description. For example, in Marshalltown, Iowa, Kinney's outlet is downtown on the one main street (T. 271) and in Winston-Salem, North Carolina, Kinney's store is on "Shoe Avenue" (T. 1196). On the other hand, all of Kinney's outlets are not so fortunately located. For example, the Kinney locations in Little Rock and South Bend are very poor, and Kinney is not operating profitably in either city (T. 1986-7).

Kinney's Suburban Stores

Kinney was alert to the trend to suburban retailing, and was one of the first popular price family shoe chains to move into the new shopping centers (T. 1509). By 1955, Kinney had 50 outlets in shopping centers in suburban areas, and by 1958 the number of suburban outlets had increased to 118 (T. 1440). It has, for example, an outlet at the Eastover Shopping Center in Washington, D. C.

Not all of the more recent suburban outlets are in shopping centers, however, for Kinney has pioneered "the free standing store" on highways in suburban areas such as Rockville, Maryland and Falls Church, Virginia (T. 1443, 1511). This type of store is one that stands alone "free of all other buildings", surrounded by a generous parking area (T. 1511). They are operated on a "self-selection" basis. Style samples are on open racks and the customer selects the style he wants by viewing them; the clerk then fits the customer in the style selected (T. 1525).

The highway "free standing" store operation is quite different from that in old Kinney stores (T. 1572). The style range in these stores is greater than in the average Kinney store and (when the store is successful) the volume of business is substantially greater (T. 1525).

Kinney Prices

The following tables, which are derived from Defendant's Exhibits PPPP1-PPPP16 (R. 5821-6336, T. 2323), show how Kinney's 1955 sales, in pairs, by shoe type and price class, were distributed. The median retail price range in each category is in bold face type and underlined.

KINNEY RETAIL SALES
WOMEN'S SHOES (Pairs)

Retail Price Class	Dress	Casual	Staples*	Total Pairs
$1.01–2.00		134,420		134,420
2.01–3.00	16,799	**1,183,792**		1,200,591
3.01–4.00	221,195	250,912	1,601	**473,708**
4.01–5.00	**562,456**	69,916	103,829	736,201
5.01–6.00	6,947		28,568	35,515
6.01–7.00		1,554	**269,862**	271,416
7.01–8.00			170	170
8.01–9.00		54		54
Total	807,397	1,640,648	404,030	2,852,075

* Figures in the column headed "Staples" represent shoes sold by Kinney's Department 14 which handles nurses' oxfords and conservative arch-type shoes.

MEN'S SHOES (Pairs)

Retail Price Class	Dress	Work	Total Pairs
$ 2.01– 3.00	73,555		73,555
3.01– 4.00	32,764	6,321	39,085
4.01– 5.00	66,762	158	66,920
5.01– 6.00	87,946	4,621	92,567
6.01– 7.00	**233,518**	**79,780**	**313,298**
7.01– 8.00	142,888	4,729	147,617
8.01– 9.00	235,951	6,373	242,324
9.01–10.00	60,769		60,769
10.01–11.00	12,967	8,005	20,972
Over $11.00	980	2,328	3,308
Total	948,100	112,315	1,060,415

CHILDREN'S SHOES (Pairs)

Retail Price Class	Babies' and Infants'	Misses' and Children's	Youths' and Boys'	Growing Girls'
$1.01–2.00	97,263	118,332	5,446	364
2.01–3.00	**308,690**	576,166	268,692	248,557
3.01–4.00	156,086	**536,495**	**183,810**	**628,560**
4.01–5.00	4,370	190,023	150,739	375,363
5.01–6.00	383	517	75,286	8,170
6.01–7.00		10,039	283	40,065
7.01–8.00		769	4,442	187
Over $8.00		728		2,587
Total	566,792	1,433,069	688,698	1,303,853

C. Brown and Kinney Compared and Contrasted

In the two preceding sections, the businesses of Brown and Kinney have been described. In this section, their operations will be compared and contrasted.

In the Argument section of this Brief, appellant will point out that this comparison demonstrates that Brown and Kinney do not compete at any level in the shoe industry and are not in the same "line of commerce" within the meaning of Amended Section 7.

1. *Manufacturing*

A fundamental difference between Brown and Kinney is that Brown is primarily a manufacturer, whereas Kinney is primarily a retailer. In addition, the manufacturing operations of the two firms are entirely different, for each manufactures shoes in fundamentally different age/sex, style/use and price/quality categories.

Raw Materials Differences

There are great differences in the quality and price of the raw materials purchased by Brown and Kinney. Brown uses raw materials of different and higher quality than Kinney.

About 30% of Brown's shoes utilize calfskin, which is the most expensive upper leather (T. 2328-9), whereas Kinney uses no calfskin at all (T. 1960).

Similarly, about 45% of Brown's upper leather purchases are of sides* and extreme sides in the top three or four grades, and about 15% to 20% of Brown's upper leather purchases are of the top three grades of full grain kips (T. 2329-32). In contrast, Kinney purchases only third grade corrected grain sides, which constitute about 80% to 85% of Kinney's upper leather purchases, and only 2% to 3% of such purchases are kips, and third grade corrected grain kips at that (T. 1960-3). About 10% of Brown's upper leather purchases are of kidskin in the top five grades (T. 2332-3). Kinney purchases only an insignificant amount of kidskin ($7,000 per year) (T. 1962-3).

Lining materials used by Brown are likewise of higher quality and price. About 40% of Brown's linings are sheep linings and another 50% are split leather linings (T. 2333). In contrast, 70% of Kinney's shoes have no leather lining, utilizing an inexpensive textile (T. 1968-9).

Similar differentials in quality and price are found in materials used for insoles, heels and outsoles. Brown maintains quality control by cutting its own leather insoles from a superior quality leather (T. 2171). 85% of Kinney's purchases of insoles are of synthetic insoles (T. 1967).

Similarly, Brown's heels are of a superior leather and rubber, compared to Kinney's, which utilize no new leather top lifts and only a third grade synthetic rubber (T. 1968).

Most of Brown's shoes have leather or composition soles of high quality. On the other hand, less than 15% of Kin-

* Next to calfskin, kip leather (pelts of animals from 3 to 5 months old) is the most expensive bovine upper leather. Extreme sides are less expensive, and sides are the least expensive of all full grained upper leather.

ney's soles are leather and these are of a lower grade than used by Brown (T. 1964). Kinney's composition soles are likewise lower in grade and price (T. 1966).

As is to be expected from the differences in the quality of their raw material purchases, Brown and Kinney utilize different suppliers for their requirements of raw materials.

Brown's principal suppliers of bovine side and kip leather include A. C. Lawrence, a division of Swift & Co., Armour and Brown's own tannery, Moench (T. 2330-1). On the other hand, Kinney purchases most of its leather from Albert Trostel, a supplier of less expensive leather (T. 1962-3). Out of its total 1954 leather purchases of $1,554,548.65, Kinney purchased $1,233,603.32 from Trostel (Dx. XX, R. 4384, T. 2010). Brown does not purchase from Trostel.

Armour is the only major supplier of Brown from which Kinney purchases leather, and Kinney's purchases from Armour ($132,997.63) constitute less than 9% of Kinney's total leather purchases (Dx. XX, R. 4384, T. 2010). Similarly, Brown's suppliers of calfskin and kidskin are not suppliers of Kinney (Dx. AAAA, R. 4892, T. 2319; T. 2332-3).

Brown's suppliers of the leather from which it cuts soles are not suppliers of Kinney, which purchases its soles already cut (Dx. AAAA, R. 4892, T. 2319; T. 1965). The few pairs of already cut soles which Brown does purchase are obtained from suppliers which do not sell to Kinney (Dx. AAAA, R. 4892, T. 2319; Dx. XX, R. 4892, T. 2010).

Brown's high quality composition soles are purchased primarily from Avon, from which Kinney does not purchase. Brown purchases some composition soles from American Biltrite, a firm which is a significant supplier of Kinney. However, Brown purchases only the highest and medium grade composition soles from American Biltrite, whereas Kinney purchases only the lowest grades of composition soles from that firm (T. 1966, 2206-7).

Differences in Brown and Kinney Production

Brown is predominantly a producer of women's shoes. 56% of its production, in pairs, is of women's shoes, whereas, only 17% of Kinney's production is of women's shoes. Kinney is predominantly a producer of men's shoes. 45% of its production, in pairs, is of men's shoes, whereas only 14% of Brown's production is of men's shoes. Brown is a large producer of infants' and babies' shoes; Kinney produces none. 20% of Kinney's production is of youths' and boys' shoes; this category accounts for only 5% of Brown's production (Dx. KKKKK-1, R. 7078, T. 2593).

Brown and Kinney production is not only in substantially different age/sex categories, but Brown and Kinney shoes are sold at substantially different prices within each age/sex category. This disparity is shown by the wholesale price lines at which Brown and Kinney sales diverge, as the tables on pages 75 through 78 demonstrate.

Any price differences which exist at the wholesale level will be magnified at the retail level. In considering wholesale selling price differences, it must be borne in mind that the typical retail selling price of a shoe includes a retailer's mark-up of approximately 40% or more of the retail price, or 66⅔% above the wholesale price (T. 1846).

Thus, a shoe selling at $4.80 at the factory would retail at about $8.00 and one selling at $3.00 would retail at $5.00 (T. 1958).

The marked price line differences between Brown and Kinney which appear in a simple analysis of production figures by age/sex categories, are shown to be even more pronounced when separated into significant shoe use types.

Just as age/sex categories are used because they are meaningful in the shoe industry and distinguish shoes which are not close substitutes, so also are the use types of dress, casual, sport and work used by manufacturers within the industry to distinguish shoes which are not close substitutes within each age/sex category (T. 2137-9, 2468).

In most of the important Brown price classes, Kinney produces no shoes at all. Where overlap occurs in any price category, an examination of the use category in which the overlap occurs shows that neither company has substantial production in the particular price/use category.

In women's shoes, some 86% of Brown production sells at a manufacturer's selling price of $3.00 and above, whereas only 9% of Kinney's production sells at that price and above.

BROWN AND KINNEY 1955 PRODUCTION BY PRICE CLASS AND SHOE TYPE*
WOMEN'S SHOES (in pairs) [1]

Mfrs. Selling Price f.o.b. Plant (dollars per pair)	Women's Dress		Women's Casual		Women's Sport	
	Brown	Kinney	Brown	Kinney	Brown	Kinney
Less than 0.61	—	—	—	—	—	—
0.61– 1.20	—	—	—	—	—	—
1.21– 1.80	48,420	4	—	—	—	—
1.81– 2.40	108,252	—	720	83,355	17,998	24
2.41– 3.00	54,731	116,210	732,103	90,740	1,058,336	150,066
3.01– 3.60	202,549	7,038	495,071	11,537	433,842	22,203
3.61– 4.20	1,121,781	689	157,590	—	268,150	—
4.21– 4.80	843,333	—	334,174	—	580,224	—
4.81– 5.40	975,682	—	354,020	—	191,154	—
5.41– 6.00	496,876	—	53,825	—	31,314	—
6.01– 7.20	4,318.570	—	1,125,204	—	29,980	—
7.21– 8.40	204,404	—	3,408	—	117	—
8.41–10.20	—	—	—	—	—	—
10.21–12.00	—	—	—	—	—	—
12.01–and over	—	—	—	—	—	—
Total	8,374,598	123,941	3,256,115	185,632	2,611,115	172,293

[1] Brown and Kinney production data are for the fiscal year ended October 31, 1955. Kinney manufactures no shoes traditionally denoted as women's shoes. It does produce girls' shoes in sizes that have been traditionally considered women's sizes.

* Source: Dx. EEEEEE, R. 7106, T. 2593.

In men's shoes, about 66% of Brown's production sells at a manufacturer's selling price of \$4.80 and above, whereas only 14% of Kinney's production sells at that price and above. When broken down by use types, the overlap, where it occurs, is in price brackets where production is small.

BROWN AND KINNEY 1955 PRODUCTION
BY PRICE CLASS AND SHOE TYPE*

MEN'S SHOES (in pairs)[1]

Mfrs. Selling Price f.o.b. Plant (dollars per pair)	Men's Dress		Men's Casual		Men's Sport		Men's Work	
	Brown	Kinney	Brown	Kinney	Brown	Kinney	Brown	[illegible]
Less than 0.61	—	—	—	—	—	—	—	
0.61– 1.20	—	—	—	504	—	—	—	—
1.21– 1.80	—	—	—	131	—	—	—	
1.81– 2.40	—	—	—	—	648	225	—	
2.41– 3.00	—	131	—	3,001	14,220	2,672	—	
3.01– 3.60	—	55,975	—	141,399	5,760	17,444	984	—
3.61– 4.20	8,408	82,668	2,640	168,586	—	86,813	9,288	28,4[illegible]
4.21– 4.80	81,585	199,693	50,695	116,383	—	77,554	49,056	62,3[illegible]
4.81– 5.40	260,853	224,390	383,990	21,283	—	24,669	18,618	
5.41– 6.00	644,941	12,072	330,231	—	—	—	15,660	
6.01– 7.20	518,885	216	252,603	—	601	—	5,292	
7.21– 8.40	666,748	—	1,905	—	—	—	—	
8.41–10.20	222,036	—	—	—	—	—	—	
10.21–12.00	2,041	—	—	—	—	—	—	
12.01–and over	714	—	—	—	—	—	—	
Total	2,406,211	575,145	1,022,064	451,287	21,229	209,377	98,898	[illegible]

[1] Brown and Kinney production data are for the fiscal year ended October 31, 1955. [illegible] figures include Regal but exclude 2,659 pairs which cannot be classified by type.

* Sources: Dx. SSSSS, R. 7085, T. 2593; Dx. CCCCCC, R. 7103, T. 2593.

In youths' and boys' shoes, about 91% of Brown's production sells at a manufacturer's selling price of \$4.20 and above, whereas only one-twentieth of 1% of Kinney's production sells at that price and above. In the only price brackets where there is any noticeable overlap, i.e., \$3.01 to \$4.20, the overlap largely disappears when broken down by use types, and in all cases the production involved is relatively very small.

BROWN AND KINNEY 1955 PRODUCTION BY PRICE CLASS AND SHOE TYPE*
YOUTHS' AND BOYS' SHOES (in pairs)[1]

Mfrs. Selling Price f.o.b. Plant (dollars per pair)	Youths' and Boys' Dress		Youths' and Boys' Casual		Youths' and Boys' Sport	
	Brown	Kinney	Brown	Kinney	Brown	Kinney
Less than 0.61	—	—	—	—	—	—
0.61– 1.20	—	—	—	—	—	—
1.21– 1.80	—	—	—	—	—	—
1.81– 2.40	—	3,568	—	3,399	288	214
2.41– 3.00	—	57,395	—	81,236	3,816	—
3.01– 3.60	900	280,151	1,056	73,957	72,678	15,051
3.61– 4.20	40,236	38,560	6,576	2,892	1,148	10,349
4.21– 4.80	452,016	131	333,504	130	255,075	—
4.81– 5.40	244,086	—	10,320	—	—	—
5.41– 6.00	13,164	—	—	—	—	—
6.01– 7.20	96	—	—	—	—	—
7.21– 8.40	1,896	—	—	—	—	—
8.41–10.20	—	—	—	—	—	—
10.21–12.00	—	—	—	—	—	—
12.01–and over	—	—	—	—	—	—
Total	752,394	379,805	351,456	161,614	333,005	25,614

[1] Brown and Kinney production data are for the fiscal year ended October 31, 1955.
Brown figures exclude 2,928 pairs of work shoes which type Kinney did not produce.

* Source: Dx. GGGGGG, R. 7109, T. 2593.

In misses' and children's shoes, about 75% of Brown's production sells at a manufacturer's selling price of \$3.00 and above, whereas only 10% of Kinney's production sells at that price or above. In the price and use categories in which Brown has the most important share, *e.g.*, \$3.61 to \$4.20 in dress and in sport shoes, Kinney has either no production or almost none.

BROWN AND KINNEY 1955 PRODUCTION BY PRICE CLASS AND SHOE TYPE *

MISSES' AND CHILDREN'S SHOES (in pairs)[1]

Mfrs. Selling Price f.o.b. Plant (dollars per pair)	Misses' and Children's Dress		Misses' and Children's Casual		Misses' and Children's Sport	
	Brown	Kinney	Brown	Kinney	Brown	Kinney
Less than 0.61	—	—	—	—	—	—
0.61– 1.20	—	—	—	—	—	—
1.21– 1.80	—	9	19,704	—	81,948	18
1.81– 2.40	158,033	83,220	194,955	128,722	176,826	40,925
2.41– 3.00	46,380	62,361	163,235	7,323	199,668	76,745
3.01– 3.60	169,816	27,107	21,498	—	312,316	18,584
3.61– 4.20	817,251	—	20,142	—	1,966,107	1,430
4.21– 4.80	—	—	5,832	—	36,696	—
4.81– 5.40	—	—	—	—	10,917	—
5.41– 6.00	—	—	—	—	546	—
6.01– 7.20	—	—	—	—	54	—
7.21– 8.40	—	—	—	—	—	—
8.41–10.20	—	—	—	—	—	—
10.21–12.00	—	—	—	—	—	—
12.01-and over	—	—	—	—	—	—
Total	1,191,480	172,697	425,366	136,045	2,785,078	137,702

[1] Brown and Kinney production data are for the fiscal year ended October 31, 1955.

Brown figures exclude 20,304 pairs of boots, which type Kinney did not produce.

* Source: Dx. IIIII, R. 7112, T. 2593.

In babies' and infants' shoes, Kinney has no production, whereas Brown's production is nearly two million pairs (Dx. WWWWW, R. 7093, T. 2593).

Differences in Brown and Kinney Customers

Brown and Kinney sell to different customers.

85% of Brown's production is sold to independent retailers (T. 1673). Kinney makes no sales to independent retailers.

Kinney's sales are confined to its own retail organization and to a few large chain retailers which purchase shoes from Kinney for resale under their own brand name (T. 1928). 60% of Kinney's production (in dollars and pairs) is sold in its own retail outlets (T. 1439).

In 1954, a representative year, Brown sold private brand make-up shoes (the remaining 15% of Brown's production) to 79 customers and Kinney sold private brand make-up shoes to 72 customers. There were only 14 customers in common for the two companies.

COMMON MAKE-UP CUSTOMERS OF BROWN AND KINNEY, 1954*

Customer	Sales	
	Kinney	Brown
Aimcee Wholesale Corp.	$ 58,063	$ 28,355
Bata Shoe Co.	24,494	1,300
Dan Cohen	76,925	103,439
Dial Shoe Co.	12,533	10,430
Gallenkamps Stores Co.	77,998	85,460
Hofheimers Inc.	19,310	80,826
John Irving Shoe Co.	41,122	56,997
Melville Shoe Co.	197,453	327,385
Miles Shoe Co.	469,021	206,044
Miller Jones Co.	222,370	3,600
Montgomery Ward Co.	1,349,013	491,905
Nobil Shoe Co.	4,269	160,104
J. C. Penney Co.	4	1,901,314
Trade Home Co.	3,243	22,861

* Sources: Dx. ZZZ1, R. 4798, T. 2319; Dx. SSSS, R. 6917, T. 2325

Only Brown's make-up divisions, Capitol, Mound City and United Men's were involved in these shipments, and for the most part they were selling different types of shoes to these customers than Kinney. For example, with respect to Kinney's largest customer, Montgomery Ward, Brown sold only women's shoes, where Kinney sold neither women's nor growing girls'. Similarly, Brown sold only women's shoes to Hofheimer's and to Aimcee, while Kinney sold only men's and boys'; Brown sold only women's and children's to Nobil and to Dan Cohen, while Kinney sold only men's and boys'; Brown sold only women's casuals to Dial, while Kinney sold misses', children's and growing girls'; and Brown sold only women's and children's to Trade Home, while Kinney sold only boys'. With respect to Brown's largest common customer, J. C. Penney, Kinney sold only $4 worth of shoes as samples.

Brown and Kinney sell shoes in the same age/sex category to only six common customers. A detailed analysis reveals that, with few minor exceptions, the shoes sold to such common customers were of quite different price and quality.

CUSTOMERS OF BROWN AND KINNEY BUYING SHOES IN THE SAME AGE/SEX CATEGORY, 1954*

Customer	Type	Dollar Amount		Wholesale Price Range	
		Kinney	Brown	Kinney	Brown
Bata	Children's	$ 1,340	$ 1,300	$2.50	$1.80–$2.40
Gallenkamps	Boys'	77,998	516	$3.22–$3.73	$4.30
Irving	Misses'	23,968		$2.37–$2.40	$2.47
	Children's	15,176	20,300	$2.37–$2.45	$1.90–$2.22
Melville	Men's	97,560	190,133	$4.15–$5.05	$7.50–$7.80
	Children's	38,709	62,114	$2.25–$2.73	$1.15–$2.40
Miles	Children's	66,951	104,911	$2.25–$2.35	$1.15–$2.45
Miller Jones	Men's	186,148	3,600	$3.47–$5.37	$5.00

* Sources: Dx. Z, R. 3301, T. 1942; Dx. DDD, R. 4608, T. 2083.

As the preceding table shows, Brown's sales to Bata, Gallenkamps and Miller Jones were trivial in amount and represented sample lots from which no further business of substance resulted. The same is true of Kinney's sales to Bata. In addition, Brown's sales of men's shoes to Melville were at a substantially higher price than Kinney's sales to Melville in the same category.

Thus, it is only with respect to the remaining misses' and children's shoes that Brown and Kinney were selling in the same price range. However, Kinney's sales of these shoes amounted to only \$122,176 and Brown's to only \$188,625. These quantities represent insignificant shares of the total sales of the two firms.

Moreover, the apparent overlap in prices in this small quantity of misses' and children's shoes is overstated, at least in part, because of differences in construction. The Brown shoes priced at \$1.90-2.22 were all cements and those priced at \$1.15-1.80 were all sandals (Dx. DDD, R. 4608, T. 2083), whereas Kinney's sales of misses' and children's shoes included no sandals but were all Goodyear welts and bon-welts and a few misses' cement straps and misses' loafers (Dx. Y, R. 3300, T. 1929).

Regal also sells its make-up shoes to different customers from those to which Kinney sells. Only one of Regal's outside customers bought shoes from Kinney in 1954. Melville, which purchased men's dress shoes from Regal at prices of \$7.50 to \$7.80, purchased men's dress shoes from Kinney at the significantly lower wholesale prices of \$4.15 to \$5.05 (Dx. LLLL, R. 5729, T. 2322; Dx. SSSS, R. 6917, T. 2325).

2. *Retailing*

A comparison of the retail operations of Kinney and Brown, through Wohl and Regal, reveals that they are also substantially different.

Shoe Purchasing

A comparison of the outside shoe suppliers of Wohl and Kinney shows how few firms were common suppliers of the two firms. Of Kinney's 20 largest suppliers of leather footwear, only three were also among Wohl's 20 largest suppliers of such footwear. Kinney's total purchases of such footwear from its 20 largest suppliers amounted to $10,339,428. The three Kinney suppliers who also appear on Wohl's list of 20 largest suppliers supplied Kinney with only $1,890,094 of merchandise, or something less than 18% of Kinney's purchases from its 20 largest suppliers. In other words, 82% of Kinney's purchases in dollars from its 20 largest suppliers were from companies not appearing on the list of Wohl's 20 largest suppliers (Dx. AAA, R. 4573, T. 2012).

Likewise, of the 20 largest suppliers of leather footwear to Wohl, only three suppliers also appear on the list of Kinney's 20 largest suppliers of such footwear. Wohl's total purchases of such footwear from its 20 largest suppliers amounted to $12,449,247. The three suppliers of Wohl who appear on the list of Kinney's 20 largest suppliers supplied Wohl with only $959,449, or something less than 7% of Wohl's total purchases from its 20 largest suppliers of such footwear (Dx. SS, R. 4316, T. 2008).*

Kinney and Regal have virtually no shoe suppliers in common. In the first place, Regal purchases only men's shoes (Regal's purchases of women's and children's shoes were discontinued in 1955). There were only four common suppliers of men's shoes in 1955, not one of which was a significant supplier of both companies. Thus, Danvers Shoe Co's. sales to Kinney were only $20 ($20,974 to Regal); E. J. Givren Shoe Co's. sales to Regal were only $6,412 ($225,870 to Kinney); Plymouth Shoe Co's. sales to Kinney were only $1,338 ($368,958 to Regal); and Strathmore Shoe Co's. sales to Kinney were only $16,464 ($53,125 to Regal) (Dx. AAA, R. 4573, T. 2012; Dx. HHHH, R. 5695, T. 2321).

* When the analysis is carried further and a comparison is made between Kinney's 50 largest suppliers of leather footwear and Wohl's 50 largest suppliers of such footwear, the contrast becomes even greater. Of Kinney's 50 largest suppliers, only five appear among Wohl's 50 largest suppliers. The five Kinney suppliers which also are among Wohl's 50 largest suppliers, supplied Kinney with footwear having a value of approximately 13% in dollars of Kinney's purchases from its 50 largest suppliers, and an even smaller percentage of Kinney's total outside purchases (Dx. AAA, R. 4573, T. 2012).

Of Wohl's 50 largest suppliers of such footwear, five suppliers also appear on the list of Kinney's 50 largest suppliers. Purchases from the five largest suppliers of Wohl who also appear on the list of the 50 largest suppliers of Kinney amounted to approximately 11% of Wohl's purchases from its 50 largest suppliers, and an even smaller percentage of Wohl's total outside purchases (Dx. SS, R. 4316, T. 2008).

Shoe Merchandising

Price Differentials

There is a substantial price difference between the medium to high price shoes sold by Wohl and Regal at retail and the less expensive shoes sold by Kinney at retail.

Men's shoes permit the simplest comparison:* 92% of Kinney's men's shoes sell below $9 per pair at retail, while 85% of the men's shoes Wohl and Regal sell at retail sell above $9 per pair.

In women's shoes, a comparison between Kinney sales at retail and the retail sales in Wohl's better grade departments indicates a definite price disparity. 89% of Kinney's women's shoes sell below $5 per pair at retail, whereas 86% of the women's shoes sold by Wohl's better grade departments retail above $5 per pair.

The price distinctions mentioned above carry forward even when Wohl's popular price women's department sales are compared with Kinney's sales of women's shoes. In dress shoes, 99% of Kinney's sales of women's shoes sold for below $5 per pair, 56% of Wohl's popular price dress shoes sold at over $5 per pair at retail.

Kinney's casual shoes sold predominantly at below $3 per pair, 81% of the pairs of these shoes being sold at below

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* The percentages are derived from the price category sales data set forth at pages 55-63 (Wohl) and 68-69 (Kinney) and (Regal) in Defendant's Exhibit MMMM (R. 5748, T. 2322).

With respect to the following comparison, we note that the retail pricing of shoes is primarily at dollar intervals such as $7.95, $8.95, $9.95, without intermediate prices. Thus, in comparing sales of shoes at above $5 per pair at retail and below $5 per pair at retail, there is a spread of an actual full dollar rather than a difference of a few cents.

$3 at retail. In Wohl's popular price departments, its play and sport shoes sold in a broad price range. 44% of the play and sport shoes sold by Wohl in its popular price women's departments sold at above $3 per pair at retail.

Children's shoes also present a complicated picture because the prices of children's shoes vary directly with their sizes. This would make any price line comparison by other than identical sizes imperfect. No such comparison is possible because records are not kept so as to preserve size distribution and because the size runs of the shoes in the various sub-categories are not identical.

In each category of children's shoes the majority of Kinney's shoes are priced below the majority of the children's shoes sold by Wohl at retail in both its better grade and popular price departments.

With respect to the babies' and infants' category, 72% of Kinney's shoes sell below $3 per pair at retail, while 80% of Wohl's sell above this figure. In the category of children's and misses' shoes, 86% of Kinney's shoes sell below $4 per pair at retail, while 62% of Wohl's sell above this figure. In the youths' and boys' category, 88% of Kinney's shoes sell below $5 retail, while 58% of Wohl's shoes sell above this figure. In the growing girls' category, 96% of Kinney's shoes sell below $5 retail, whereas 69% of Wohl's sell above this figure.

The data referred to above relate to Kinney and Wohl prices throughout the United States as if the United States, as a whole, were a single retail market. It is undisputed that it is not; rather it is clear that retail shoe markets are local in nature. In addition, the data fail to take account of the fact that whereas Kinney's prices are relatively uniform throughout the country, Wohl's prices vary widely depending on the merchandising policy and character of the department or specialty stores in which its leased departments are located.

The price differences between Brown and Kinney in the retail field may be illustrated briefly by a look at the 58 areas where Brown and Kinney both had retail outlets and where the combined retail sales of Brown and Kinney constituted 5% or more of retail shoe sales within the particular area. Data relating to retail sales by Brown and Kinney in these areas are set forth in detail in Defendant's Exhibit CCCCCCC* (R. 7314, T. 2593).

Almost all shoe retailers, including Brown and Kinney, sell shoes in a particular age/sex category at a variety of prices reflecting differences in style and quality. To measure and express the price level of a particular seller of shoes requires the use of some concept of a central price which represents the core of its shoe business.

The price corresponding to the median sales dollar is such a measure. This shows the price which splits the outlet's dollar sales of a particular age/sex category of shoes into equal parts: half representing sales of shoes selling at *higher* prices, half representing sales of shoes selling at *lower* prices (T. 2571).

Such a measure has been calculated for the sales of Brown and Kinney for each of the six age/sex categories in

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* In the remaining communities in which each firm had a retail outlet, the combined sales of the two firms constituted less than 5% of the retail shoe sales within that area. We have not included in our analysis areas in which Brown did not have a retail outlet. Our reasons for believing that the district court was in error in including such areas is fully set out at pages 153 and 154.

each of the 58 areas. The resulting median sales dollar measures have been compared area by area (58) and category by category (6) to determine the basic differences in the price levels between Brown and Kinney outlets, for a total of 348 possible comparisons.

This comparison takes the form of calculating how much higher Brown's median price is when compared to Kinney's. The following example illustrates our procedure:

In Altoona, Pennsylvania, Brown's median price for men's shoes was \$13.10; Kinney's median price for men's shoes was \$6.42. Brown's median price of \$13.10 was divided by Kinney's median price of \$6.42 to see how much higher Brown's median price is compared with Kinney's. In this example, Brown's median price was 2.04 times as much as Kinney's. Another way of expressing this is to say that Brown's median price is 204% of Kinney's.

This procedure was followed for each sex category for each city. Since there are 58 areas and 6 age/sex types, there are 348 cases to examine. The table below shows the detail for each age/sex category. It first shows those instances in which either Brown or Kinney had no sales in a particular age/sex category. Next the table shows those instances in which sales of Brown or Kinney in a particular age/sex category in a particular area examined were less than 1% of the total sales of the particular firm in that area. Finally, the table sets forth a comparison of Brown's median price and Kinney's median price in those instances in which both had sales in a particular age/sex category in a particular area and states the comparison in terms of the relationship of Brown's median price to Kinney's median price.

BROWN AND KINNEY RETAIL PRICES COMPARED

Brown's Median Price Times Kinney's Median Price by Class	Men's	Women's	Growing Girls'	Youths' and Boys'	Children's and Misses'	Babies' and Infants'	Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
.5 – .69							
.7 – .89			1				1
.9 – 1.09	5			1			6
1.1 – 1.29	3	4		3	2		12
1.3 – 1.49	4	2	2	5	5	3	21
1.5 – 1.69	5	6		4	4	5	24
1.7 – 1.89	3	3	2	9	14	25	56
1.9 – 2.09	2	8	17	9	19	7	62
2.1 – 2.29		14	7	3	4	3	31
2.3 – 2.49	2	7	2	2	1	1	15
2.5 and up	1	12		1		1	15
Less than 1% of Brown's sales or of Kinney's Sales in this Age-Sex Class	16		16	12		3	47
No Overlap in this Age-Sex Class	17	2	11	9	9	10	58
Total	58	58	58	58	58	58	348

The table shows that in 58 out of 348 cases either Brown or Kinney had no sales in that age/sex class. In 47 out of the 348 cases, either Brown or Kinney had less than 1% of their sales in the particular age/sex class. Thus, in 105 out of 348 cases, there were no sales at all or only token sales by either Brown or Kinney in the particular age/sex classes.

Column 2 in the above table gives the detail for men's shoes. It shows that either Brown or Kinney did not have sales of men's shoes in 17 out of 58 areas. In 16 cases, Brown or Kinney sales of men's shoes were under 1% of their total sales. Thus, in 33 out of 58 cases relating to men's shoes, there were only token sales by either Brown or Kinney of men's shoes.

In addition, in 13 of the remaining 25 cases, Brown's median price of men's shoes was over 150% of Kinney's median price. If Kinney's median price of men's shoes was $6.50, Brown's median price was at least $9.75, and most frequently was even higher. There were thus only 12 out of the 25 cases involving men's shoes in which Brown's median price was less than 150% of Kinney's median price.

Turning to women's shoes, a similar analysis shows that in the 58 overlap areas, there were two areas in which either Brown or Kinney sold no women's shoes, thus leaving 56 areas for examination. In 33 areas, Brown's median price of women's shoes was over 210% of Kinney's. In 50 areas out of 56 in which there was any overlap, Brown's median price of women's shoes was at least 150% of Kinney's median price and in all of the areas where there was overlap, Brown's median price exceeded Kinney's median price.

An examination of the foregoing table indicates that the pattern revealed by an analysis of men's and women's shoes is paralleled for the other age/sex classes of shoes.

If the 243 cases in which either Brown or Kinney had more than token sales are examined, we find that in 123 of these cases, Brown's median price was at least 190% of Kinney's median price. Translated into dollars, this means that if Kinney's median price for women's shoes was $6 per pair, Brown's median price was at least $11.40 per pair.

In 203 cases, Brown's median price was at least 150% of Kinney's median price. In only 40 cases was Brown's median price less than 150% of Kinney's median price. In only seven cases was Brown's median price less than 110% of Kinney's median price.

Style and Size Range Differences

In addition to price/quality differences, there are significant style differences in the shoes sold by Wohl and Kinney. This is particularly true with respect to women's shoes, which make up the principal part of Wohl's business. Wohl's women's shoes are typically high-fashion shoes, the styles of which change rapidly in response to shifts in fashion. Wohl's own Marquise and Jacqueline lines, both of which are very important in Wohl's better-grade department, for example, are very high-style shoes, selling in the $12.95-$14.95, and the $9.95-$10.95 1955 price ranges respectively (T. 1743-4). In its better grade departments, Wohl also sells many outside brands featuring very high-fashioned shoes, including Martinique, Pallizzio, and De Liso Deb (T. 1746-7). Wohl's women's lines sold by its women's fashion stores are also high-fashion shoes (T. 2379).

Because of Kinney's price range—99% of its women's dress shoes sell below $5 a pair—Kinney is not a logical customer for high-price, high-fashion shoes (which rapidly come in and go out of favor) such as Wohl sells. Moreover, since Kinney's whole purchasing program is based on volume buying, Kinney cannot speculate in styles the way Wohl does.

Kinney's policy of limiting the number of shoe styles it carries is reflected in its stock numbers. It has only 4,000 different stock numbers, of which 3,000 to 3,300 represent leather shoes (T. 1520). This is Kinney's entire stock of men's, women's and children's shoes.

Wohl, on the other hand, with a comparable dollar volume, has in its retail division alone over 27,000 stock numbers, of which 15,000 are women's shoes (T. 1743).

Closely related to the style difference between Wohl and Kinney is the difference in size and width variety of their inventory. Kinney does not attempt to "sell all customers in all sizes" (T. 1512). Consequently, Kinney stocks its women's shoes with 75% to 85% of its patterns in two widths, the rest being in a single width (T. 1490). Almost 75% of its men's shoes are stocked in a single width only, the other patterns having two widths (T. 1490). In neither case does Kinney carry a long range of sizes (T. 1512). Since Wohl carries a much broader range of sizes and widths, Kinney cannot offer a service comparable to Wohl's in closely fitting each customer.

Merchandising Differences

Merchandising differences are as significant as differences in the price and quality of the product sold. In considering them, the focus is on the way in which the shoes are sold, and the appeal which is made to the consumer.

Locational Differences

Kinney and Wohl appeal to different customers and this accounts for the differences in their locations.

Wohl's ideal, and most frequent, location is in the outstanding downtown department store of the retail market (T. 1737). Its leased departments in stores like Wanamaker's in Philadelphia, Younker's in Des Moines, Foley's in Houston and Mabley-Carew's in Cincinnati are typical (Dx. P1-P6, R. 2844, 3121, 847, 1901, T. 1997). It is these stores with their fine names and reputations for selling high quality merchandise which attract the kind of customer to whom Wohl knows it can appeal.

Kinney, on the other hand, tends to locate in moderate income neighborhoods and suburban areas (T. 1443). A more detailed discussion of Kinney's location appears at page 67 of this Brief. The only conclusion one may draw from this description may be stated simply: a Kinney location is not a Wohl location.

The importance of location in retailing cannot be overemphasized. Outlets appealing to the same type of customer, that is, to customers in the same age, sex and income groups, tend to cluster together in different parts of the city (T. 2393). Kinney, for example, frequently locates its popular price shoe outlets close to the highway outlets of the Robert Hall popular price clothing chain (T. 1511).

Differences in Merchandise Sold

An important difference between the operations of Wohl and Kinney lies in the type of shoe featured by each. Wohl specializes in women's high fashion shoes (T. 1765-6), whereas Kinney specializes in shoes for the whole family (T. 1502).

80% of Wohl's dollar sales at retail are of women's shoes and only 3% to 4% are of men's (T. 1736). Kinney's sales are more evenly distributed: women's shoes constitute 33% of Kinney's dollar volume, and men's comprise 22% (T. 1458).

Kinney's operation is also dramatically different from Wohl's in that Kinney specializes in satisfying the *family* demand for children's and growing girls' shoes. While children's shoes constitute only 16% of Wohl's dollar sales at retail (T. 1736), 44% of Kinney's dollar volume is in children's shoes (T. 1458).

Another distinction between Kinney and Wohl lies in the type of the items they each carry. Kinney sells a substantial quantity of shoe accessories like hosiery and shoe laces, and in some stores, sells leather belts and leather handbags (T. 1500). Kinney's sales of non-footwear items amount to $7 million annually or about 15% of Kinney's total sales (Dx. NNNN, R. 5780, T. 2322; Dx. OOOO, R. 5819, T. 2323; T. 1440).

Since the merchandising of Wohl's leased shoe departments is controlled by the department store itself and not by Wohl, Wohl is not permitted to and does not carry non-footwear items in any quantity.

In addition, Kinney sells a very large amount of canvas-upper, rubber-soled shoes. In 1955 it sold over one million pairs of such shoes and its sales of such items made up 6% to 7% of Kinney's dollar sales in that year (T. 1499, 1501). Wohl's sales of such shoes are inconsequential.

Wohl and Kinney employ brand names in different ways. Kinney sells its shoes at popular prices under its own retail brand names, particularly, Kinney and Educator (T. 1520). The customer is encouraged to rely on Kinney, the retailer, not the unknown manufacturer of the shoe, whoever he may be.

The brand names used by Wohl, on the other hand, are either manufacturers' nationally advertised brands or Wohl's own nationally advertised brands (T. 1743-5, 1746-7). The latter, in terms of their merchandising significance, are much more akin to manufacturers' brands than they are to the usual retailer's brands such as those of Kinney. The reasons for this are twofold. First, the brands are nationally advertised in important national media (T. 1740). Second, they are sold in department stores where the customers consider that the store itself is the retailer, and think of the brand names as being associated with a manufacturer (T. 1736-7).

Thus, Kinney is like other large retail shoe chains, whereas Wohl's operation cannot be distinguished from that of the independent retailer operating a department or specialty store.

Advertising Differences

National shoe retailing chains usually advertise primarily in local newspapers and feature price and the chain name (T. 1289, 1552).

Kinney splits the bulk of its $600,000 plus advertising budget (1955) between local newspaper and local radio advertising on the one hand and window display advertising on the other (T. 1513-4). Until 1958, Kinney ran a small ad in one issue of Parent's Magazine annually at a cost of $5,000, but that was the extent of its national advertising (T. 1513).

On the other hand, Wohl sells many branded lines which are supported by extensive national advertising. In addition, Wohl's own branded lines are advertised nationally (Gx. 165, R. 648, T. 1080). Wohl's ads in national magazines typically feature style and the names of Wohl's brands (T. 1763). A price range is mentioned, but price as such is not emphasized (T. 1570).

Promotional Differences

Wohl's and Kinney's promotional policies also differ markedly. Wohl's operation, especially in its popular price departments, is highly promotional and "bargain specials" are played up as a means of attracting customers (T. 1751). In addition, mail and telephone orders from the newspaper advertisements of specials play an important part in its business (T. 1751).

Kinney, on the other hand, runs occasional "item" promotions during the year, such as featuring a camp moccasin at the end of the school year, but does not constantly promote one style after another (T. 1516).

The merchandising differences between Wohl and Kinney are dramatized by the different emphasis of each on window displays. Kinney, whose stores are always on street level, lays great stress on its window trim and dedicates half of its total advertising budget to window display (T. 1514).

Department stores, on the other hand, spend five to six times the amount in newspaper advertising that they spend on windows and interiors (T. 1515). Shoes are not displayed in department store windows at all times, and from Kinney's point of view "their display of shoes is very, very poor" (T. 1535).

Wohl Variety and Kinney Uniformity

As previously noted, the sales policy of Wohl's leased departments is set by the department store in which Wohl has a leased shoe department (T. 1741). Wohl's aim, and achievement, is to "fit" itself into the sales policy of the department stores in which it operates (T. 1741). Since the sales policy of the different department stores varies widely, Wohl's merchandising and advertising differ from location to location as does the style, brand and price range of the shoes it carries (T. 1743).

Kinney's operation is entirely different in this respect. With allowances for climatic differences, Kinney carries the same stock in all of its family stores. Kinney's merchandising is centrally directed, and Kinney attempts to make a uniform presentation to the public at all Kinney locations (T. 1507).

Differences in Customers

There is a "department store customer" who concentrates her purchases in department stores because she likes the distinctive services offered by department stores (T. 1762). The reputation of the department store for integrity and fair dealing is a very important attraction, particularly when the families of the customer have shopped in the store over the years (T. 1762). The reputation is frequently associated with a liberal return policy (T. 2244) which is part of a program to obtain repeat business (T. 1764-5).

The availability of a charge account in a department store is also a big attraction, for customers are proud of their credit standing (T. 1762). The importance of the charge account is demonstrated by the fact that from 40% to 60% of Wohl's business in its better grade departments is charge business, as is from 35% to 55% of the business in its popular price departments (T. 1762).

Department stores attract customers who like to do all their shopping under one roof and those who like to browse (T. 1764). The fact that delivery services are typically available is also an attraction.

Kinney does not aim for this customer who desires service and is willing to pay for it and furnishes none of the attractions described above. Conspicuously absent are the charge accounts (T. 1512). Kinney sells only on a cash-and-carry basis. This policy affects return transactions as well as sales. Kinney's return policy is fair, but the psychology of a cash and carry sale works against the ready return of merchandise. The department store customer typically has no compunctions about returning merchandise and thinks of easy returns as part of the system.

Because of these merchandising differences, Kinney has never considered department stores as competition (T. 1533). Conversely, department store operators do not consider popular price chains like Kinney to be their competitors (T. 607, 1765).

Differences in Particular Areas

The foregoing basic differences between the retail operations of Brown and Kinney obtain generally in each of the markets in which they both operate. However, in any individual area, the differences can be even more pronounced.

Because of this, each market in which both Wohl and Kinney sell at retail must be examined individually. There are 92 such markets in the United States.* Detailed statistical data relating to the structure of these markets are contained in Defendant's Exhibits UUUUUU (R. 7155, T. 2593) and CCCCCCC (R. 7314, T. 2593). In the latter exhibit, the prices of every single pair of shoes sold at the local Wohl and Kinney outlets in 1955 in 58 of the 92 areas are included in a price line comparison. The 58 areas are those where the combined retail sales of Brown and Kinney constituted 5% or more of total retail shoe sales in such areas.

We will not set out the detail relating to those markets, but only briefly note some of the most salient facts demonstrated by these exhibits.

In 7 of the 58 areas, Brown sells only women's shoes. In one, Asheville, N. C., the Regal leased department sells only men's shoes. In 6 areas, over 90% of Brown's dollar sales at retail are of women's shoes. In 17 areas, over 80% of Brown's sales at retail are of women's shoes. The data for each area confirm Kinney's character as a family shoe store.

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* The district court refers to 141 communities as separate sections of the country for shoe retailing. In 64 of these communities Brown does not sell at retail at all. This leaves, according to the district court's count, 77 localities in which both Brown and Kinney sell at retail. The difference between the district court's count of 77 and the 92 areas to which we refer is explained by the fact that the district court's 77 communities include only those political subdivisions in which Brown and Kinney each had retail outlets. The 92 areas which we examine comprise not only these 77 political subdivisions referred to by the district court but also Standard Metropolitan Areas and other significant economic areas, which may include more than one political subdivision, as set forth in more detail below at page 161.

In a community such as Rockford, Illinois, for example, we find a typical pattern. There the distribution of Brown and Kinney sales in dollars by age and sex categories is as follows:

	Brown	Kinney
Men's		26.8%
Women's	100.0%	33.7%
Youth's and Boys'		6.4%
Growing Girls'		19.9%
Children's and Misses'		9.2%
Babies' and Infants'		4.0%

Even if we assume, which is not a fact, that all Kinney sales of women's shoes compete with all sales by Brown of women's shoes in Rockford, it is apparent that the product dimension of competition in Rockford is at once limited by the fact that all of Brown's sales are of women's shoes, whereas only 33.7% of Kinney's sales are of women's shoes. Brown is obviously not a competitor of Kinney in the sale of men's shoes, which accounts for 26.8% of Kinney's sales, or in the other categories in which Kinney sells, which account for 39.5% of Kinney's sales.

When differences of price and quality are examined, we find that 96.3% of Brown's sales of women's shoes were above $5 per pair, whereas only 17.3% of Kinney's sales were above $5 per pair.

Another method of comparing Brown's and Kinney's prices is to compare the median price of each.* When this is done for women's shoes in Rockford we see that Brown's median price was $9.51 and Kinney's median price was

* As pointed out above at page 86, the median price is that price which splits the outlet's dollar sales in equal parts; half representing the sales of shoes selling at higher prices, half representing the sales of shoes selling at lower prices.

$3.92. Thus, Brown's median price was over twice as large as Kinney's median price.

3. *Reasons for Merging*

Having described the differences between the operations of Brown and Kinney, we turn now to the reasons which led the respective managements of the two firms to decide to merge.

Brown's Reasons for Merging

Brown's interest in Kinney was not in its ancient and obsolete manufacturing facilities, but its successful retail operations in the lower price field—a field in which Brown did not operate (T. 1314-16). The acquisition of Kinney gave Brown therefore, an opportunity to diversify its investment into the lower price field (T. 1316).

Brown was acutely conscious of retail growth in the suburbs, more particularly, in shopping centers in the suburbs, to the detriment of shoe retailing in downtown areas (T. 1311-15). It was concerned by the fact that its traditional customers, independent retailers, located in downtown areas, were not taking leases in the new suburban shopping centers (T. 1315).

Brown, with its experience wholly outside the area of popular price family shoe stores, did not have the personnel to create from its own ranks a retail organization in the popular price field capable of moving into the new suburban shopping centers (T. 1317-8). It decided that it was wiser and more practical to buy an organization that was a successful retailer in the popular price field (T. 1318).

Brown believed that in the suburban shopping centers there might be a demand for a broader selection of shoes than chains such as Kinney typically sold in their outlets (T. 1323). Brown reasoned that as Kinney moved into new suburban locations, Kinney would find it desirable to supplement its basic popular price lines by adding some higher grade lines and that would give Brown "an opportunity we hoped to be able to sell them in that category" (T. 1323).

Kinney's Reasons for Merging

Kinney believed that it was in its interest to merge with Brown so that it could obtain immediately the overall capital it required to maintain its competitive position in the new suburban shopping areas (T. 1446-7). During the period 1953 through 1955, when the suburban retail movement was gaining great momentum, Kinney failed to keep pace with its competitors. While important chains, such as Melville (Tom McAn and Miles) and Shoe Corporation of America had added 150 and 100 retail outlets respectively, largely in suburban shopping centers, Kinney had increased its retail outlets by only 28 (T. 1446).

Kinney's future looked limited, for Kinney with its own resources was in a position to finance only a limited expansion program (T. 1489).

Since its capital structure was badly unbalanced, Kinney could not sell additional common stock without seriously diluting the equity of the common stockholder. In the opinion of Kinney management, the stockholders would not approve any dilution of their interest (T. 1447).

In addition, Kinney's long-term debt agreement contained restrictions on additional borrowings (T. 1446). Because of this financial bind, Kinney's management looked to Brown as a source of capital. Brown has made available the capital necessary to maintain Kinney's competitive position (T. 1563).

An important consideration to both Kinney management and its stockholders grew out of the fact that Kinney's common stock was closely held by a relatively small number of stockholders. An exchange of Kinney stock for Brown stock, which was listed on the New York Stock Exchange, would give the Kinney stockholders an asset having greater marketability. This was an important factor in favor of the merger to the Kinney stockholders who had large holdings (T. 1451).

Finally, Kinney's management believed it essential to preserve the independence of the Kinney organization as a retailer. The Kinney management's concern on this point was acute because in the 1930's Kinney had come close to disaster when the Kinney factories in an effort to counter decreased sales forced their shoe production into the Kinney retail stores; Kinney's retail operations had become successful only when its retail organization achieved independence from its manufacturing operation. Kinney's management favored the merger with Brown because it believed that Brown was sensitive to Kinney's need for independence in retailing, and would recognize it and would not attempt to force Kinney to purchase Brown's production (T. 1560).

Thus we see that the reason for the merger was a common desire of the managements of the two firms to bring together two essentially dissimilar but complementary firms.

SUMMARY OF ARGUMENT

The ultimate questions in this case turn upon the operative phrases in amended Section 7: "line of commerce", "section of the country" and "substantially to lessen competition". We contend that the district court erred in its conclusions under all three key phrases. Before examining the specific errors of the district court under these heads, however, three fundamental errors of the district court should be noted.

First, the district court ignored or disregarded the clear and undisputed facts of the market place in assessing the issues presented by these three key phrases.

Thus, the district court swept aside as immaterial all distinctions of price, quality, style and intended use. This determination was contrary to the undisputed evidence in the record that these matters are highly relevant. In addition, the district court's holding runs counter to the teachings of this Court in *United States* v. *du Pont & Co.*, 353 U. S. 586, 593, *United States* v. *du Pont & Co.*, 351 U. S. 377, 404 and *International Shoe Co.* v. *FTC*, 280 U. S. 291. *Cf. International Boxing Club, Inc.* v. *United States*, 358 U. S. 242. In furtherance of this error, the district court also ignored well settled trade usages in casting aside as irrelevant differences in merchandising methods among various sellers of shoes.

Equally fundamental was the district court's failure to distinguish the markets in which manufacturers of shoes sell their product to wholesalers and retailers on the one hand, and the quite different markets in which retailers sell shoes to the consuming public. Since "line of commerce" and "section of the country" refer to the product and geographical dimensions of real markets, this was vital error.

The district court made no examination of any relevant market place in shoe retailing. Without supporting evidence or analysis, it assumed that every market place had the same characteristics whether such market place be New York City or Marshalltown, Iowa.

Second, the district court failed to examine the impact of the Brown-Kinney merger upon competition in any of the sections of the country which it found. While the district court's ultimate conclusions are stated in the words of the statute, it is clear from the district court's opinion that no examination was made to determine the effect of the acquisition upon any particular market. No finding of the district court as to the effect upon competition can be related to any specific section of the country which it found. Rather, the district court seemed to assume that once it had found that the two firms were in competition with each other its task was done.

Third, the district court ignored two important changes which were made in Section 7 when it was amended in 1950.

(1) Before 1950, Section 7 condemned an acquisition if it substantially lessened competition "between the corporation whose stock is so acquired and the corporation making the acquisition" [38 Stat. 731]. Under amended Section 7, a finding of competition between the acquired and the acquiring companies does not answer the question which the statute poses. Rather, there must be proof of a substantial lessening of competition in an area of effective competition generally, without regard to the identity of the competitor.

The district court's examination was chiefly limited to the question of competition between Brown and Kinney, and upon that question we submit that it came to an erroneous conclusion. The only other matter which the district court speculated upon was the possible effects of the merger upon particular competitors of the merged firm. This was not enough under the terms of amended Section 7.

(2) Prior to its amendment in 1950, a violation of Section 7 was established if the proscribed effects were found "in any section or community". In the amendment to Section 7 in 1950, the words "or community" were eliminated so that amended Section 7 condemns only effects "in any section of the country". It is evident from this change and from the relevant legislative history that Congress intended to make amended Section 7 less restrictive than the statute stood before the amendment.

The district court failed to give effect to this amendment in its consideration of shoe retailing. It is undisputed that shoe retailing is conducted in local areas or communities, which we submit could not be on the basis of the record "sections of the country" under amended Section 7.

I

In reaching its conclusions on "lines of commerce", the district court looked to four factors as controlling. Two of these factors, interchangeability of shoe manufacturing processes and varying usages of trade classifications, relate only to shoe manufacturing. The remaining two factors, identity of appearance of shoes and ultimate use of the shoe by the consumer, relate only to shoe retailing.

On the undisputed facts, the first two factors are beside the mark. The fact is that shoes of particular quality, particular type and particular price are normally produced in a single factory. A single factory does not and cannot economically produce shoes of various quality, type and price categories. Similarly, the trade classifications which the district court finds to be confusing are well established in the industry and are used by sellers and buyers of shoes in the determination of the critical question of what shoes are bought and sold.

In shoe retailing, the district court's conclusion as to identity of appearance of shoes is not only incorrect but misleading The supposed identity of shoes relates only to the appearance of shoes when viewed in a display window. It does not relate to identity of price, style, quality or wear.

The district court's reliance upon the ultimate use of shoes by the consumer is not only totally without support in the record, but it is also irrelevant to the crucial question of the retailer's sale and the consumer's purchase of particular shoes.

More important, however, the factors selected by the district court do not relate to the markets in which manufacturers sell shoes to retailers nor do they relate to the markets in which retailers sell shoes to the ultimate consumer.

In ignoring "price, quality, style and intended use" of the shoes sold by Brown and Kinney in its "line of commerce" determination, the district court could state, and in fact was forced logically to conclude, that Brown and Kinney competed in every area in which each had an outlet.

The record is clear, however, that Brown and Kinney are not in competition. Even in areas where they both had retail outlets, they sell shoes of different quality, price, style and use to different customers. These material differences cannot be ignored in the context of the real markets in which shoes are bought and sold. *International Shoe Co.* v. *FTC,* 280 U. S. 291, 295; *International Boxing Club, Inc.* v. *United States,* 358 U. S. 242.

II

The "sections of the country" which the district court held appropriate for shoe retailing bear no relationship to economic reality.

In the first place, the district court was not clear whether each of the 141 localities it selected is a separate section of the country or whether the aggregate is a single section of the country. It is clear that the latter cannot stand, for there is nothing in the record to show that these 141 areas have any economic relationship to one another with regard to shoe retailing.

On the other hand, each separate locality cannot be considered a separate "section of the country" under Section 7, as amended, on the basis of this record and in view of the language and legislative history of the statute.

The district court did not attempt to analyze the nature and structure of shoe retailing in any of the 141 localities. It assumed, without analysis and without support in the record, that they were the same in all. The record makes it clear that the nature and structure of shoe retailing varies greatly in different places. The 141 communities selected by the district court include Marshalltown, Iowa (population 25,000), and New York City (population 8 million).

In addition, the district court failed to take into account the geographical reach of different shoe retailers—the shopping center or the downtown department store in contrast to the neighborhood shoe store.

When Section 7 was amended in 1950, the description of the economic area which the effects of acquisition are to be measured was changed from "any section or community" to "any section of the country". The elimination of the term "community" means that the 141 local areas—"communities"—cannot each be a separate "section of the country" within the meaning of amended Section 7.

Moreover, the district court selected the 141 communities on an arbitrary and incorrect basis. In each of these localities there is a Kinney outlet, but in only 77 is there a Brown (Wohl or Regal) retail outlet. The additional 64 localities were treated as if Brown operated a retail outlet in them solely because Brown sold shoes at wholesale to independent retailers who operate in the areas on the Brown Franchise Program or Wohl Plan entirely at their own risk and who exercise their own independent business judgment. This allocation is completely without justification.

The plain fact is that Brown does not sell at retail and thus does not compete with Kinney in these 64 communities.

III

The district court could not and did not delineate the respective competitive positions of Brown and Kinney in any of the sections of the country it found, and made no attempt to specify the way in which competition might be lessened in any locality by the acquisition. Without attempting to define the competitive role played by either firm or even to ascertain the market positions of the two firms, the district court declared that in shoe retailing the shares of each were "substantial".

Since, according to the district court, these percentages vary from one area to another, it was of the opinion, apparently, that all percentages, however small, are "substantial".

The fact that the combination of the market shares of Brown and Kinney could be "substantial"—in some sense of that word—does not meet the standard which Section 7 poses. It does not answer the question whether *competition* generally in the appropriate line of commerce in the appropriate section of the country may be substantially lessened by the acquisition.

The district court's findings as to sections of the country render impossible the required appraisal as to the competitive effect of the merger in shoe retailing. Since the sections of the country which the district court found bear no relation to economic reality, the district court, in discussing the competitive effects of the merger, was compelled to ignore the particular localities held to be sections of the country. All it did was to discuss the impact of the merger in vague language, casting its conclusions in terms of supposed general effects on shoe retailing on a nationwide basis. It is undisputed that shoe retailing is not national, but local in its nature.

For shoe manufacturing the district court concluded that the increase of market positions of the combined firms is slight—not substantial. Such a conclusion does not meet the standards laid down by amended Section 7.

The district court's conclusion that the vertical effects of the acquisition will bring about a lessening of competition in "manufacturing-retailing" also springs from a basic misconception about the standards of amended Section 7. The district court equates "reasonable probability" with a speculative possibility. It compares the acquisition to a bite of an apple and points out that the apple may be consumed by a delicate nibble as well as a ravenous gobble. There is nothing in the record to support the district court's theory that Brown's acquisition of Kinney presages further acquisitions in the shoe industry. Brown's acquisition of Kinney gives rise to no necessary inference that Brown (or any other firm) will acquire some third firm.

The district court's supposed trend of acquisitions by shoe manufacturers of shoe retailers cannot stand analysis, in the light of the undisputed evidence. On the basis of this record, the supposed trend is without economic significance.

The district court's conclusion that manufacturers acquiring retail outlets inevitably tend to take over the supply of such outlets is likewise meaningless. There is no reliable evidence with regard to what any manufacturer other than Brown has done. With respect to Brown, the record is perfectly clear that Brown has not taken over the supply of its retail outlets.

With respect to the contention that Brown will take over the supply of Kinney, two points should be made. In the first place, Brown's basic production is of shoes of a different quality than Kinney typically purchases. It would be uneconomical for Brown to seek to take over Kinney's supply when Brown's experience in the lower quality field has been consistently unprofitable. Moreover, even if Brown undertook to supply all of Kinney's requirements, no substantial lessening of competition could result. Kinney has only about 1% of national purchases. This does not represent a significant portion of any substantial market.

The so-called "advantages" enjoyed by company owned and company-controlled retail outlets, which the district court purported to find, are not borne out by the record. There is nothing to show that any possible advantages of the acquisition will be decisive.

No finding of a trend toward monopoly in the shoe industry is justified by the record. The district court's view that any increase in concentration violates amended Section 7—regardless of whether it increases market power—is plainly wrong.

In view of the competitive structure of the shoe industry and the definite lack of any trend toward concentration, it is inconceivable that the slight increases in market positions of the combined firm would result in any lessening of competition in the shoe industry in any section of the country. Indeed, it is by no means certain, in view of the dynamic and highly competitive nature of the shoe industry, that the combined firms increased sales—a temporary arithmetical increase in market position—will prove durable for any length of time.

ARGUMENT

Appellant attacks the conclusions of law of the district court. It contends that the district court utilized erroneous legal standards in appraising the evidence, much of which was undisputed, and that the use of such standards led the district court to ignore crucial, undisputed evidence of the highly competitive nature of the shoe industry which demonstrated conclusively that the challenged acquisition would not substantially lessen competition.

The district court's ultimate findings and holdings must be appraised against the legal standards of amended Section 7 which declare that an acquisition is unlawful if its effect may be "substantially to lessen competition" or to tend to create a monopoly "in any line of commerce" "in any section of the country".* We discuss these key phrases of the statute before examining them in the context of the Brown-Kinney acquisition.

Preliminarily, a fundamental point should be made concerning the phrases "line of commerce" and "section of the country". These are not arbitrary or subjective concepts, but refer to the product and geographic dimensions of real markets. The third key term "competition" has meaning only to the extent that it is related to a specific "market" defined in terms of product and geography.**

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* The history of the amendments to Section 7 is conveniently and concisely set forth in Handler and Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652-674 (1961).

** In *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320, decided February 27, 1961, a case arising under Section 3 of the Clayton Act, this Court observed (327):

> "Following the guidelines of earlier decisions, certain considerations must be taken. *First*, the line of commerce, *i.e.*,

In *United States* v. *du Pont & Co.*, 353 U. S. 586, 593, this Court observed that:

> "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition'."

The Court of Appeals for the Third Circuit made a similar observation in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 169 (3rd Cir. 1953), *cert. denied*, 346 U. S. 901:

> "Accordingly in order to determine the existence of a tendency to monopoly in the commercial banking or any other line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined."

A "line of commerce" and a "section of the country" can only be defined by an investigation of the actual workings of the market place. As Judge Wyzanski observed in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521:

> ". . . the problem of defining a market turns on discovering patterns of trade which are followed in practice."

> the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. *Second*, the area of effective competition in the known line of commerce must be charted by careful selection of the market area . . ."

While the ultimate tests under Section 3 are different from those under amended Section 7, the quoted language is fully applicable here.

The determination of the correct "line of commerce" and the appropriate "section of the country" are in a sense preliminary. Until and unless proper determinations are made on these points, no assessment can be made of an effect of an acquisition on "competition".

The key test of an acquisition's legality under amended Section 7 is whether or not it is likely "substantially to lessen competition".* The lessening which may be substantial is not identical in every merger situation, but whether or not a probable lessening attains a substantial level in a particular situation depends completely on the competitive structure of the markets affected.

Only by appraising the vigor of "competition" in a particular relevant market can it be determined whether or not a "substantial" lessening of competition in that market will probably result from the acquisition in question. The House Report on Amended Section 7 (H.R. Rep. No. 1191, 81 Cong., 1st Sess. 8 (1949)) recognized this when it declared that the amended Section is aimed at acquisitions which may result in a "significant reduction in the vigor of competition". This is also clear from the fact that the proscribed lessening of competition must be *substantial* in the sense that it will probably be injurious to the

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* Amended Section 7 also condemns acquisitions where the effect may be "to tend to create a monopoly". It is difficult to conceive a case where the "tend to create a monopoly" test of illegality could be invoked when the presumably broader "substantially to lessen competition" test was not applicable. Appellee offered no evidence at the trial relating to the monopoly test which did not bear on the broader point. The district court treats the two tests as if they were a single criterion except, perhaps, when it adverts to Brown's alleged "dominant" position in the industry. We comment on this point at pages 199 *et seq.*

public. In the words of this Court in *International Shoe Co.* v. *FTC*, 280 U. S. 291:

> "Mere acquisition . . . of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisition as probably will result in lessening competition to a substantial degree . . . ; that is to say, to such a degree as will injuriously affect the public." (at 289)

To the same effect, see *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922); *Pennsylvania R.R.* v. *ICC*, 66 F. 2d 37 (3rd Cir. 1933), *aff'd*, 291 U. S. 651 (1933); *V. Vivaudou, Inc.* v. *FTC*, 54 F. 2d 273 (2d Cir. 1931; *Temple Anthracite Coal Co.* v. *FTC*, 51 F. 2d 656 (3rd Cir. 1931); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935).*

The 1950 amendment of Section 7 eliminated the condition that the effect of an acquisition substantially lessen competition "between the corporation whose stock is so acquired and the corporation making the acquisition" [38 Stat. 731] by deleting the quoted phrase. Under the amended

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* The amendment of Section 7 in 1950 did not change the public injury test of *International Shoe*. The legislative history of amended Section 7 is crystal clear that the public injury test is preserved. The House Report (H.R. Rep. No. 1191, 81st Cong., 1st Sess. 7 (1949)) quotes with approval the rule laid down by this Court in the *International Shoe* case with its emphasis on "public injury". The Report expressly notes that "The language in the amendment . . . follows closely the purpose of the Clayton Act as defined by the Supreme Court in the International Shoe Case" [at 7].

In addition, Representative Celler, who was in charge of the bill on the floor of the House, referred with approval to the public injury test of *International Shoe* and declared it to be "definitely the law of the land" [95 Cong. Rec. 11487 (1949)]. Senator O'Conor, who was in charge of the bill on the Senate floor also noted that the amendment "follows closely" the *International Shoe* case [96 Cong. Rec. 16435 (1950)].

Section, a probable lessening of competition between the acquiring and acquired companies is no longer sufficient to invalidate an acquisition; there must be proof of a substantial lessening of competition in an area of effective competition generally, without regard to the effect on any particular competitor. It is clear that the district court failed to give effect to this critical amendment.

The district court employed the language of amended Section 7 in declaring that the probable effect of the acquisition by Brown of Kinney would be "substantially to lessen competition". It is clear from the opinion, however, that the district court did not seek to measure the impact of the acquisition on *competition*, indeed, it took the position that an appraisal of the nature, extent and vigor of competition in the shoe industry was not required.

Ignoring the statutory command for an appraisal of the effect of the acquisition on "competition", the district court focused its attention on the possible effects of the acquisition on particular manufacturers and retailers who might be potential competitors of Brown or Kinney. This was fundamental error, for it is not possible harm to a particular *competitor*, but probable harm to *competition*, which is critical.*

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* The Federal Trade Commission made specific note of this point in a recent opinion, *A. G. Spalding & Bros., Inc.*, 3 Trade Reg. Rep. ¶28694, at 37357-8 (1960), *appeal docketed*, No. 13277, 3d Cir., June 10, 1960:

> "The hearing examiner, in concluding that the merger would not have the effect of lessening competition nor the tendency to create a monopoly in the aforementioned lines of commerce, placed considerable emphasis on the fact that neither of the officials of Wilson and MacGregor who had testified was questioned as to whether his company had been adversely affected by the acquisition. This was clearly an unsound basis for his conclusion. The statute refers to lessening of competition and not to injury to competitors."

Having ignored the competitive structure of the shoe industry, the district court could not advance any persuasive reason why a *probable* lessening of competition would occur. It could only speculate as to possibilities. Possibilities may not form the basis of a violation of amended Section 7. In the language of the Senate Report on the Section: "The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere *possibility* but only to the reasonable *probability* of the prescribed [proscribed?] effect . . . " [Emphasis supplied]. In *United States* v. *du Pont & Co.,* 353 U. S. 586, 598, this Court has clearly laid down the rule that "probability" is the test.

We might observe here that the district court, at this stage of its analysis, could do no more than speculate as to possible effects on competitors. Having failed to find any "line of commerce" which corresponded to economic reality and any "section of the country" which represented an area of effective competition, the district court arrived at the crucial question as to the probable impact of the acquisition on competition, without any possibility of reaching a conclusion which would meet the statutory standard.

We demonstrate in the pages which follow that the district court committed fundamental errors in its conclusions as to "line of commerce". These errors in and of themselves vitiate certain of the district court's holdings with respect to "section of the country".

We further demonstrate that the district court committed fundamental errors in its conclusions on "section of the country" relating to shoe retailing. The district court's errors on "line of commerce" and "section of the country" also make invalid its holding on the effect of the merger on "competition". Moreover, as we shall show, the district court committed further errors in its conclusions on the effect of the merger on "competition".

We now turn to an analysis of the effect of the acquisition on (A) shoe manufacturing, (B) shoe retailing, (C) shoe "manufacturing-retailing" and (D) the shoe industry.

A. Effect of the acquisition on shoe manufacturing.

Considering the effect of the acquisition by Brown of Kinney on shoe manufacturing alone, the district court concluded that it would "but *slightly* lessen competition" (T. 75). This holding falls short of the *substantial* lessening of competition required by amended Section 7.

In the light of this express finding and the whole opinion, it is apparent that the district court's conclusion was based solely on a conviction that any combination of facilities in the same industry means perforce that competition has been lessened to some degree and that the minuteness of the degree is immaterial. As we shall point out, this mistaken notion pervades the district court's opinion and invalidates its ultimate holding not only as to shoe manufacturing but also as to every other aspect of the case.

1. The lines of commerce selected by the district court bear no relation to the markets in which shoes are sold by shoe manufacturers.

The product dimension of a market, a "line of commerce" within the meaning of Section 7, was described by this Court in *United States* v. *du Pont & Co.*, 353 U. S. 586, 593-4, as including products which have "sufficient peculiar characteristics and uses" to constitute them products distinct from all other products. In an earlier case, ***United States* v. *du Pont & Co.*,** 351 U. S. 377, 404, this Court defined the product "market" (a line of commerce) as composed of products "that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered." The tests are wholly consistent and refer, in any particular context, to the same economic reality.

The district court paid lip service to the tests laid down by this Court in the two *du Pont* cases but failed to apply them. Indeed, the district court expressly found that price, quality, style and intended use were irrelevant and immaterial in the determination of the lines of commerce. The district court held that "'men's shoes', 'women's shoes' and 'children's shoes' each considered separately" constitute a line of commerce "regardless of quality, style, price and intended use" (T. 58).

This conclusion completely ignores the standards of the *du Pont* cases and runs squarely counter to the earlier holding of this Court in *International Shoe Co.* v *FTC*, 280 U. S. 291. In that case, this Court considered an order of the Federal Trade Commission which had directed International Shoe Company to divest itself of an acquired subsidiary, McElwain Shoe Company. Although both International and McElwain manufactured men's dress shoes, this Court found that they were not in competition and set aside the Federal Trade Commission's divestment order. This Court said (280 U. S. at 295-97):

> "It is true that both companies were engaged in selling dress shoes to customers for resale within the limits of several of the same states; but the markets reached by the two companies within these

states, with slight exceptions hereafter mentioned, were not the same. Certain substitutes for leather were used to some extent in the making of the McElwain dress shoes; and they were better finished, more attractive and modern in appearance, and appealed especially to city trade. The dress shoes of International were made wholly of leather and were of a better wearing quality; but among the retailers who catered to city or fashionable wear, the McElwain shoes were preferred. The trade policies of the two companies so differed that the McElwain Company generally secured the trade of wholesalers and large retailers; while the International obtained the trade of dealers in the small communities. When requested, the McElwain Company stamped the name of the customer (that is the dealer) upon the shoes, which International refused to do; and this operated to aid the former company to get, as generally it did get, the trade of the retailers in the larger cities. . . .

"It is plain from the foregoing that the product of the two companies here in question, because of the difference in appearance and workmanship, appealed to the tastes of entirely different classes of consumers; that while a portion of the product of both companies went into the same states, in the main the product of each was in fact sold to a different class of dealers and found its way into distinctly separate markets. Thus it appears that in respect of 95 per cent. of the business there was no competition in fact and no contest, or observed tendency to contest, in the market for the same purchasers; and it is manifest that, when this is eliminated, what remains is of such slight consequence as to deprive the finding that there was substantial competition between the two corporations, of any real support in the evidence."

Another relevant authority is *International Boxing Club, Inc.* v. *United States,* 358 U. S. 242, where this Court sustained the district court's finding that "the promotion of professional *championship* boxing events" constituted "a separate identifiable market". This Court noted that the district court in that case had made a detailed analysis of the real economic markets in which boxing matches are promoted and found that championship bouts were a world apart. Notably, revenues from attendance, television rights, and movies were substantially greater than those for non-title fights, and the spectators paid "substantially more" for tickets. One statement of the Court, although in terms directed to the Sherman Act, is equally relevant to a Section 7 case: a determination as to the relevant product market "involved distinctions in degree as well as distinctions in kind".*

In reaching its conclusion on line of commerce, the district court did not distinguish between the lines of commerce appropriate for shoe manufacturing and the lines of commerce appropriate for shoe retailing. The basic reason for this error was that the district court did not examine either the facts of the market place in which shoes are sold by manufacturers to retailers or the facts of the quite different market place in which retailers sell the shoes to their customers.

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* In *A. G. Spalding & Bros., Inc.,* 3 Trade Rep. ¶28694 (1960), *appeal docketed,* No. 13277, 3d Cir., June 10, 1960, the Federal Trade Commission adopted lines of commerce in the athletic equipment field which were delineated by price. With respect to baseballs the Commission found significant differences between those selling for over $9.00 a dozen and those selling for less. Noting that higher priced balls (which are yarn wound while the lower priced are not) are sold for use in organized competitive games, whereas the lower priced are in the nature of toys, the Commission described the two categories (at 37353) as follows:

> "They are of different quality, are sold at different prices, and have different end-uses and different markets."

There is no evidence in the record to support the district court's conclusion that quality, style, price and intended use are meaningless and entitled to no weight. On the contrary, all the evidence in the record indicates that these factors are vital and meaningful in the context of the market place.

In its Motion to Affirm, appellee attempted to defend the district court's holding that price, quality, use and style are immaterial by arguing that there were no significant differences in these categories between the two firms. Appellee made a substantially similar argument to the district court. Since the district court failed to make any such findings, it is clear that it did not adopt appellee's submission.

An analysis of the actual markets in which Brown and Kinney sells shoes as *manufacturers* demonstrates (i) that differences of quality, style, price and intended use separate very distinct markets and (ii) that Brown basically competes in markets with one set of characteristics and Kinney basically competes in another market with entirely different characteristics.

As noted above, at pages 70 through 78, there are vital differences between Brown and Kinney in respect of the quality, style, price and the intended use of the shoes which they manufacture. These facts are not subject to dispute; they were established from records of the companies which were conceded to be accurate. They demonstrate that Brown and Kinney do not compete as manufacturers.

Brown's production as a shoe manufacturer is significantly higher in quality and price than Kinney's production. In those categories of shoe production where there is an overlap, such overlap is insignificant.

On the question of price and quality alone, a brief summary will indicate the differences in these matters between the two firms. In women's shoes, approximately 86% of Brown's production sells at a manufacturer's selling price of $3.00 and above, whereas only 9% of Kinney's production of shoes in women's sizes sells at that price and above.* In men's shoes about 66% of Brown's production sells at a manufacturer's selling price of $4.80 and above, whereas only 14% of Kinney's production sells at that price and above. In youth's and boy's shoes 91% of Brown's production sells at a manufacturer's selling price of $4.20 and above, whereas only one-twentieth of 1% of Kinney's production sells at that price and above. In misses' and children's shoes about 75% of Brown's production sells at a manufacturer's selling price of $3.00 and above, whereas only 10% of Kinney's production sells at that price and above. As noted above, at pages 74 through 78, even where the two firms sell shoes in the same price categories, the shoes in such price categories widely diverge when broken down by use types.

Brown's most important production category is women's shoes, accounting for 56% of the pairs which Brown produced in 1955. Only 17% of Kinney's production is of women's shoes. Kinney's most important category of production is in men's shoes other than work shoes which accounted for 45% of the pairs Kinney produced in 1955. Brown's production of men's shoes accounted for only 14% of the pairs which it produced in 1955.

Brown and Kinney as manufacturers sell to different classes of customers. Brown sells 85% of its production,

* The percentages given here are derived from the tables at pages 75 through 78.

consisting of nationally advertised branded quality shoes, to independent retailers, including department stores located largely in downtown areas of cities. Only about 15% of Brown's production consists of make-up shoes made to buyers' specifications.

Kinney sells no nationally advertised branded shoes and does not sell to independent retailers. 60% of Kinney's production in pairs and in dollars is sold in its own retail stores; its remaining production is sold on a make-up basis to a few large chain retailers.*

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* The district court's finding: "During this same period [1954-7] Kinney's sales to independent retailers diminished" (T. 50) is totally without foundation in the record. In the first place, Kinney makes no sales at all to any customers who could be described as "independent retailers". All of Kinney's manufacturing sales are, as noted above, made on a make-up basis to large chain retailers who redistribute the shoes through their own organizations. None of the shoes which Kinney sells at wholesale are nationally advertised. It is nationally advertised shoes, such as Brown carries in stock, which are purchased by independent retailers and are subject to order and delivery from time to time as the independent retailer needs them.

Second, Kinney's sales to outside customers increased from 1955 to 1957 as follows (Dx. X, R. 3299, T. 1928):

	1955	*1956*	*1957*
Sales to outside customers	$4,249,874	$4,519,331	$4,796,010

The so-called decline in Kinney's sales to independent retailers which we have just shown to be non-existent is used by the district court for an alleged contrast with Kinney's wholesale sales to Brown and Wohl. The district court asserts that "By 1957 Kinney wholesale sales to Brown and Wohl retail outlets tripled and by the first half of 1958 it more than quadrupled" (T. 50). The relevant dollar sales to Brown and Wohl are as follows (Dx. X, R. 3299, T. 1928):

1955	*1956*	*1957*	*1958 (Six Months)*
$23	$12,450	$34,680	$55,516

Quite apart from the deficiency of the district court's arithmetic it will be readily seen that from 1955 to 1957 Kinney's sales to outside customers increased by roughly a half million dollars. This is in sharp contrast to the total amount of its sales to Brown, including Wohl, set forth above.

As we have noted at pages 79 through 81, Brown and Kinney have few common customers for make-up shoes. Even where there are common customers, there are significant differences in the age/sex category of the shoes sold to common customers. There are also significant differences of quality and construction in those limited instances where common customers for make-up shoes purchase in the same age/sex category. The district court completely ignored these important differences between Brown and Kinney.

In reaching its conclusions on "line of commerce", the district court looked to four factors. Two of the factors relied on by the district court, the identity of appearance of shoes in a shop window and the interchangeability of use of shoes by the ultimate consumer, can only be relevant, if at all, to shoe retailing. They have no relevancy to the markets in which shoe manufacturers sell and shoe retailers purchase shoes for sale to the ultimate consumer.* The district court advanced only two reasons relevant to shoe manufacturing in support of its conclusion: (a) the possible "interchangeability in a manufacturing process" (T. 56) and (b) the trade use of shoe classifications on an age/sex basis (T. 57).

a. Interchangeability in shoe manufacturing

As to interchangeability in the manufacturing process, the district court's conclusions are without foundation in the record.

The district court correctly notes that men's shoes are produced in different plants from women's and children's

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* We discuss these reasons at pages 139 through 144, *infra*.

shoes and that women's shoes are produced in different plants from men's and children's shoes. What the district court does not note is that a given factory usually uses only one type of construction at any one point of time (T. 1652).

The district court's statement that "welt shoes may be made for men, women and children" (T. 56) is true as a theoretical academic statement but does not reflect the realities of shoe manufacturing. The undisputed facts in the record are that the welt process* is not used generally for making women's shoes and, indeed, for many years the cement process* has been used to a greater and greater degree for the manufacture of women's shoes (T. 2138-9).

Further, the various processes of shoe making are not readily interchangeable among themselves. Time, different machinery, and the expenditure of money is required to convert from one process to another. Workers in a shoe factory are normally trained to work on a particular type of shoemaking process (T. 2154). If the factory is to be converted from one process to another, the workers must be retrained for the new process (T. 2154-6).

Shoe workers are traditionally paid on a piece-rate basis at rates directly related to the quality of the shoes which they produce (T. 2157). From the standpoint of the shoe worker, this means that if a shoe worker trained to produce higher grade shoes were shifted to work on lower grade shoes, he would be compelled to produce more units in order to make the same wages as he made working on higher

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* Shoe manufacturing processes are described in the footnote to page 20.

grade shoes. As a matter of human experience, shoe workers cannot be persuaded to make such a change (T. 2156). It follows, therefore, that if a manufacturer has trained shoe workers to produce medium or high grade shoes, it is not economically feasible for the manufacturer to produce low grade shoes with the same workers. Accordingly, a shoe factory cannot be downgraded in its production as a matter of sound economics (T. 2155-6).

For these reasons, shoe factories tend to specialize in the manufacture of a particular type and grade of shoes (T. 1547). Women's dress shoes retailing at $30 per pair are simply not produced in the same plant which produces women's dress shoes retailing at $5 per pair.

Thus, one of appellee's witnesses produced men's dress shoes in one plant and men's casual shoes in a second plant (T. 428). Production in a single factory is typically limited to narrow price and quality lines. As one witness for appellee testified (T. 1124):

> "You buy an 8.98 shoe from a manufacturer that makes 8.98 pumps, and buy a 12.98 pump from a manufacturer that makes 12.98 pumps."

b. Trade use of shoe classifications

The district court's point with regard to shoe classification is not well taken and is unrealistic since the undisputed evidence in the record shows that shoes are classified by manufacturers in categories which correspond to the intended use for which they are to be put as well as on age/sex and price/quality basis (T. 2468).

Thus, men's shoes are broken down into men's dress, men's casual, men's sport, and men's work shoes. Manufacturers selling such shoes and retailers purchasing them use these categories to distinguish between styles and intended use of the shoes. A retailer wishing to purchase sport shoes cannot purchase such shoes from a manufacturer producing only dress shoes. Nor does a retailer desiring to add a sport shoe to his stock purchase a dress shoe to sell as a sport shoe.

The district court did distinguish between men's and women's shoes, but lumped all children's shoes together without regard to sex (T. 57). This was plainly wrong; a little boy does not wear a little girl's black patent leather pump.

In the case of children's shoes a further distinction is dictated. Children's shoes are classified additionally by size. There are infants' and babies' shoes, misses' and growing girls' shoes, youths' and boys' shoes. This distinction reflects actual differences in intended use. A male baby cannot wear a growing boy's shoe; the shoe would simply not fit. This distinction pervades the entire field of children's shoes, and hence one category of children's shoes cannot in any sense be interchangeable with another category of children's shoes.

2. The effect of acquisition will not be to lessen competition in shoe manufacturing.

Brown produced 4% and Kinney produced 0.4% of the footwear produced in the United States. Thus, their combined total is 4.4% overall.*

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* The district court gives two erroneous figures for the combined total of Brown and Kinney. At one point (T. 49) this figure is said to be 5%; at another point (T. 71) the figure is said to be 5.5%.

A more detailed analysis of the production of the two firms by age-sex categories is shown on the following table:

1955 PRODUCTION AND PRODUCTION SHARE BY TYPES OF FOOTWEAR, INDUSTRY, BROWN AND KINNEY*
(Production in thousand pairs)

	Industry	% of Total	Brown	% of Total	Kinney	% of Total	Brown-Kinney Combined	% of Total
'otal Footwear	642,507	100	25,549	4.0	2,894	0.4	28,443	4.4
Men's Other Than Work	77,877	100	3,452	4.4	1,298	1.7	4,750	6.1
Men's Work	25,784	100	99	0.4	91	0.4	190	0.7
Youths' and Boys'	22,097	100	1,440	6.5	577	2.6	2,017	9.1
Women's	270,908	100	14,252	5.3	482	0.2	14,724	5.4
Misses' and Children's	74,539	100	4,452	6.0	446	0.6	4,898	6.6
Infants' and Babies'	38,002	100	1,864	4.9	—	—	1,864	4.9
Athletic Shoes	4,723	100	—	—	—	—	—	—
Slippers for House Wear	68,069	100	—	—	—	—	—	—
Canvas-Upper, Rubber-Soled	57,138	100	—	—	—	—	—	—
All Other Footwear	3,370	100	—	—	—	—	—	—

* Sources: Dx. PPPPP, R. 7081, T. 2466; Dx. II, R. 3345, T. 2003.

This table indicates that the Brown-Kinney combined share of any of the above categories is small. For instance, in women's shoes (Brown's most important category), Kinney added only .2%; in misses' and children's shoes, Kinney added only .6%, and in men's other-than-work shoes, Kinney added only 1.7%. Kinney produced no infants' and babies' shoes. In only one category, the youths' and boys' category, is the combined total above 6.6%. There it is 9.1%. In this category, which is a relatively small part of national production, Kinney added only 2.6% to Brown's share.

An important qualification on the use of the data contained in the above table is that it fails to take into account price/quality and use differences. The fact is that both price categories and the use classes of dress, casual, sport and work are employed by the shoe industry and the Census Bureau to differentiate among basically separate types of shoes (T. 2467-8). When the data is further refined to reflect price/quality and use differences, the insignificant impact of the merger on shoe manufacturing is even more apparent.

We now turn to that analysis in the tables which follow. These tables show the following:

1. There are wide differences in the prices and quality between the shoes which Brown and Kinney produce.

2. In cases where Brown and Kinney produce shoes in the same age-sex category at the same price level, there are wide divergences between the use categories of the shoes produced by the two firms.

3. In no case is the addition of production of one firm in any one category a significant addition to the production of the other firm computed as a percentage of national production.

These tables are based upon Census data* and production figures of Brown and Kinney.

* The prices employed in the following tables are wholesale prices, *i.e., manufacturers* f.o.b. selling prices, in the categories used by the Bureau of Census (T. 2467). The Census wholesale price spreads of 60 cents equal approximately $1 at the retail level because of the retail mark up (T. 2484).

The data published by the Census shows the total production of the shoe industry classified by use types. This Census data also shows total industry production broken down into categories of major age-sex groups and price lines. The Census figures do not, however, give industry totals for each use type within a particular price category.

The production of Brown and of Kinney, however, has been sub-classified by use type and by price category. To facilitate comparisons the production of each firm in each of these price-use cells is expressed as a *percentage of the total industry shoe production* in the age-sex and price categories which *are* available from the Census, not as a percentage of industry shoe production in the particular price-use cell, because that data is not available. This data is presented in tabular form in the following pages.

In men's shoes, the overlap in price line and use type categories is very small (Dx. DDDDDD, R. 7104, T. 2593).

MEN'S OTHER THAN WORK, 1955
BROWN AND KINNEY PRODUCTION SHARE
BY PRICE CLASS AND SHOE TYPE

Mfrs. Selling Price f.o.b. Plant (dollars per pair)	Men's Dress		Men's Casual		Men's Sport		Total Men's	
	Brown[1]	Kinney	Brown[1]	Kinney	Brown[1]	Kinney	Brown[1]	Kinney
0– 1.80	—	—	—	.3%	—	—	—	.3%
1.81– 2.40	—	—	—	—	.1%	*	.1%	—
2.41– 3.00	—	*	—	.1	.6	.1%	.6	.2
3.01– 3.60	—	1.2%	—	2.9	.1	.4	.1	4.5
3.61– 4.20	.2%	1.6	*	3.2	—	1.6	.2	6.4
4.21– 4.80	.7	1.8	.4%	1.0	—	.7	1.1	3.5
4.81– 5.40	2.0	1.7	3.0	.2	—	.2	5.0	2.1
5.41– 6.00	9.1	.2	4.7	—	—	—	13.8	.2
6.01– 7.20	4.0	*	2.0	—	*	—	6.0	—
7.21– 8.40	7.5	—	*	—	—	—	7.5	—
8.41–10.20	5.6	—	—	—	—	—	5.6	—
10.21–12.00	*	—	—	—	—	—	—	—
12.01 and over	*	—	—	—	—	—	—	—
ALL	3.1%	.7%	1.3%	.6%	*	.3%	4.4%	1.6%

* Less than .1% and accordingly disregarded.

[1] Brown data exclude 2,659 pairs of shoes which cannot be classified by type.

The price category where overlap is largest is $4.81 to $5.40. Here Brown's share of national production is 5% and Kinney's share is 2.1%. Breaking down their shares by use classes, we find most of Kinney's share (1.7%) and a good part (2%) of Brown's is accounted for by the production of men's dress shoes.

Most of Brown's share in this price range is accounted for by the production of casual shoes (3%) whereas Kinney's share of production in this price class accounted for by casual shoes is small (0.2%). In the $4.81 to $5.40 price category Kinney has some production of sport shoes whereas Brown has none.

With respect to men's work shoes, the combined Brown-Kinney share in all classes was only 0.7% and the maximum combined share in any one category is 3.2%.* In the upper quality levels there is no overlap and at the levels where there is overlap it is very small.

With respect to women's shoes, in no price class does Kinney have a share which exceeds 0.7% of national production.**

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* The data for men's work shoes is contained in Dx. SSSSS, R. 7085, T. 2593.

** Source: Dx. FFFFFF, R. 7107, T. 2593.

WOMEN'S SHOES, 1955
BROWN AND KINNEY PRODUCTION SHARE BY
PRICE CLASS AND SHOE TYPE

Mfrs. Selling 'rice f.o.b. Plant dollars per pair)	Women's Dress		Women's Casual		Women's Sport		Total Women's	
	Brown	Kinney	Brown	Kinney	Brown	Kinney	Brown	Kinney
,ess than 0.61	—	—	—	—	—	—	—	—
0.61– 1.20	—	—	—	—	—	—	—	—
1.21– 1.80	.1%	*	—	—	—	—	.1%	—
1.81– 2.40	.2	—	*	.2%	*	*	.2	.2%
2.41– 3.00	.1	.2%	1.5%	.2	2.1%	.3%	3.7	.7
3.01– 3.60	.9	*	2.2	.1	2.0	.1	5.1	.2
3.61– 4.20	5.2	*	.7	—	1.3	—	7.2	—
4.21– 4.80	5.9	—	2.3	—	4.0	—	12.2	—
4.81– 5.40	6.7	—	2.4	—	1.3	—	10.4	—
5.41– 6.00	5.2	—	.6	—	.3	—	6.1	—
6.01– 7.20	19.7	—	5.1	—	.1	—	24.9	—
7.21– 8.40	3.4	—	.1	—	*	—	3.5	—
8.41–10.20	—	—	—	—	—	—	—	—
0.21–12.00	—	—	—	—	—	—	—	—
ALL	3.1%	*	1.2%	.1%	1.0%	.1%	5.3%	.2%

* Less than .1%.

The only price classes in use types where overlap does occur are lower than the price classes in which Brown's production is concentrated. In addition, the overlaps occur in use type categories where the highest production of either company is not more than 2.2% of national production of all women's shoes in that price category.

With respect to youths' and boys' shoes, there is an almost complete lack of overlap between Brown production and Kinney production in use types.*

* Source: Dx. HHHHHH, R. 7110, T. 2593

YOUTHS' AND BOYS' SHOES, 1955
BROWN AND KINNEY PRODUCTION SHARE BY
PRICE CLASS AND SHOE TYPE

Mfrs. Selling Price f.o.b. Plant (dollars per pair)	Youths' and Boys' Dress		Youths' and Boys' Casual		Youths' and Boys' Sport		Total Youths' and Boys'	
	Brown[1]	Kinney	Brown[1]	Kinney	Brown[1]	Kinney	Brown[1]	Kinney
Less than 0.61	—	—	—	—	—	—	—	—
0.61– 1.20	—	—	—	—	—	—	—	—
1.21– 1.80	—	—	—	—	—	—	—	—
1.81– 2.40	—	.1%	—	.1%	*	*	—	.2%
2.41– 3.00	—	1.2	—	1.7	.1%	—	.1%	2.9
3.01– 3.60	*	7.9	*	2.0	2.0	.4%	2.0	10.3
3.61– 4.20	.8%	.8	.1%	.1	*	.2	.9	1.1
4.21– 4.80	19.9	*	14.7	*	11.2	—	45.8	—
4.81– 5.40	12.5	—	.5	—	—	—	13.0	—
5.41– 6.00	3.7	—	—	—	—	—	3.7	—
6.01– 7.20	.1	—	—	—	—	—	.1	—
7.21– 8.40	4.3	—	—	—	—	—	4.3	—
8.41–10.20	—	—	—	—	—	—	—	—
10.21–12.00	—	—	—	—	—	—	—	—
12.01 and over	—	—	—	—	—	—	—	—
ALL	3.4%	1.8%	1.6%	.7%	1.5%	.1%	6.5%	2.6%

[1] Brown data exclude 2,928 pairs of work shoes.

* Less than .1%.

The only perceivable overlap occurs in the $3.01-$3.60 category of sport shoes. Even this overlap is insignificant because Brown's production in this category is 2% of national production of youths' and boys' shoes in this price category, and Kinney production is but 4/10th of 1% of such production, making a combined total of 2.4%. The production of both companies in all other categories where some overlap occurs is completely trivial.

In each case where there is an overlap between Brown and Kinney production of misses' and children's shoes, Kinney's share of the national production of such shoes in the price class involved is less than 1% of such production.*

* Source: Dx. JJJJJ, R. 7113, T. 2593

MISSES' AND CHILDREN'S SHOES, 1955
BROWN AND KINNEY PRODUCTION SHARE BY
PRICE CLASS AND SHOE TYPE

Mfrs. Selling 'rice f.o.b. Plant dollars per pair)	Misses' and Children's Dress		Misses' and Children's Casual		Misses' and Children's Sport		Total Misses' and Children's	
	Brown[1]	Kinney	Brown[1]	Kinney	Brown[1]	Kinney	Brown	Kinney
.ess than 0.61	—	—	—	—	—	—	—	—
0.61– 1.20	—	—	—	—	—	—	—	—
1.21– 1.80	—	*	.1%	—	.5%	—	.6%	—
1.81– 2.40	1.0%	.5%	1.2	.8%	1.1	.2%	3.3	1.5%
2.41– 3.00	.4	.5	1.4	.1	1.7	.6	3.5	1.2
3.01– 3.60	2.8	.4	.4	—	5.2	.3	8.4	.7
3.61– 4.20	5.8	—	.1	—	14.0	*	19.9	—
4.21– 4.80	—	—	.1	—	.7	—	.8	—
4.81– 5.40	—	—	—	—	.7	—	.7	—
5.41– 6.00	—	—	—	—	.1	—	.1	—
6.01– 7.20	—	—	—	—	[2]	—	—	—
7.21– 8.40	—	—	—	—	—	—	—	—
8.41–10.20	—	—	—	—	—	—	—	—
'0.21–12.00	—	—	—	—	—	—	—	—
'2.01 and over	—	—	—	—	—	—	—	—
ALL	1.6%	.2%	.6%	.2%	3.8%	.2%	6.0%	.6%

[1] Brown data exclude 20,304 pairs of boots.

[2] Combined with previous class.

* Less than .1%.

The only price category in which there is overlap and the combined share of national production exceeds 5% is \$3.01-\$3.60. Here Brown's share is 8.4% and Kinney's is 0.7%.

The Brown-Kinney merger cannot affect competition at all in infants' and babies' shoes at the manufacturing level because Kinney produces no shoes of this type.

The foregoing tables put Brown and Kinney production in perspective by measuring it against the background of national shoe production. The insignificant market shares disclosed take on additional significance when they are considered with other factors demonstrating the highly competitive nature of the shoe industry as a whole.

As we have pointed out in detail at pages 14 through 22, there are a large number of firms (over 1,000 even on the district court's finding); the largest firms have a relatively small segment of total production, and the share of the four largest firms is exactly what it was in 1939; the production share of small firms is growing; entry is easy; there are no technological barriers to entry; shoe machinery may be leased; initial capital requirements are modest and the optimum size plant is small.

Against this competitive background, it is inconceivable that the combination of the insignificant shares of Brown and Kinney of national shoe production could lessen competition in shoe manufacturing—even *slightly*.

B. Effect of the acquisition on shoe retailing.

1. Lines of commerce in shoe retailing.

The conclusions of the district court with respect to lines of commerce in shoe retailing were the same as those reached for shoe manufacturing. The district court held that price, quality, style and intended use were immaterial and irrelevant for determining lines of commerce in shoe retailing. For the reasons set forth above at pages 118 through 121, we contend that this was vital error as a matter of law.

An analysis of the actual markets in which Brown and Kinney sell shoes as retailers demonstrates that there are important differences of quality, style and price between Brown and Kinney and that Brown basically competes at retail in markets with characteristics quite distinct from those in which Kinney competes.

As we have pointed out at pages 84 through 90, there are substantial differences in the price and quality of shoes which Wohl and Regal sell at retail and the price and quality of shoes which Kinney sells at retail.

92% of Kinney's men's shoes sell at retail below $9.00 per pair. On the other hand, 85% of the men's shoes which Wohl and Regal sell at retail are above $9.00 per pair.

In women's shoes, which Regal does not sell, 86% of women's shoes sold by Wohl's better grade departments retail above $5.00 per pair. 89% of Kinney's women's shoes sell below $5.00 per pair at retail. In Wohl's popular price departments, 56% of Wohl's women's dress shoes sell at over $5.00 per pair at retail, whereas 99% of Kinney's sales of women's dress shoes sell for less than $5.00 per pair at retail.

In children's shoes, which Regal does not sell, the same price and quality differentiations carry forward. 72% of Kinney's babies' and infants' shoes sell below $3.00 per pair at retail, while 80% of Wohl shoes in the same category sell at more than $3.00 per pair at retail. 86% of Kinney's children's and misses' shoes sell below $4.00 per pair at retail; 62% of Wohl sales in the same category sell at more than $4.00 per pair at retail. 88% of Kinney's youths' and boys' sell below $5.00 per pair at retail. 58% of Wohl shoes in the same category sell at more than $5.00 per pair at retail. 96% of Kinney's growing girls' shoes sell for below $5.00 per pair at retail, whereas 69% of Wohl's sales in this category are at more than $5.00 per pair.

This comparison is on a national basis and does not reflect the situation in any particular community where Wohl or Regal on the one hand and Kinney on the other hand both sell at retail. We examine two communities where Wohl and Kinney both sell at retail, in detail, at pages 167 through 171.

As we have pointed out at pages 90 through 91, there are important style differences between Wohl and Kinney. Wohl sells primarily women's high fashion shoes, including many nationally advertised branded shoes. Kinney does not sell women's high fashion shoes.

In addition, Kinney stocks 75% to 85% of its patterns in women's shoes in two widths and the remainder in only a single width. Kinney does not carry a long range of sizes. On the other hand, Wohl carries many widths and a long range of sizes in its retail outlets.

Moreover, as pointed out at pages 92 through 96, there are important merchandising differences between Regal and Wohl on the one hand and Kinney on the other hand. Regal sells only men's shoes. Wohl is predominantly a seller of women's shoes, 80% of its dollar volume being in women's shoes. Kinney operates family shoe stores, women's shoes constituting 33% of Kinney's dollar volume, men's shoes comprising 22% of its dollar volume and children's shoes accounting for the remaining 44% of Kinney's dollar volume.

In general, each Kinney store is the same as every other Kinney store. Wohl, on the other hand, must conform to the merchandising policies of the department or specialty store in which its leased department is located.

Approximately 15% of Kinney's total sales are of non-footwear items, whereas Wohl's sales of non-footwear items are unconsequential. In addition, Kinney sells a very large amount of canvas-upper, rubber-soled shoes comprising approximately 6% to 7% of Kinney's dollar sales. Wohl sales of non-footwear items are inconsequential as are Wohl's and Regal's sales of canvas-upper, rubber-soled footwear are insignificant.

The district court in arriving at its lines of commerce did not distinguish between the different markets in which shoe manufacturers sell their shoes to retailers and the markets in which shoe retailers sell shoes to ultimate consumers. Only two of the reasons which the district court gave in arriving at its conclusions on lines of commerce relate to shoe retailing. These are (a) the "appearance" of the shoes to the ultimate consumer and (b) the interchangeability of use by the ultimate consumer.

a. Identity of appearance

The district court states "shoes manufactured with cheap quality material are often made to look exactly like the higher priced shoes; the average store window shopper, uninitiated in matters of shoe quality, can easily mistake one shoe for the other . . . " (T. 56).* This finding as to the subjective mind of a mythical window gazer does not justify the conclusion which the district court seeks to draw from it, namely, that price, style and quality may be disregarded in arriving at a proper line of commerce in shoe retailing. This is made clear by the district court's

* There is no evidence in the record concerning "the average store window shopper uninitiated in shoe quality". Neither party called any witness who could be classified merely as a consumer of shoes. In addition, it is somewhat difficult to believe that there could be such a person of mature years purchasing shoes who was uninitiated in matters of shoe quality. Practically everyone in the United States purchases shoes and walks in them. The experience of buying and wearing shoes must necessarily give every wearer of shoes an insight into their quality.

example that a buyer who does not have the money to purchase a higher quality shoe may buy a cheaper shoe which attempts to imitate the style of the higher priced shoe (T. 56). All that this example can possibly mean is that the merchant selling the higher priced shoe is not in competition with a merchant selling a lower priced shoe.

The district court's recital with respect to the superficial appearance of shoes in a shop window is highly misleading. One characteristic of every window displaying shoes is the fact that each group of shoes displayed and, indeed, each pair of shoes displayed, is accompanied by a price tag (Gx. 245 A-D, R. 2824, T. 2813). Whatever the superficial resemblance of one shoe to another, the customer is immediately informed of the price of the shoe.

Not only does the district court's holding on the line of commerce run counter to established judicial authority as pointed out above at pages 118 through 121, but it also offends elementary principles of economics. The district court's holding mandates, for example, a disregard of all price differentials within the product lines which it has selected. It does not require extended economic analysis to demonstrate that women's dress shoes selling at $35 per pair, such as some of the women's shoes sold by Wohl, are not sold in competition with women's dress shoes at $5 per pair, such as most of the women's shoes sold by Kinney. If such products were in competition with one another, experience tells us that the $35 women's dress shoes would no longer be sold because consumers will not pay seven times as much for a comparable product.

The record is clear that price differences are highly significant. Consumers as a rule do buy in a narrow price range. As Mr. Shaefer, Vice President of Brown, testified (T. 1721):

> "I don't think she gets out of her range, as it were. I think when people are used to buying things in a certain price range, they pretty well stick to it."

Because of this phenomenon, at any one time, shoe manufacturers manufacture shoes to be sold in more or less standard price ranges. For example, Mr. Gamble, President of Brown, testified with respect to women's shoes that one standard line would run from \$11.95 to \$13.95 with a "few extreme shoes higher", another from \$9.95 to \$10.95, and another from \$6.95 to \$8.95. There is some overlapping but the price brackets are "pretty well" defined (T. 1371).

It is impossible to state generally just how small a price differential must be before two shoes of different qualities will compete. In part, it depends on the price range involved; for example, in children's shoes selling at \$5.99 and below, Mr. Smith, President of Kinney, testified that one dollar would make an important difference (T. 1474). The significant point is that price differentials have an economic effect.

The importance of these different price ranges is keenly appreciated by the successful retailer. The organization of Edison Bros., a strikingly successful operation, selling solely women's fashion shoes, provides evidence of this. So important is price to Edison that they divide their whole operation into four separate divisions according to price, each division having its own separate outlets: Chandler's, Baker's, Leed's and Burt's. Chandler's is the highest priced at \$9.98 to \$12.98. Baker's and Leed's sell in the range \$6.99 to \$7.99, and Burt's sells in an even lower range of \$4.99 to \$5.99 (T. 1289-90, 1405). Each of these outlets is calculated to appeal to a different market, and each division is organized to concentrate on its market.

Mr. Crawford of Peoria expressed the retailer's point of view when he testified that if he lost a branded line, he would try to replace it with another in the same price range; he would not want to experiment with other price channels (T. 1621).

Mr. Jones, President of Midland Shoe Company, an operator of leased shoe departments, spoke of the importance of concentrating on a defined market in these terms (T. 2242):

> ". . . we feel that we appeal to a certain class and we try to stick to what we call our pattern. We found it to be very unprofitable to get out of the pattern."

For this proposition, Mr. Jones cited an occasion when his company, which specializes in women's nationally advertised branded fashion shoes in the medium to upper price range, ventured into the lower price field, with notable lack of success (T. 2242).

Witnesses called by appellee were also highly sensitive on price differences. For example, Mr. Hansen, a shoe retailer in Marshalltown, Iowa, testified that a difference of \$2.00 might be critical (T. 275). Mr. Hagstrom, a retailer of men's shoes in Chester, Pennsylvania, stated that neither his regular line of shoes at \$14.95 and up nor a special line he once carried at \$10.95 competed with men's shoes sold by others at \$8.95 (T. 365-7). Mr. Badazinski, an independent retailer of women's shoes in Buffalo, New York, testified that he had to change his price line as the result of competition with Kinney. He stopped carrying shoes selling below $6.00 (Kinney's price range) and moved up to the $6.00 to $10.95 price range (T. 479).

Witnesses called by appellee were also sensitive to differences in quality and style (*e.g.,* T. 633-35, 815-16, 835-39).

The district court's opinion leaves the impression that style is simultaneous throughout all prices and grades of shoes. There is a considerable time lag, however, between the time when shoes appear, for example, in Paris or Rome and when they reach popular price family chain stores such as Kinney. For example, Wohl introduced the needle pointed toe for women into some of its leased departments nearly two years before Kinney started to sell that style of merchandise (T. 1518).

b. Interchangeability of use

With respect to the interchangeability of use by the ultimate customer, we first note that there was no evidence on this point. The district court's opinion also fails to take into account the vital question of timing. A man who buys a new pair of black dress shoes, we submit, is not likely to do the gardening in those shoes on the day following his purchase. Perhaps after he has worn the shoes for a period of time and they have become scuffed and worn, he may put them to such salvage use. There is no evidence which suggests that a woman seeking a pair of opera pumps will substitute for her purchase of such shoes a play shoe designed for housewear or other informal occasions.

The simple fact is that what a shoe purchaser may do with well used shoes long after his purchase has no bearing on the nature of the economic market in which the shoes, when new, were originally purchased and marketed.

What is relevant is the quality, style, price and intended use of the shoes at the time of purchase. Differences in these factors are reflected in the way shoes are merchandized. The comparison between the retail operations of Brown and Kinney at pages 82 through 100, which is based on undisputed facts, demonstrates that Brown and Kinney each compete in entirely separate markets and in no sense are part of a single line of commerce.

2. Sections of the country in shoe retailing.

The district court found the appropriate "section of the country" for shoe retailing to be cities of 10,000 or more population and their "immediate and contiguous surrounding area . . . in which a Kinney store and a Brown (operated, franchised or plan) store are located" (T. 64-5).* As we have noted, the district court did not make clear whether each such city is to be considered a "section of the country" separate and apart from other such cities or whether the aggregate of all 141 such cities is to be so considered. Its holding on "section of the country" is drawn in terms of the first alternative, but in appraising the impact of the merger, the district court speaks in terms of the second.

The geographic dimension of competition, *i.e.*, the relevant "section of the country", can be defined only in terms of the actual behavior of buyers and sellers. As Judge Dawson said in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1956),

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* For shoe manufacturing, the court adopted the section of the country which both parties agreed upon. The nation's shoe manufacturers sell shoes in a national market.

aff'd, 259 F. 2d 524 (2d. Cir. 1958), these geographic markets:

> ". . . are not mere legal abstractions but correspond to the commercial realities of the sugar industry."

The geographic scope of competition will be different for different products. It will also be different for different trade levels—different for shoe manufacturing and for shoe retailing (T. 2451). At the shoe manufacturing level the transport cost is small in relation to the typically large wholesale transaction and hence the market is national; while at the level of consumers' purchases at retail, the cost in money and in personal time of going to a shoe store is large in relation to the typically small retail transaction, and hence the market is local (T. 2459).

An aggregate of separate unrelated localities cannot be a "section of the country" within the meaning of amended Section 7 in this case. There is no evidence in the record that any of these cities had any relation to one another with regard to shoe retailing. Indeed, the evidence was exactly the contrary. Shoe retailing in New York City has no relationship to shoe retailing in Springfield, Missouri, yet both cities are included in the 141 cities selected by the district court. Such a section of the country composed of these 141 cities could not be justified on the basis of any economic test; such a section of the country simply does not conform to the realities of retail shoe marketing.

a. A Community as a Section of the Country

If, on the other hand, each locality is itself considered a relevant retail section of the country, we submit that the district court ignored an important change which was made in Section 7 when it was amended in 1950.

The test in the pre-1950 statute that the acquisition have an adverse effect on competition "in any section or *community*" was changed to condemn only effects "in any section of the country" by the 1950 amendment.

The Senate Committee Report on Amended Section 7 (Senate Rep. No. 1775, 81st Cong., 2d Sess. (1950)) stated:

> "In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country." (at 6)

The above quoted language of the Report which speaks in terms of an "economically significant" area and an "appreciable segment" of a market is particularly significant because amended Section 7 was expressly intended to calm fears that a strict application of the Act would forbid mergers between firms operating in a community which was not an economically significant area. It was for this reason that the test in then existing Section 7 that the acquisition have an adverse effect on competition "in any section or community" was changed to eliminate "community" from the statute and thus to condemn only effects "in any section of the country".

By eliminating the "community" test Congress intended to make Section 7 "less restrictive" and to focus on "economically significant" mergers having adverse effects on appreciable markets in "sections of the country".

Appellee argued in its Motion to Affirm that the change was not intended to eliminate local communities but only to exclude local enterprises. The legislative history does not support this position. By the elimination of "community" from the statute, all acquisitions within a community are effectively excluded from the purview of the statute even if the local enterprises are owned by companies which also have operations elsewhere. This was expressly recognized by Mr. William T. Kelley, Chief Counsel of the Federal Trade Commission, a chief sponsor of amended Section 7. In response to questions by Senator Donnell in the course of the hearings before the Subcommittee of the Senate Committee on the Judiciary (Hearings, Subcommittee of the Judiciary Committee on H. R. 2734, 81st Cong., 1st and 2d Sess., 43 (1949-1950), Mr. Kelley said:

> "SENATOR DONNELL. Supposing Sears, Roebuck took over Montgomery Ward, which are two of the largest department stores in the world; would you call that a violation?
>
> MR. KELLEY. I would not think that would violate the statute. . . . I would not think there would be a violation of the statute if maybe four of the big department stores in New York went over into one ownership."

Sears, Roebuck and Montgomery Ward, the companies mentioned, are two major national retailing firms having many local outlets; in fact, they are important shoe retailers. There was no confusion in Mr. Kelley's mind between "community" and "enterprise", nor is there anything to suggest that Congress intended the distinction urged by appellee.

We submit, therefore, that the geographical areas selected by the district court— towns and cities and their "immediate and contiguous surrounding area"—cannot, as a matter of law, be sections of the country for shoe retailing for the purposes of amended Section 7.

b. Sections of the Country Unrelated to Real Markets

The district court apparently relied for its conclusion as to the appropriate sections of the country upon its own observations with respect to the city of St. Louis and the surrounding territory. It may be noted that there is no Kinney outlet in St. Louis or in the area immediately surrounding it. Hence St. Louis is not one of the cities presented for analysis on any basis. Evidence was submitted, however, using St. Louis as an example, to illustrate the complexities of the structure of shoe retailing. The evidence was offered in the form of expert testimony by Mr. James R. Appel, an expert in marketing problems (T. 2387-8). Mr. Appel's uncontradicted testimony is at radical variance with what the district court found.

For example, the district court found that all shoe retailers in the St. Louis area compete with each other in that area. The district court thus lumped all shoe retailers together and did not give effect to differences in geographical location between shoe retailers and differences in the range of merchandise offered by various shoe retailers and other merchants.

On the other hand, Mr. Appel clearly differentiated for competitive purposes among shopping centers of the regional type, shopping centers of the community type and neighborhood shopping strips (T. 2404-5).

Shopping centers of the regional type, such as Crestwood Plaza and Northland in the St. Louis metropolitan area, are characterized by the presence of large department stores, apparel stores, shoe stores and a wide variety of other retail outlets, such as grocery, jewelry, toy and gift stores, as well as finance companies (T. 2398-2400, 2402-3).* Such regional centers offer a wide selection of merchandise at a correspondingly broad range of prices. These centers may draw customers from the entire metropolitan area, although the great majority of their customers come from within a driving range of 15 to 20 minutes of the center (T. 2416). Thus, even the largest center of the regional type in the St. Louis area did not compete with retail outlets in other parts of the St. Louis city and metropolitan area when the driving distance exceeded the 15 to 20 minute limit just mentioned. Indeed, Mr. Appel testified that there would be "relatively little competition" between two large regional centers because there was as much as 35 minutes driving time between the two (T. 2410).

Regional shopping centers are closely comparable to the downtown shopping area in their range of goods and the distances from which they draw customers (T. 2404).

On the other hand, shopping centers of the community type are characterized by two or three apparel stores, with one or two shoe stores. In the community center there is no department store and comparatively little selection of

* In both regional centers there were many shoe outlets. In Northland, the large department store had 11 shoe departments (T. 2402). There were, in addition, five shoe stores operated by other firms (T. 2402-3). Seven other stores also carried footwear (T. 2402-3). In Crestwood, there were two large department stores, both of which had several shoe departments (T. 2398). There were three other shoe stores, and six other retail stores selling footwear (T. 2398-9).

clothing and goods other than strictly convenience goods (T. 2404). The range and variety of merchandise offered is thus considerably more limited than that found in a regional shopping center. Community shopping centers draw their principal customers from a driving range of five minutes from the center (T. 2415-6). Thus a shoe outlet in a community center has a very limited competitive area. Neighborhood shopping strips draw customers from even a smaller area (T. 2397).

There is thus no evidence in the record to support the district court's finding that all shoe retailers in the St. Louis area compete with each other; the only evidence on the point is to the contrary. The areas of effective competition in St. Louis established by the record were not only generally very limited but also could not be deemed "sections of the country" within the meaning of amended Section 7.

Without support in the record the district court has selected sections of the country on an abstract arbitrary basis, ignoring the principle that a section of the country must be defined in terms of the actual behavior of buyers and sellers.

There is literally no evidence at all to support the district court's finding as to what the market area of shoe retailing is in any of the 141 cities.

With respect to 23 cities out of the 141, there is some evidence available, which rather than supporting the district court's finding, demonstrates that the district court was plainly wrong.

Wide variations in the areas involved are apparent. Included within the 141 cities are such large metropolitan areas as New York, Chicago, Detroit, Philadelphia and Los Angeles, whose marketing areas extend to many suburban communities beyond political city limits. Another of the 141 cities is Council Bluffs, Iowa which the record reveals is within the Omaha, Nebraska metropolitan area for marketing purposes (T. 670). Still another situation is found in Texarkana the marketing area of which extends into both Arkansas and Texas (T. 2632). A still different situation is encountered in the case of small communities such as Marshalltown, Iowa (population 25,000) which has a local trading area extending 25 miles beyond the city limits of the political entity (T. 283). It is clear, therefore, that no single formula suffices to determine correct retail marketing areas in view of the great geographical and marketing differences which the record reveals.

c. Failure to Analyze Nature and Structure of Competition

The district court also failed to analyze the nature and structure of shoe retailing competition in any of the 141 cities embraced within the district court's sections of the country.

The only testimony in the record on this point dictates a conclusion far different from that reached by the district court. Thus, a witness from the Chicago area testified that his marketing area embraced a shopping center comprising a relatively small portion of that large city (T. 553-4). A retailer from Buffalo testified that his competitive area consisted of a shopping area in his immediate vicinity as well as the downtown area of the city (T. 477).

Further variations can be found depending upon the geographical situation and the size of the community as to which evidence is available. For communities such as Marshalltown, Iowa (population 25,000) where there are 12 shoe outlets (T. 271), a customer can readily shop all of them within a brief period of time. On the other hand, there is nothing to suggest that a consumer who lives in the Bronx, the northernmost part of New York City, would be likely to shop for shoes on Staten Island, the southernmost part of the city, eleven miles away by subway and ferry. There are 4 Regal stores located in the heart of Manhattan in an area bounded by 42nd Street on the north, 37th Street on the south, Broadway on the west and Madison Avenue on the east. It is apparent that Regal would not have located all of these stores within a relatively small area if one store would suffice to serve the need of customers in the area.

The record dictates a still further distinction with regard to the geographical reach of shoe retailing. A large department store situated in the downtown district of a major city, such as Gus Blass' in Little Rock, may readily have drawing power for its many varied wares and services which extends over practically an entire state (T. 2355). This does not mean, however, that a local shoe merchant situated in either of these cities will draw his customers from any such area; rather the evidence is that, as in St. Louis, his customers will be derived from a comparatively short distance from his store, such as five or ten minutes' driving time or a few blocks from the customer's office. The district court's analysis takes no account of such clear differences.

It is clear that the district court made no analysis of the nature and structure of shoe retailing competition within any of the 141 cities which it selected. Without such an analysis, no determination could be properly made of the area of effective competition pertaining to any of the 141 cities. We submit, therefore, that the absence of such an analysis makes invalid the district court's holding on "section of the country".

d. Treatment of Independent Retailers as if Brown Outlets

In reaching its conclusion on the appropriate section of the country for retailing, the district court included within its 141 cities 64 communities where Brown did not sell at retail at all. In these 64 communities there was a Kinney store and an independent retailer purchasing shoes of his own selection for his own account from Brown at wholesale who participated in the Brown Franchise Program or the Wohl Plan.

In consequence, under the view adopted by the district court, the appropriate "section of the country" for retailing shifts whenever a Brown customer discontinues his relationship with Brown under the Brown Franchise Program or the Wohl Plan, and accordingly, a new "section of the country" automatically comes into being whenever an independent retailer joins either of these plans in a community where there is a Kinney outlet. We submit that this is another example of the district court's failure to distinguish between the market in which a manufacturer sells at wholesale to retailers and the quite different market in which a retailer sells to its customers.

We submit that the district court erred in assigning to Brown completely independent retailers who purchase shoes with their own money at their own risk merely because they operated on the Brown Franchise Program or the Wohl Plan.

Under these programs, which are discussed in detail at pages 44 through 45 and 47 through 49, Brown and the wholesale division of its subsidiary, Wohl, give the independent retailer merchandising advice. The retailer is completely independent and is not obliged to, nor does he, buy all of his shoe requirements from Brown or Wohl. Moreover, these arrangements are completely voluntary and readily terminable. Neither Brown nor Wohl receives the proceeds of the sales made by these independent retailers. Neither Brown nor Wohl dominates or controls the retail operations. The testimony of appellee's witnesses who elected to join these programs was clear that each was an independent merchant who made freely his own business decisions (T. 333, 467, 497, 551-3).

The district court ignored these undisputed, fundamental facts when it allocated the retail operations of these independent retailers to Brown.

e. Sections of the Country Vaguely Defined

The district court's notion as to what might constitute a "section of the country" was erroneous in another respect. A "section of the country" refers to a geographic area. Without contending that the market area need be defined with a metes and bounds description, the section of the country cannot be described so vaguely that it is impossible to measure the competitive effects in it of a particular acquisition. The district court's designation was so vague as to make such measurement impossible. The court added to the market area of shoe retailing in a particular city the "immediate and contiguous surrounding area"

(T. 64). No attempt was made to delineate the bounds of any particular section of the country.

3. Effect of the acquisition on competition in shoe retailing.

The district court failed to appraise the probable effects on *competition* in any real market. This may be explained in part by its erroneous conclusion on the appropriate section of the country. As the opinion of the district court indicates, appellee took the position at the trial that the political boundaries of the city were the appropriate measure of the shoe retailing market (T. 59). On the other hand, Brown argued that the appropriate measure of the retail market in shoe retailing varied with economic reality, so that it ranged from the central business district of a large city to a Standard Metropolitan Area as defined by the Census in smaller communities.

Based on these proposed geographical markets both appellee and Brown introduced evidence to show the size of the total market within the geographical areas analyzed. Since the geographical areas differed, the evidence relating to the size of each market necessarily differed. In addition, through testimony and statistical material, Brown introduced considerable evidence relating to the number of shoe outlets in each area, the types of shoe outlets, and the varying types of shoes which the outlets in the area sold.

The district court did not adopt the geographical markets contended for by appellee or by Brown. It adopted geographical areas of its own the boundaries of which are not clearly defined. Accordingly, there was no evidence which showed the magnitude of the shoe retailing market in any geographical area found by the district court, nor was there evidence which showed the number of shoe outlets in any such area or indeed the character of the shoe retailing market in any such area.

The district court, therefore, made no finding as to the extent and nature of competition in shoe retailing in any of the 141 sections of the country which it found. This constituted vital error because, under these circumstances, the district court could not make any rational finding as to the impact upon competition in shoe retailing of the acquisition of Kinney by Brown.

The district court could not and did not set forth findings which delineated the respective competitive positions of Brown and Kinney in any of the sections of the country which it found. It could not and did not set forth in any specific terms the way by which competition might be lessened in any one of these areas by the Brown-Kinney merger.

The district court did find that: "These Brown stores [inaccurately referring not only to outlets operated by Brown but also to completely independent retailers operating on the Brown Franchise Program or the Wohl Plan] have a varying share of the retail market therein, as do Kinney's stores; those percentages are substantial and if combined would become more substantial" (T. 64).

In marked contrast to the many other statistics and data contained in its opinion, the district court did not further define or specify what varying shares of any particular retail market Kinney or Brown has, or what share the combined firm has in any such market. Nor did the district court indicate what constitutes a "substantial" percentage.* The percentages, however computed, do vary greatly —as the district court concedes. To say that all percentages are substantial (however small) is surely to use a standard of measurement in a way not permitted by the statute.

Aside from this, the district court's holding that the percentages of the retail market enjoyed by Brown and Kinney are substantial and that a combination of them would become more substantial does not answer the question which amended Section 7 poses. It does not answer the question whether *competition* may be substantially lessened by the acquisition in any line of commerce in any section of the country.

In an effort to repair the deficiencies of the district court's opinion, appellee, in its Motion to Affirm, cited the testimony of certain retailer witnesses it called at the trial to support the district court's conclusion that the Brown-Kinney acquisition will substantially lessen competition by eliminating existing competition between Brown and Kinney.

We note that of the 24 shoe retailers called by appellee to testify at the trial, three [Erlen (T. 1158-73), Hagstrom (T. 363-92) and Wiley (T. 921-38)] did not testify at all concerning retail competition between Brown and Kinney.

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* Quite apart from the vagueness of its statement and its infirmities as a mere play upon words, the district court here fell into the error which this Court recently condemned in a case arising under Section 3 of the Clayton Act. In *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320, 329, this Court held that ". . . a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence". The contract involved in *Tampa Electric* amounted to purchases of approximately 128 million dollars over a 20-year period. The district court on this point does not supply even a remote measure of "substantial".

Four of the witnesses were independent retailers operating on the Brown Franchise Program [Buckley, Hill, Sherman and Sugarman]. Mr. Buckley testified that he regarded Kinney as a "competitor" (T. 496) but he described Kinney as a "popular price" store as compared to his medium price store (T. 495). Mr. Hill did not regard Kinney as a competitor (T. 320, 336). Mr. Sherman took the view that "all shoe men" compete (T. 462). Mr. Sugarman's testimony was very ambiguous, but he did *not* testify that he competed with Kinney (T. 557, 574). Since all four of these witnesses were independent retailers, their testimony cannot, under any view of the matter, support a finding that Brown and Kinney were in competition at retail in the particular local communities about which they gave testimony.

Ten of the remaining retailers [Cook (T. 395-6), Dunoff (T. 1114), Floro (T. 602-3), Harrison (T. 721), Johnson (T. 1173), Jontz (T. 575), Krasne (T. 653), Smith (T. 857), Sullivan (T. 142) and Trussel (T. 685)] asserted that Kinney sold shoes in competition with certain independent retailers selling shoes purchased from Brown. This testimony is totally irrelevant to the contention that Brown and Kinney compete at retail since shoes sold by Brown at retail were not involved.

The remaining seven retailers [Augustine (T. 612), Badazinski (T. 473), Driscoll (T. 172), Hansen (T. 270), Long (T. 257), Moreno (T. 194) and Stinson (T. 289)] gave conclusory testimony that Kinney competed with Wohl at retail. None of these witnesses had any connection with Wohl or Kinney and had no direct knowledge of any such possible competition. In addition, their testimony was limited by their experience. Mr. Long, for example, sold only children's shoes and did not even purport to have experience with women's shoes—Wohl's specialty.

A reading of the testimony of these witnesses shows that it was based on wishful thinking and on the unrealistic theory that all shoe outlets in any geographic area compete for all the dollars spent on shoes in the area (see *e.g.*, T. 174, 265, 292). They were merely saying that they were in business to sell shoes and would attempt to sell anyone who came in their store. It did not mean that they actually competed for all shoe sales as indeed it was clear that no one retailer can satisfy the broad range demand of shoes. As we have pointed out at pages 43 and 44, he cannot economically stock his store to do so. Each retailer sold in a well-defined niche.

The most that the testimony of the seven retailers who testified that Brown and Kinney were in competition at retail could possibly amount to is limited to that fact. Such testimony does not supply the necessary link—the effect of the Brown-Kinney merger on competition.

A finding that Brown and Kinney are in competition in selling shoes at retail does not answer the ultimate question proposed by amended Section 7. That question is whether the effect of the acquisition may be substantially to lessen competition in shoe retailing generally.

We note also that the district court's conclusion as to competition between Brown and Kinney flowed automatically from its conclusions with respect to the appropriate line of commerce in shoe retailing. The district court made no examination of the competitive situation in any of the 141 communities.

Appellee introduced literally no evidence which would provide a basis for an analysis of the competitive situation in any of the 141 cities later selected by the district court. The retailers who testified for appellee were not requested by appellee to give any information to the district court regarding the competitive situation in the communities in which they operated. Appellant adduced some information on this point from these witnesses on cross-examination.

Appellee limited its efforts to an attempt to show the number of pairs of shoes sold within the political boundaries of certain cities. This computation, however, was not adopted by the district court. In contrast, appellant introduced evidence, which was uncontradicted, showing the competitive structure of shoe retailing in each city where Brown (Wohl or Regal), on the one hand, and Kinney, on the other, had a retail outlet.

a. Analysis of Areas Where Brown/Kinney Competition Possible

The district court ignored the detailed evidence which appellant introduced concerning the competitive situation in each of the local markets in which Brown (Wohl or Regal) and Kinney could possibly compete at retail.*

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* As noted above, there is no evidence in the record which establishes the competitive area of shoe retailing in most of the communities found by the district court to be sections of the country, or indeed even in those communities where there was both a Brown and Kinney retail outlet. Our analysis was made on the basis of taking areas selected by the Census for purposes of general marketing analysis without specific reference to shoe retailing. We do not mean to indicate that the areas used by the Census are the correct ones for the competitive areas of shoe retailing. On the contrary, as we have pointed out above, at pages 148 through 151, the competitive area of shoe retailing varies greatly from one community to another. Indeed, there may be great differences among competitive areas in which various shoe retailers sell. Thus, a downtown department store may draw its trade for its wares, including shoes, from far beyond city, county and even state boundaries, whereas the neighborhood shoe store will draw only from a five minute driving range.

In preparing this evidence, appellant used the boundaries of Standard Metropolitan Areas as the boundaries of local shoe retailing areas. The concept and delineation of Standard Metropolitan Areas is the work of the U. S. Census Bureau. A Standard Metropolitan Area is an economic unit which is commonly the result of consolidating political units. Its borders are defined by the flow of local commerce as measured by objective economic indicators. Where Standard Metropolitan Areas had not been established, typically in rural parts of the country, the county was used as a substitute for the Standard Metropolitan Area (T. 2548).

Using these areas, appellant surveyed the locations of Brown's (Wohl or Regal) and Kinney's retail outlets. If Brown (Wohl or Regal) and Kinney each had retail outlets in the same area, it was termed an "overlap area".

The overlap was identified as of December 31, 1955. The selection of this date, which preceded the merger, made possible the use of the extensive 1954 data in the Bureau of Census' Census of Business. On this date, there were 92 "overlap areas" (Dx. UUUUUU, R. 7155, T. 2593).*

Appellant next calculated the total shoe sales made in 1954 by *all* shoe sellers in each "overlap area".

In each area the sales of the Brown and Kinney outlets, separately and combined, were then taken as a percentage of the total sales in such area. The results of this process

* In each of these 92 areas there was an actual Brown retail outlet operated by Wohl or Regal. Outlets operated by independent retailers purchasing shoes from Brown were not included. It was only by incorrectly including such outlets that the district court reached its "141 cities". In addition, as pointed out in the footnote to page 98, these 92 areas were identified on an entirely different basis than the 77 localities in which the district court found that Brown and Kinney both had retail outlets.

for all 92 "overlap areas" is set out in detail in Defendant's Exhibit UUUUUU (R. 7155, T. 2593).

The percentages of Brown's and Kinney's sales in relation to total sales in both cities and Central Business Districts were also calculated. The city area, the limits of which are historical and political, is not an economically sound area in which to measure competition, but despite this appellee had proposed the city area.

Appellant's calculations disclosed that, even with respect to any city area, the Brown-Kinney combined share of total sales is so small that the merger could have no adverse effect on shoe retailing competition even where there is overlap.

Birmingham, Alabama, which is the first city alphabetically (by state) where an overlap occurs, illustrates this. In the Standard Metropolitan Area, the combined Brown-Kinney share is 1.3% of total retail shoe sales. By taking the smaller area, the city, this percentage moves up only 0.2% to 1.5%.

In addition to giving data for Standard Metropolitan Areas, the Census also gives data for Central Business Districts, primarily in larger cities where the downtown area represents a major part of the business conducted in the Standard Metropolitan Area. The magnitude of combined Brown-Kinney sales in the Central Business District was also calculated where a Central Business District had been defined by the Census Bureau.

The percentages of combined Brown-Kinney sales in relation to total shoe sales within Central Business Districts yields the same results as the calculation of percentages within cities and Standard Metropolitan Areas: typically the percentages are so small as to be insignificant.

Analysis of these 92 overlap areas (by Standard Metropolitan Area) shows that in only 58 of them did the combined shares of Brown and Kinney retail shoe sales exceed 5%. In these 58 areas the shares are as follows: in 34 of them the shares fall between 5% and 10%, in 15 the shares fall between 10% and 15%, in 6 the shares fall between 15% and 20%, in only 3 areas are the shares in excess of 20%, and in no area was the combined share in excess of 22.9% (Dx. CCCCCCC, R. 7314-6, T. 2593).

Analysis also shows that the likelihood of Brown-Kinney overlap is greatest in densely populated retail areas and goes down as the size of the population diminishes. It shows also that the size of the Brown-Kinney share of retail shoe sales is small in large areas and rises for little ones, which is an inevitable consequence of the fact that small areas cannot support a large number of shoe retailers.

OVERLAP RELATED TO SIZE OF RETAIL AREA*

Population Size Group (Thousands)	SMA's and Counties not in SMA's	Brown-Kinney Overlap Areas		Brown-Kinney Combined Dollar Shares in Individual Overlap Areas		
		Number	% of size Class	Lowest	Median	Highest
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1000 and over	14	11	79%	1.1%	1.9%	5.1%
500–999	19	9	47	1.3	2.9	7.1
250–499	45	21	47	0.9	4.0	10.4
100–249	110	32	29	1.5	7.9	22.7
50– 99	224	10	4	7.3	9.7	13.9
25– 49	626	9	1	8.9	15.6	22.2
0– 24	1,951	0	0	—	—	—

* Source: Dx. BBBBBBB, R. 7149, T. 2593.

The first line of the table shows that there are 14 large areas (population of 1 million or more). In 11 of these both Brown and Kinney have outlets, indicating an overlap in 79% of these big areas. But the Brown-Kinney combined dollar share in these areas is small, ranging from 1.1% to 5.1%, with a median of 1.9%.

In contrast, in the small retail markets (25,000 to 49,000 population) the probabilities of overlap are low, about 1 in 100, whereas the Brown-Kinney combined share is higher, ranging from 8.9% in the lowest overlap area to 22.2% in the highest, with a median of 15.6%.

Thus, the likelihood of overlaps declines systematically, as is shown in column 4, and the magnitude of market share rises, as is shown in column 6.

Overlap is more frequent in areas with large populations, in the first place, simply because they are large. Because of their size, these areas are attractive to retailers. There are great opportunities for competition in these large areas, and the Brown and Kinney shares of total sales in these areas are very low.

Areas small in population (consequently, small in shoe consumption) are less likely to have overlap because there are many more of them than any single retailer or retail chain could serve. Overlap in small areas is a product of the historical scattering of the outlets of Wohl and Kinney. When an overlap does occur the combined share will almost certainly be higher than it would when there is an overlap in the larger area. The limited number of customers in a small area means that an area small by population will have relatively few stores and that each is likely to have a reasonable share of shoe sales in the area. In short, a shoe outlet in such a small area must have a minimum level of sales to survive.

It is this phenomenon which in large measure accounts for the fact that the Brown-Kinney combined share of total sales in small areas is higher than it is generally. For example, assume that the total shoe sales in a Standard Metropolitan Area are in the neighborhood of $1,000,000 annually. Thus, if an annual volume of $50,000 for each outlet, represents a profitable volume of business, the town would have only 20 outlets. If all retailers were of equal size, the market share of each merchant would be 5% and if two merged the combined share would be 10% *temporarily*.

The analysis which follows is based upon data which represent the dollar volume of all shoe sales in the areas involved. The data does not distinguish between dollar sales of shoes in different age-sex categories, and does not reflect differences in price, quality, style and intended use of the shoes sold.

The market share data reflected in the analysis which follows represent calculations which are correct only if it is assumed, which we do not, that the district court's lines of commerce, ignoring as they do all differences of price, style, quality and intended use, are correct. If we are correct that these matters are of vital importance in assessing whether Brown and Kinney compete at retail and the ultimate issue whether the merger has the forbidden effect under amended Section 7, then such market share data greatly overstate the respective market shares of the two firms. The data is given to show that, even upon the district court's erroneous conclusions on lines of commerce, the merger falls far short of a violation of amended Section 7.

Moreover, the data do not take into account the geographical locations in which Brown and Kinney actually sell shoes within a particular Standard Metropolitan Area. Closer examination of the geographical locations of the Brown and Kinney outlets is in and of itself sufficient to demonstrate that, in most instances, the two outlets are not in competition within a particular Standard Metropolitan Area. For example, when a Central Business District was available it also revealed the clear instances where the Brown and Kinney outlets were in different parts of the Standard Metropolitan Area. For example, Brown (Wohl and Regal) had outlets in each of the Central Business Districts of Los Angeles, Chicago, and New York, whereas Kinney had none.

The actual disparities with respect to price and other differences between Brown and Kinney in the communities or areas where both have retail outlets and where their combined market share exceeded 5% are shown in Defendant's Exhibit CCCCCCC (R. 7314, T. 2593) which analyzes the overlap situation in these 58 areas. At pages 86 through 90, we have set forth an analysis of the 58 areas by comparing Brown's median price in those areas with Kinney's median price in those areas. In sum, that analysis revealed that out of 348 cases of possible overlap, there were only 243 cases in which either Brown or Kinney had more than token sales. In other words, in 105 cases, there could be no possible competition between Brown and Kinney. In the remaining 243 cases, the analysis disclosed that in 123 cases, Brown's median price was at least 190% of Kinney's median price. In 203 cases out of 243, Brown's median price was at least 150% of Kinney's median price. In only 40 cases was Brown's median price less than 150% of Kinney's median price.

This analysis, revealing though it is, cannot supplant a detailed examination of each of the 58 areas. We do not propose to examine all 58 here. Instead, the structure of two retail markets—both of which were given considerable attention by appellee in the presentation of its case—will be briefly developed:

(1) Marshalltown, Iowa

Marshalltown, Iowa is a town with a population of over 25,000 and is the center of a large trading area running at least 40 miles to the East and 30 miles to the North and South (T. 283, 2367). There are 3 or 4 stores selling shoes exclusively and about 12 other outlets where shoes are sold (T. 271). All of the shoe stores are on the one main street (T. 271).

Wohl operates a women's better grade department and a children's better grade department in Younker's Department Store in Marshalltown (T. 272). Wohl's wholesale division sells women's shoes to the independent operator of a leased department in Fantle's, a junior department store (T. 2367).

Kinney operates the only popular price family shoe store in Marshalltown (T. 1983).

Since there are relatively few stores in Marshalltown, the Kinney store, which does a very good business there, has a relatively high share of the sales in the Marshalltown metropolitan area; this share being 14.3%. Wohl's share is only 4.2%.

The percentage distribution of Wohl's and Kinney's sales on an age/sex basis demonstrates the differences in the two operations:

WOHL AND KINNEY, PERCENTAGE DISTRIBUTION OF SALES

	Wohl	Kinney
Men's	—	21.3%
Women's	76.7%	33.9
Youths' and Boys'	0.6	6.6
Growing Girls'	3.9	22.5
Children's and Misses'	15.9	12.0
Babies' and Infants'	2.9	3.6

A price line analysis of Kinney's and Wohl's sales in Marshalltown shows the separation of their price lines to be as follows:

PERCENT OF DOLLAR SALES ABOVE A SELECTED PRICE IN EACH AGE-SEX CLASS

	Wohl	Kinney
Men's Dress Above $9.00	—	2.4%
Women's Above $5.00	92.6%	31.0
Youths' and Boys' Above $5.00	21.8	14.9
Growing Girls' Above $5.00	75.6	10.4
Children's and Misses' Above $4.00	88.2	23.7
Babies' and Infants' Above $4.00	91.3	2.1

Since Wohl sells no men's shoes in Marshalltown, it obviously does not compete with Kinney in that category. Nor do the two firms compete in other categories.

Women's shoes account for 76.9% of Wohl's dollar sales, but only 33.9% of Kinney's dollar sales. In women's shoes, Wohl's prices (92.6% in dollars above $5) are markedly higher than Kinney's (31% above $5).

The marked differences in prices between Wohl and Kinney are repeated in every other category in which both sold shoes, except youths' and boys', where Wohl's sales accounted for .6% of its total dollar sales.

(2) Springfield, Missouri

Springfield, Missouri, which has a population of around 100,000, is the only city in the surrounding large trading area which includes some 250,000 people (T. 2376). Shoes are sold in at least 40 different retail outlets in the city (T. 175-180).

In Springfield, Wohl operates an outlet under the name of Vanity Slipper Shop (T. 2375). This store sells women's shoes exclusively. Its women's dress shoes retail at $5.95 to $10.95 (T. 2375). It specializes in fashion merchandise appealing to young women in the 14 to 25 year old age group (T. 2376). The bulk of the sales in dollars are at $7.95 (T. 2376). Wohl also operates a better grade women's department in Netter's Department Store in Springfield (T. 2380). This department sells in the $10.95 and up price range and does a large business.

Kinney also has an outlet in Springfield (T. 2378). Kinney's outlet there is a family shoe operation and is geared to attract the family trade (T. 2378). This outlet carries some shoes, particularly sports and flats in the $4.99 bracket, which may be somewhat comparable to the shoes sold by Wohl in its Vanity store (T. 2378). However, Kinney's styles are more conservative than those in the Vanity store and follow Vanity's styles by one or two seasons (T. 2379).

The two Wohl outlets together have a 6.6% share of the shoe sales in the standard metropolitan shoe market of Springfield. Kinney's share is 2.6%.

The percentage distribution of Wohl's and Kinney's sales on an age/sex basis demonstrates the differences in the two operations:

WOHL AND KINNEY, PERCENTAGE DISTRIBUTION OF SALES

	Wohl	Kinney
Men's	—	34.8%
Women's	96.7%	39.4
Youths' and Boys'	0.1	5.1
Growing Girls'	—	10.5
Children's and Misses'	2.2	7.4
Babies' and Infants'	1.0	2.8

In Springfield, Wohl sells no men's or growing girls' shoes and only .1% of its dollar sales are in youths' and boys' shoes. Kinney's sales in these three categories amount to 50.5% of its sales in dollars in Springfield. It is clear that Wohl and Kinney do not compete in these categories.

A price line analysis of Kinney's and Wohl's sales in Springfield shows the separation of their price lines to be as follows:

PERCENT OF DOLLAR SALES ABOVE A SELECTED PRICE IN EACH AGE-SEX CLASS

	Wohl	Kinney
Men's Dress Above $9.00	—	9.4%
Women's Above $5.00	70.1%	28.2
Children's and Misses Above $4.00	89.1	8.6
Babies' and Infants' Above $4.00	81.7	—

In women's shoes, the only category in which Wohl is important (96.7% of its dollar sales), Wohl's prices (70.1% above \$5) are markedly higher than Kinney's (28.2% above \$5). In the only other two categories in which Wohl sells shoes (children's and misses' and babies' and infants'), its sales are relatively minor (3.2% of its total sales) and its prices are markedly higher than Kinney's. The differences in the operations of the two outlets are significant and mean that Wohl and Kinney do not compete in Springfield.

We submit that the examination of the structure of shoe retailing in Marshalltown and Springfield demonstrates that the Brown-Kinney merger would not lessen competition in those communities. Furthermore, there was no proof that either community constituted an economically significant area so as to make it a section of the country within the meaning of amended Section 7. The district court's failure to make the kind of analysis required by amended Section 7 thus invalidates its conclusion even as to those communities where both Brown and Kinney had a retail outlet.

b. Limitations on Use of Sales Data

The district court apparently assumed that in analyzing a retail market Brown's sales could be merely added to Kinney's sales. We submit that this assumption is based upon the mistaken notion that either Brown or Kinney has a fixed share of any market, however defined. The undisputed evidence showed that no shoe retailer has a lock on any segment of the retail shoe market.

In the first place, the shoe consumer has a tremendously wide choice of retail suppliers. The range of styles available is similarly of great magnitude. This is in sharp contrast to the situation which confronts purchasers having only a few suppliers, each offering a standard product.

The fragile franchise which a retail shoe location has on custom is evidenced by Kinney's experience with the locations of its outlets since its acquisition by Brown. In 1955, Kinney had 352 stores; in 1958, it had 416, a net addition of 64 stores (Gx. 70, R. 456, T. 1057). This arithmetic does not tell the full story. During this period Kinney opened 65 shopping center outlets (T. 1510) and 46 highway stores (T. 1444) and closed some 47 "regular stores" (T. 1443). This represents an attrition rate of about 16 stores a year. What had once been profitable locations ceased to be so as the local shoe retail market changed. Kinney had no hold on the market to prevent this change.

Wohl's experience with the location of its leased departments well illustrates the point: 23 departments were closed in 1953, 13 in 1954, 20 in 1955 (Gx. 68, R. 449, T. 650), and 14 in 1957 (Dx. N, R. 154, T. 1742). This amounts to an attrition rate of 19 departments a year. Wohl's situation is different from Kinney's, because it holds a location at the will of the department store owner and may have to leave a location it would like to keep (*e.g.,* Gus Blass', the largest department store in Little Rock). Nevertheless, Wohl's experience parallels Kinney's experience that shoe retail locations generate no durable consumer franchise.

The district court purported to measure the impact of the acquisition at the retail level by adverting to the number of shoe retail outlets operated by Brown (Wohl or Regal) on a national basis (T. 68).* The district court then purported to compare these figures with figures as to the total number of shoe outlets in the country as a whole. There is no evidence that shoe retailing is national in scope. All the evidence is to the contrary; shoe retailing is essentially local in character. The district court's comparison of national figures is, therefore, wholly beside the mark. In addition, this comparison, however, does not supply the missing link; it does not tell us what the state of competition was in any section of the country as found by the district court.

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* In footnote 9 of its opinion (T. 68) the district court lists the number of retail outlets which it assigns to Brown. It erroneously assigns to Brown the independently operated Brown Franchise stores and the independently operated Wohl Plan accounts; this we contend was error. In addition, it gives the number of Wohl operated outlets as 457. We submit that this was also error. As noted above, Wohl basically operates leased departments in department stores. In a particular department store Wohl may operate as many as five leased departments. It seems clear that if a department store operated these leased departments instead of leasing them to Wohl, the department store would be counted as a single seller of shoes. We submit that Wohl operating in a single department store should be treated no differently for purposes of analysis here. Accordingly, we submit that the correct number of shoe outlets operated by Brown and Kinney in 1956 is not 1,820 as found by the district court but should be 751, consisting of:

92	Regal outlets
243	Wohl operations
416	Kinney stores
751	

The total figure of 751 is correct for 1956. The correct figures for 1955 are set forth in the footnote at page 180. In addition, in footnote 10 (T. 69), the district court classified the Wohl operations as shoe stores. This is not the proper classification since the overwhelming majority of the Wohl outlets are in fact operated as part of department stores which the Census classifies on a different basis from shoe stores.

c. Shoe Retailing Nationally

Indeed, even on a national basis the district court failed to analyze the vigor of existing competition in shoe retailing. The undisputed facts in the record establish that competition in shoe retailing is vigorous and growing.

In 1954 there were over 22,000 stores which were primarily shoe stores, and a total of over 70,000 shoe outlets of every type which regularly handled shoes (Dx. TTTTTT, R. 7135, T. 2593). Brown's total retail outlets of 640 in 1955, including Wohl, Regal and Kinney, are then insignificant on a national basis, amounting to less than 1% of the national total.

In 1954, Brown, through its Wohl and Regal retail outlets, and Kinney, through its own retail outlets, were each selling shoes at the rate of approximately $39 million a year. Each sold slightly over 1.1% of national retail shoe sales of approximately $3.5 billion. The combined Brown-Kinney share of such sales was 2.3%.

Having investigated individual retail market overlap areas where Brown and Kinney could possibly compete in order to measure the impact of the combination on competition in those areas, appellant offered evidence upon trial to show the significance of Brown and Kinney sales in these areas measured against total national retail shoe sales. To do this, dollar figures were employed which obscure all of the important age/sex price/quality distinctions which are vital. The results of the analysis are instructive despite this.

As we have stated, an "overlap area" is one where Brown and Kinney each have at least one retail outlet. A "non-overlap area" is one where neither has a retail outlet or where one does and the other does not have such an outlet. The "non-overlap areas" are those in which there is no possibility that the merger will lessen competition.

The distribution of shoe sales as between these two groups of areas, and the combined Brown-Kinney share in each is shown on Defendant's Exhibit MMMMM6 (R. 7142, T. 2593), which appears at page 176. In the nation as a whole, the Brown-Kinney share of total dollar retail shoe sales is 2.3%; in the non-overlap areas as a whole, the share is 1.5%; and, in the overlap areas as a whole, the share is 2.9%.

RETAIL FOOTWEAR SALES IN DOLLARS, 1954
SALES OF BROWN-KINNEY AND OTHERS
BY RETAIL LOCATION (000'S OMITTED)

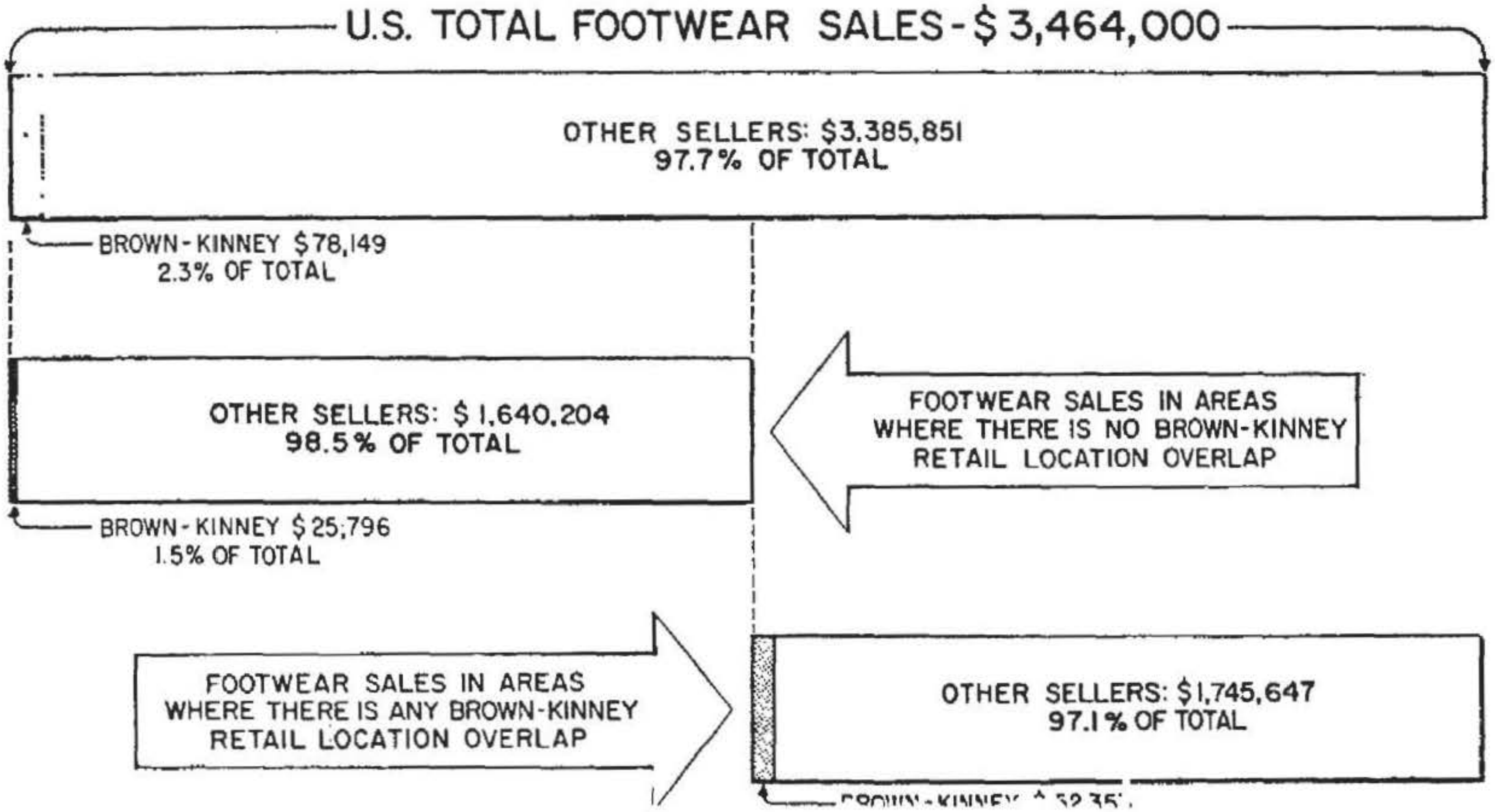

Exhibit MMMMM 6

The 2.9% figure is for the 92 retail overlap areas taken together. The combined share in some of these "overlap" areas was higher and in others it was lower. The share figures are so low as to demonstrate the impossibility that the Brown-Kinney merger could confer significant market power on the combined firm even if the "overlap" areas as a group could be taken to represent a market. Of course, they cannot be so considered. They can be taken together only abstractly: combined they are *not* a real market and do not comprise a "section of the country".

d. Efficiency of Small Unit and Ease of Entry

In addition, the district court failed to take into account the undisputed evidence which demonstrated that small independent retailers are efficient and able to compete with other shoe outlets—there are no significant economies of size in shoe retailing. Among retail shoe stores there are great variations in size. For example, a typical shoe store has annual sales ranging from $50,000 to $100,000; 1,327 shoe stores have annual sales of less than $10,000 (Dx. YYYY, R. 7058, T. 2326).

Finally, the district court failed to take into account the ease by which shoe retailing can be entered and the ease with which an existing shoe operation can be expanded.

As we have set forth at pages 24 through 37, entry is easy for a variety of reasons: the small investment needed for shoe retailing, the ability to achieve success through many different merchandising methods, the easy access to sources which are willing and able to supply a wide variety of shoe styles, the demonstrated ability of retail stores to succeed without substantial advertising outlays at retail, and the willingness of shoe manufacturers to assist independent retailers in meeting each of these problems. The ready availability of many nationally advertised branded lines means that the independent retailer can secure merchandise which is already extensively advertised. From the reservoir of shoes which manufacturers of nationally advertised branded shoes maintain for the independent retailer, he can order and reorder as he perceives demand, thereby reducing his capital requirements and his risks of inventory loss. The fact of easy entry and expansion in shoe retailing means that no firm can achieve durable market power.

C. Effect of the acquisition on shoe "manufacturing-retailing".

The district court concluded that the acquisition of Kinney by Brown "would substantially lessen competition and tend to create a monopoly in manufacturing-retailing" (T. 75). While the opinion is not entirely clear on the matter, we believe that the district court intended by the term "manufacturing-retailing" vertical product-flow integration in the shoe industry.*

Since the district court's conclusion on this point rests upon its conclusions as to line of commerce and section of the country, the errors with respect to these points which we have previously discussed operate here as well.

Moreover, the standard against which the district court purported to measure the competitive effects of the acquisition has no relation to the "reasonable probability" stand-

* Vertical product-flow integration means intra-company sales between two or more functional levels of an industry. Here we are concerned with transfers from the manufacturing level to the retail level within the same firm.

ard of amended Section 7. The speculative standard utilized by the district court is illustrated by the following language of the opinion in which the acquisition is compared to a bite of an apple:

> "We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves, three-quarters, or the whole, and is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same." (T. 73)

To be relevant at all, the analogy proposed must assume a stable apple and the inevitability of the nibbling process. Neither assumption is valid or finds support in the record. With regard to the first, the shoe industry (the "apple") is not stable: it is a dynamic, expanding industry. The second assumption is not supported by the record or common sense. Brown's acquisition of Kinney gives rise to no necessary inference that Brown (or any other firm) will acquire some other firm. To envisage the monopolization of the shoe industry—the consumption of the apple—on the basis of Brown's acquisition of Kinney is to engage in the most arbitrary speculation.

The district court referred to two related but separate matters in support of its conclusion that the acquisition would substantially lessen competition in "manufacturing-retailing":

(1) the acquisition by shoe manufacturers of shoe retailers; and

(2) sales by shoe manufacturers to shoe retail outlets owned by them.

(1) The acquisition by shoe manufacturers of shoe retailers

The key findings by the district court under this head are that between 1950 and 1956 nine independent shoe firms, operating 1,114 retail shoe stores, became subsidiaries of large chains and ceased their independent operations and that by 1956 the six largest firms owned and operated 3,997 shoe stores or 18% of the nation's 22,000 retail shoe stores*

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* The district court lists in footnote 10 of its opinion (T. 69) the percentages of the six firms "of total retail shoe store operation for 1956". So far as the figure given for Brown is concerned (3.8%), the finding is a compound of confusion, error and mistake. 3.8% of 22,000 is 836 outlets. The district court makes it clear that the percentage for Brown excludes both Kinney and the independent retailers on the Brown franchise program. In 1956 there were 98 Regal stores. Wohl operated leased departments in 163 department and specialty stores and operated 27 shoe stores. Even assuming that for the moment the Wohl leased departments in department and specialty stores are to be classified as shoe stores, the figures still add up to only 288 outlets.

For the reasons set forth at the footnote to page 173, we contend that the Wohl leased departments which are located in department and specialty stores should not be included in a numerator whose denominator is only retail shoe stores and not all shoe outlets. Appropriate for inclusion in such a numerator are only the 27 shoe stores operated by Wohl.

We submit, therefore, that the correct computation of the number of shoe stores operated by Brown in 1956 was 125, consisting of 98 Regal stores and 27 shoe stores operated by Wohl. Brown's percentage of shoe stores is thus 0.57%. It is undisputed that Kinney operated 352 shoe stores (T. 1440). Kinney's percentage of shoe stores is 1.6%, and the figure for the combined firm is 2.17%.

It is significant that the district court commences its discussion of this point with a comparison of "retail outlets". The district court's opinion then shifts to a comparison based only upon "shoe stores". This is a serious distortion. While in 1955 there were only approximately 22,000 retail shoe stores, as defined by the Census, there were over 70,000 shoe outlets of all types, including department and specialty stores. Brown and Kinney's combined retail outlets total 640, consisting of 98 Regal outlets, 352 Kinney stores, 27 Wohl shoe stores and 163 department and specialty stores in which Wohl had one or more leased departments. Brown's percentage of the 70,000 retail outlets, correctly computed, is therefore 0.91%.

(T. 69). The district court considered this finding to support its conclusion that a trend toward vertical integration existed in the shoe industry. An examination of the undisputed facts reveals that this was clearly error.

One firm to which the district court refers is Edison Bros. which, as the district court itself notes, was not a manufacturer and owned no manufacturing facilities. In addition, Edison Bros. made no acquisitions and was acquired by no other firm.

Furthermore, many of the acquired firms of which the district court speaks were already vertically integrated shoe firms; they were firms which operated factories as well as retail shoe outlets. A. S. Beck, Florsheim, Regal, Kinney, Douglas, Nisely, and I. Miller all were at least partially integrated prior to merging (T. 1325-6, 1560-1). In some cases the integration prior to merger was substantial. For example, Regal's factories supplied its stores with between 80% and 85% of their retail requirements (T. 2256) and Nisely manufactured about 60% to 65% of the shoes it sold at retail (T. 357-8). The fact that these partially integrated firms were merged could not have increased vertical product-flow integration in the shoe industry. The acquired firms listed above, all of which had vertical product-flow before acquisition, operated 745 of the 1,114 retail shoe stores noted by the district court.

Two further errors may be noted in the district court's analysis. First, the district court lumps all these acquisitions as shoe stores. Brown's acquisition of Wohl was primarily an acquisition of leased shoe departments in department and specialty stores. Second, the district court characterizes the acquiring firms as the six largest firms. This is clearly incorrect; Sears, Roebuck and J. C. Penney each had larger retail shoe sales than the retail shoe sales of Brown and Kinney combined.

These undisputed facts are convincing evidence that the trend toward vertical integration found by the district court simply does not exist.

If vertical integration conferred automatically economic advantages, we should expect to find that all large shoe firms would be integrated and that the effect of such integration would have increased the share of production enjoyed by integrated manufacturers. Neither condition is found; indeed, the undisputed facts show just the contrary.

First, some of the largest retail chains selling shoes do not have manufacturing facilities. Included in this group are J. C. Penney, Sears, Roebuck and Montgomery Ward, as well as the highly successful Edison Bros. In 1955 J. C. Penney had 1657 retail stores (Dx. W, R. 3292, T. 1924), Sears had about 387 retail outlets and 11 mail order plants (Dx. M, R. 68, T. 1601), and Montgomery Ward had about 481 retail outlets (Dx. K, R. 51, T. 1593). In 1956 Edison Bros. had 297 retail outlets (Gx. 59, R. 436, T. 547).

Sears, Roebuck had retail shoe sales of $104,352,000 in 1955, of which $36,455,000 were mail order (Dx. L, R. 65, T. 1605). Edison Bros. had retail sales of over $87,204,000 (Gx. 56, R. 432, T. 541). Penney had retail footwear sales of over $85,000,000 (Dx. W, R. 3292, T. 1924). Montgomery Ward's footwear sales were $41,167,000, of which $16,714,000 were mail order (Dx. K, R. 51, T. 1593).

Furthermore, many firms that have vertically integrated in the past have not been particularly successful. Examples of vertically integrated firms with declining profits include Regal, Hanover and Walk-over (T. 1325-6, 2277, 2281-2).

Endicott-Johnson, which is vertically integrated, has suffered a continual fall in production and share in the industry (Dx. KK, R. 3348, T. 2004). Yet, Endicott-Johnson increased its retail outlets from 488 in 1945 to 540 in 1956 (Gx. 59, R. 436, T. 547).

At least two vertically integrated firms, George Keith Company and Spencer Shoe Corporation, have sold their manufacturing facilities (T. 443, 2274). There have been notable failures of vertically integrated firms; for example, W. L. Douglas and Nisely-Smith (T. 1325, 1560).

All of the foregoing completely contradicts the district court's finding that there has been an increase in vertical integration in the shoe industry. Perhaps the best evidence, however, lies in the simple fact that the result of retail acquisitions has not been to make vertical product-flow integration an important factor in shoe distribution. Shipments in 1954 by manufacturers to owned retail outlets made up only 5% of the total pairs shipped and 7% of the total dollars shipped (Dxs. DDDDDDD, R. 7845, T. 2593; EEEEEEE, R. 7847, T. 2593). This 5% that is distributed through owned outlets relates to all vertically integrated firms regardless of the year they became integrated and the method by which they became integrated. That is, the 5% figure does not pertain to any "recent merger trend".

As the table at page 16 shows, the percentage share of national shoe production of the four largest firms taken together has decreased during the period 1947-1956 (the years of the so-called trend) from 25.40% of the total to

22.41%. It was this group of firms which, in the view of the district court, led the trend. Yet, International's percentage, for example, dropped from 10.68% to 8.26% while it was making several fairly substantial acquisitions, particularly its acquisition of the Florsheim retail outlets.

The district court's opinion suggests that the smaller (non-integrated) manufacturers have been injured by the supposed trend when it recites that "there is also a definite trend in the industry toward the decrease of the number of plants manufacturing shoes" (T. 69-70). This finding has no bearing on the fate of the smaller manufacturer and no relevance to any determination with respect to competition in shoe manufacturing.

Since it is undisputed that shoe production has been increasing, a reduction in the number of plants (without regard to who owns them) only shows that the modern plants are more efficient. The briefest look at the position of the group of smaller shoe manufacturers whose members have not participated in the so-called trend shows that they have not been shunted aside by any "trend". Indeed, the share of shoe production of the smaller shoe manufacturers (smaller than the largest fifty) has increased from less than 49% in 1939 to more than 55% in 1955 (Dx. LL, R. 3349, T. 2004).

(2) Sales by shoe manufacturers to shoe retail outlets owned by them.

The district court has held that "once manufacturers acquire retail outlets they definitely increase the sale of their own manufactured product to these retail outlets" (T. 69). The only evidence with respect to such an increase in the record related to sales of Brown and other manufacturers to retail outlets acquired by Brown. The evidence does not justify any inference about the industry generally.

The district court gained the erroneous impression that the opportunity for a manufacturer to sell to its own retail outlet is practically unlimited and, therefore, predicted that Brown would inevitably take over Kinney's supply. To support this, the district court relies heavily upon Brown's experience with Wohl.

This experience does not support the district court's prediction. This is demonstrated by the fact that Wohl's purchases from its outside shoe suppliers have risen from $20,946,111 in 1951, the year in which Brown acquired Wohl, to $23,886,000 in 1957, an increase of nearly $3,000,000. Thus, Wohl's purchases from outside shoe suppliers amounted to twice as much as its shoe purchases from Brown. During this period, the number of Wohl's outside shoe suppliers increased from 160 to 167 (T. 2036-7).

In addition, the district court overlooked the fundamental fact that Wohl's purchases from Brown are in Brown's traditional medium price grades—which are significantly higher in price and quality than Kinney's requirements for its popular price shoe stores. In 1955, $4,642,147 of Wohl's purchases from Brown were of Brown's nationally advertised branded shoes, and most of these were of Brown's better grade women's and children's brands, *i.e.,* Naturalizer, Air Step and Buster Brown (Dx. SS, R. 4337, T. 2008).

Similarly, Brown's sales to Wohl of make-up shoes made to Wohl's specifications have been primarily in Brown's traditional type and price categories. Women's shoes account for over 97% of Brown's dollar sales of make-up shoes to Wohl. 86% (in dollars) of these women's make-up shoes were in the medium price category—from $8.95 up for dress and from $6.95 up for sports and casuals (Dx. WWW, R. 4716, T. 2318). In sum, over 90% of Wohl's purchases from Brown are in Brown's traditional medium price grades (T. 2037-9).

In 1955, Wohl's purchases from Brown amounted to $10,758,518 out of Wohl's purchases of $32,998,058 (T. 2038). This represented 32.6% of Wohl's total shoe purchases (Gx. 35, R. 271, T. 418).*

The district court cited in support of its position the fact that "one manufacturer who supplied Wohl with $1,230,527.00 worth of shoes in 1955, sold them less than $100,000.00 worth of shoes in 1958" (T. 71). This comment relates to the experience of Deb Shoe Company, a multi-unit firm and a subsidiary of the large Wolff Shoe group (T. 968, 978), one of the twelve largest manufacturers in the country (Gx. 58, R. 435, T. 544).

The statistical facts are true, but are taken out of context and are misleading. Brown acquired Wohl in 1951. Deb's sales to Wohl increased from $260,867 in 1951, the year of the Wohl-Brown merger, to $306,835 in 1952, to $480,283 in 1953, to $906,524, and to $1,230,527 in 1955. In 1956, they were $838,141. Even in 1957 Deb's sales to Wohl were $593,626, more than twice their level in 1951. Deb's sales thus increased significantly and steadily year after

* At one point in the district court's opinion it is said that Wohl's shoe purchases from Brown in 1957 represented 36.6% of Wohl's total shoe purchases (T. 46). In actual fact, the percentages in the period 1955-7 were as follows: in 1955, 32.6%; in 1956, 31.8%; and in 1957, 33.6% (Gx. 35, R. 271, T. 418; Gx. 37, R. 273, T. 423).

year following Brown's acquisition of Wohl (T. 965-6). It is ridiculous to say, therefore, that Deb was adversely affected by the Brown-Wohl merger.

In addition, Deb's relationship with Wohl had nothing whatsoever to do with Wohl's acquisition by Brown. Deb Shoe Company eventually declined as a Wohl supplier after 1955 because of continued admitted complaints on quality, failure to make deliveries as scheduled and difficulties concerning prices (T. 1850-3, 951-4).

In the case of Radcliffe, another Wohl supplier which the district court cited as an example of a firm squeezed out by Brown's acquisition, Wohl's purchases reached a peak two years after the acquisition of Wohl by Brown in 1951. Radcliffe's records show sales to Wohl of about \$346,000 in 1950, \$244,000 in 1951, \$215,000 in 1952, \$366,000 in 1953, \$750,000 in 1954, \$3,000 in 1955, \$44,000 in 1956, and \$68,900 in 1957 (T. 711-4). Wohl's purchases from Radcliffe eventually declined because Wohl had increasing complaints as to the quality and fit of the shoes (T. 1856-8).

The district court also referred to Brown's experience with Wetherby-Kayser, a shoe retailing firm comprised of three shoe stores, which was acquired by Brown in 1953, to support its conclusion that Brown will become the exclusive supplier of Kinney. Unlike Kinney, Wetherby-Kayser sells only nationally advertised branded shoes; its sales are of medium to high priced shoes (T. 2032-3). There is, therefore, no analogy between Kinney and Wetherby-Kayser.

Total purchases by Wetherby-Kayser from all manufacturers have increased as the number of its stores has increased. Total purchases are as follows (Gx. 39, R. 275, T. 425; Dx. PP, R. 3826, T. 2007):

1951	1952	1953	1954	1955
$271,295	$220,398	$280,157	$481,052	$564,113

Purchases of outside brands sold through Wetherby-Kayser outlets increased after Wetherby-Kayser's acquisition by Brown. Out of total shoe purchases in 1955, which represented sales of 89,817 pairs of shoes, over half, or 45,580 pairs of shoes, were outside brands from outside suppliers. Thus the shoe purchases in dollars from outside suppliers of brands other than Brown represented purchases of more than $282,056 in 1955 (*i.e.*, out of total purchases of $564,113) compared to $197,254 in 1952 and $242,494 in 1951 before Brown acquired Wetherby-Kayser (Gx. 39, R. 275, T. 425).

Kinney's own purchases from Brown likewise form no basis for an inference that Brown will take over the supply of Kinney. As noted, Kinney's factories supply it with only about 20% of its retail requirements (T. 1439). The remaining 80% is purchased from outside suppliers. Kinney's outside purchases of leather shoes amounted to $19.4 million in 1957, and of this amount, Brown supplied only $1,546,856 or approximately 8% (Gx. 40, R. 277, T. 426).

In 1955, prior to its acquisition by Brown, Kinney's purchases of leather shoes from outside manufacturers amounted to $16.8 million (T. 1540). As noted, by 1957 Kinney's outside purchases had increased by $2.6 million. Thus Kinney's outside purchases increased between 1955 and 1957 by an amount considerably in excess of Brown's sales to Kinney in 1957.

Brown's sales to Kinney increased after the acquisition, but it was the new higher quality demand that Kinney experienced in its new suburban outlets that occasioned the purchase of these shoes in a higher price category than Kinney's traditional range before the merger, and not the fact of the acquisition.*

Upon the trial, appellee offered no evidence to demonstrate that any supplier of Kinney had been or might be displaced by Brown.

Of the ten shoe manufacturers who testified for appellee at the trial, only one was a Kinney supplier. He made no contention that he had been displaced by Brown (Gx. 251, R. 2854, T. 2819). The other shoe manufacturers who were

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* The district court also recited Regal's sales to Wohl and Kinney. The district court notes, for example, that in 1955, Regal sold $2,000 worth of shoes to Wohl (T. 46), not stating that Wohl's total purchases in that year were approximately $33,000,000 (T. 2038). Even in 1956, when Regal's sales to Wohl amounted to $265,000, Wohl's total purchases increased to approximately $34,500,000 (T. 2039). The $265,000 worth of shoes sold by Regal in 1956 to Wohl were in liquidation of Regal's women's and children's shoe stock, for in that year Regal ceased to sell such shoes in its Regal retail stores (Gx. 73, R. 460, T. 698). Moreover, the shoes sold were women's and children's shoes which Regal did not manufacture.

Regal's sales to Kinney are treated in the same misleading way in the district court's opinion. The district court recites the evidence that before Kinney had been acquired by Brown, Regal sold no shoes to Kinney and that "by 1956 it had sold and delivered $399,000 worth of shoes to Kinney" (T. 46). The district court not only expanded Regal's sales to Kinney by $40,000 in 1956 (perhaps by a typographical error) but failed to note that Regal's sales to Kinney actually declined to $240,000 in 1957 (Gx. 73, R. 460, T. 698). While Kinney's purchases from Regal declined, Kinney's purchases of the same type of shoes which Regal makes have increased from several outside suppliers, including Diamond, a subsidiary of A. S. Beck, Shoe Corporation of America, and the Bridgewater Worker's Cooperative (T. 1531).

witnesses were not Kinney suppliers and hence the Brown-Kinney merger could not effect a foreclosure of any market in which they sold.

The undisputed facts regarding Brown's production and Kinney's purchases show that even if we assume that, as a result of the acquisition, Kinney will purchase its requirements from Brown insofar as Brown can meet them, there are very few price lines in which Brown sales and Kinney purchases overlap in any age/sex category. This is graphically demonstrated by the tables appended at pages 6a through 8a in which the price categories of Brown production and Kinney purchases are compared.

The only ways in which Brown could take over the supplying of Kinney would be to convert its factories to lower grade production of make-up shoes to meet Kinney's needs or to construct new factories.

As we have pointed out above at pages 126 and 127, a shoe factory cannot economically be down-graded; a factory producing shoes retailing from $10.95 through $14.95 cannot profitably be converted into a factory producing shoes to retail at $5.95 through $6.95. Even if Brown desired to take over the supply of Kinney, it could not readily do so. Its present ability to supply Kinney with the shoes Kinney sells is limited.

If Brown wished to increase its capability to supply shoes of the Kinney grade, time and money would be required to build new factories. It would not be sensible to make this investment since there is no reason to suppose that it would be profitable.

Brown's most profitable production as a shoe manufacturer consists of its nationally advertised branded lines which account for 85% of its production. Brown's production of make-up shoes, accounting for 15% of its production, has not been profitable (T. 1320, 2167). Nearly all of the shoes which Kinney purchases and sells at retail are make-up shoes purchased by Kinney according to its own specifications. Kinney is therefore not a likely customer for Brown's most profitable production.

We submit therefore that Brown's own experience with Wohl thus demonstrates clearly that there are limits to which a manufacturer can supply its own retail outlets. The reason for this is clearly established by the record: a retailer, such as Kinney, under today's market conditions needs too many styles, too many types of shoes, for any single manufacturer to supply him with his requirements (T. 1544).

In addition, a retailer who failed to take advantage of the keen price and style competition existing in the shoe industry would soon find himself at a severe competitive disadvantage.

Indeed, this was illustrated by Kinney's own experience in the 30's. When the depression came, the then Kinney management decided that it would force its own retail outlets to buy shoes from its factories. The result of this program was to drive Kinney to the verge of financial disaster (T. 1436-7).

Notwithstanding all of the foregoing, even if Brown undertook to supply all of Kinney's requirements, this would not and could not bring about a substantial lessening of competition in shoe manufacturing. Kinney, with only 1.1% of national retail shoe sales, is not a significant portion of any substantial market (*Cf. United States* v. *du Pont & Co.*, 353 U. S. at 595-596).

In 1955 Kinney's total purchases of shoes from all sources amounted to between 6½ and 7 million pairs (T. 1540). National production of shoes in that year was approximately 642 million pairs.* Kinney's total purchases were thus only about 1% of national production. This percentage figure of course excludes any consideration of imports which, as we have shown above at page 22, have been steadily growing.

While this case does not arise under Section 3 of the Clayton Act, and the tests under amended Section 7 are necessarily different from those under Section 3, a comparison with this Court's recent decision in *Tampa Electric Co.* v. *Nashville Co.,* 365 U. S. 320, is enlightening. This Court pointed out that the number of available suppliers of coal for the electric company was approximately 700. The total number of potential suppliers of shoes of Kinney are well in excess of that number. The tonnage requirements of the electric company were something less than 1% of total available supply. This Court characterized this amount as "conservatively speaking, quite insubstantial". We submit that precisely the same conclusion is dictated here.

D. Effect of the acquisition on the shoe industry.

Two of the district court's conclusions relate to a prophecy as to the effects of the acquisition on the whole shoe industry. The first concerns alleged competitive advantages to be derived from the merger. The second concerns

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* The district court found, as the parties agreed, that the appropriate section of the country for shoe manufacturing was the entire nation. Accordingly, the production of all domestic shoe manufacturers must be taken into account on this point.

an alleged position of dominance to be achieved by the merger. Both conclusions are erroneous and without support in the record.

(1) The so-called "advantages" enjoyed by company-controlled and company-owned retail outlets

The opinion of the district court states: "National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage" (T. 70).

We do not challenge this statement; indeed we agree with it. The consequence of this finding, however, is directly contrary to the conclusion which the district court reached. The undisputed evidence is that national chains such as Kinney do not sell nationally advertised branded shoes. Kinney sells no nationally advertised men's shoes, no nationally advertised women's shoes, and only an insignificant portion (2%) of its children's shoes are nationally advertised branded shoes (T. 1555-6).

The retail outlets selling nationally advertised branded shoes are independent retailers in individual shoe stores and in department and specialty stores. These are the outlets which receive the benefit of national advertising by manufacturers selling this type of merchandise. Kinney does not engage in national advertising; it relies upon other merchandising techniques to attract its customers as more fully described at pages 92 through 97.

The opinion of the district court continues: "Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantage in advertising, insurance, inventory control and assists and price control" (T. 70).

This statement is a combination of confusion and mistake.

With respect to the claimed advantage relating to "insurance", there is nothing in the record which in any way relates to any company-owned retail outlet.

As far as the supposed advantages in "buying" enjoyed by organizations such as Brown and Kinney is concerned, the record is clear that the two firms buy different grades of materials for the different quality of shoes which the two firms produce.

For example, Brown's purchases of upper leather (the highest grade of bovine leather) from outside suppliers in 1955 amounted to \$9,712,132.41 (Dx. AAAA, R. 4892, T. 2319). Of this amount \$5,605,000 was for calf skin; Kinney purchases no calf skin. \$1,981,000 went for kid of which Kinney uses an insignificant quantity (\$7,000 per year). \$2,125,000 went for bovine side leather; Kinney also purchases bovine side leather but in grades much lower than Brown (Dx. AAAA, R. 4892, T. 2319).

The same pattern holds true for Regal whose purchases of upper leather for the last full year set forth in the record amounted to \$1,048,297.79 (Dx. FFFF, R. 5675, T. 2321). Of this amount \$642,000 was spent for calf skin. \$161,000 was spent for cordovan, an expensive leather which Kinney did not purchase, and kid, and \$244,000 was for bovine sides, also of higher quality than Kinney purchases.

Kinney's total purchases of upper leather amounted to \$1,554,448.65 (Dx. XX, R. 4384, T. 2010). Of this amount, \$1,233,000, or approximately 80% of all of Kinney's upper leather purchases, were made from one supplier—from which neither Brown nor Regal purchased.

Even with regard to the one firm which is a significant supplier of Kinney from which Brown also purchases—American Biltrite—as we have pointed out at page 73, the two firms purchase materials in different grades and there is no evidence that either firm had any purchasing advantage from that company. With respect to the only two suppliers of raw materials as to which evidence was adduced, Kinney did not purchase at all from one and its purchases from the other (Goodrich) were less than $1,000 per year (T. 998).* Accordingly, there can be no advantage conferred by the merger through the use of combined purchases.

With respect to purchases of finished shoes, there is literally no evidence that the combined firm would obtain any advantages in purchasing.

So far as company-owned retail stores are concerned, there is no evidence in the record that they have any advantages in purchasing and credit. Since Kinney and Regal do not sell nationally advertised branded shoes, Wohl is the only significant seller of such shoes among those outlets which may fairly be described as company-controlled. The evidence is undisputed that Wohl has no advantage in purchasing or in credit terms with respect to such shoes.

With respect to make-up shoes made to the buyer's specifications, there is no evidence in the record that Brown and Kinney combined would have any advantages in purchas-

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* At the trial appellee introduced evidence tending to show that Brown received price concessions from Goodrich. The record was clear that Goodrich had sold its products to Brown on the same basis since 1928 (T. 1000). Moreover, Kinney does not purchase the type of material Brown buys from Goodrich. The price concession received by Brown did not apply to the type of material purchased by Kinney.

ing. Because of the differences in price, style and quality of the shoes which the two firms sell at retail, Brown and Kinney have few common suppliers, as we have noted above at pages 82 and 83. There is no evidence of price concessions accorded to either firm in this record.

Independent retailers on the Brown Franchise Program or the Wohl Plan enjoy no buying or credit advantages over other independent retail customers of the two firms.

The price of any particular shoe style is the same to every independent retail customer of Brown regardless of whether he participated in the Brown Franchise Program or the Wohl Plan. Similarly, there is no advertising advantage conferred upon these independent retailers over and above any other independent retailers purchasing from the two firms because these customers purchase only nationally advertised branded shoes. Each of these independent retailers controls his own inventory and determines his own prices.

The Kinney merger did not add or subtract from the situation relating to independent retailers on the Brown Franchise Program or the Wohl Plan as it stood before the Kinney merger in respect of these various matters referred to by the district court.

The district court then continues with the following statement: "These advantages result in lower prices or in higher quality for the same price." The record does not support this observation. Indeed, no comparison is possible between the cost of nationally advertised branded shoes and the cost of make-up shoes intended to sell at a particular price.

In the case of nationally advertised branded shoes, the manufacturer takes the sales risk of producing and maintaining warehouse stocks of shoes (T. 1278). In the case of make-up shoes made to the buyer's specifications, the manufacturer does not take any production or warehousing risks because the shoes are not produced until an order is received and the purchaser has no option of returning the shoes once delivered (T. 2110-1).

On the other side of the coin the independent retailer limits his inventory risk when he buys nationally advertised branded shoes from a company such as Brown which carries the shoes in stock. He is free to order and reorder as demand arises, and his inventory at all times is necessarily quite limited.

The volume purchaser of make-up shoes bears all expenses of warehousing and takes substantial inventory risks on his orders of make-up shoes.

The manufacturer of nationally advertised branded shoes bears much of the promotion expense connected with the sale of these shoes. His national advertising is supplemented by promotional aids he provides at his own expense for the independent retailer (T. 1271).

The manufacturer of nationally advertised branded shoes normally sends salesmen around to call upon retail customers. These salesmen, in addition to making available the new shoe lines, also aid the merchant in stocking and making suggestions as to his inventory (T. 1265).

The volume purchaser of make-up shoes made to the buyer's specifications has to maintain a staff of buyers who deal with the various manufacturers who make the make-up shoes. In addition, the expense of advertising and promotion and the merchandising expense represented by control of inventory is borne solely by the volume purchaser (T. 1513-4).

In so far as the district court attempts a comparison as to alleged advantages in advertising, inventory, and price control as between the independent retailer and the chain seller, it is clear from the foregoing that the attempt must fail; there simply is no evidence that there is any "advantage".

The district court then stated: "The independent retailer can no longer compete in the low and medium-priced fields and has been driven to concentrate his business in the higher-priced, higher-quality type of shoes . . ." (T. 70). There is no evidence in the record to suggest that independent retailers have ever been generally in the low-priced fields. Their traditional business has been in medium-priced and higher-priced shoes, and it is there that their business remains today.

The district court's error here is fundamental. It lies in equating injury to competitors with injury to competition. The district court assumes that because a particular merchant may have a difficult time in competing, competition is thereby injured (see also statement of the district court at T. 69). But this is not the statutory test. The statutory test is whether there will probably be a substantial lessening of competition, not whether there will probably be injury to competitors.

Competition means a struggle in which some will succeed and others fail. In fact, however, there was no evidence before the district court of any independent retailer who had failed in business. The extent of their complaints was that they were being subjected to constant competition, not that competition had been lessened substantially or otherwise.

Finally, if in fact the "advantages" which the district court's opinion indicates were truly present, namely selling by chains at lower prices, we should have expected that the market position of the chains would have altered very favorably between the years 1948 and 1954, the period when most of the acquisitions to which the district court refers occurred. Here again the undisputed objective evidence shows that this did not in fact occur (Dx. NNNNN3, R. 7153, T. 2593).

(2) Brown's alleged dominant position obtained by virtue of the acquisition

The district court concluded that Brown and Kinney combined would become "the dominant shoe firm in the country" (T. 71). While it is not entirely clear, the district court's conclusion in this respect apparently rests upon facts which it recites relating to the rank both in sales and in assets of various firms selling shoes (T. 71).

Thus, the district court recites that Brown's ranking in the industry as a result of the merger would change from fourth to third from the standpoint of sales and assets. In reaching this conclusion, the district court lumped all of Brown's functions in the shoe industry together; such figures combine Brown's sales as a manufacturer, as a wholesaler and as a retailer. In sum, the district court failed to distinguish between the market in which Brown sells as a manufacturer and the entirely separate and different markets in which it sells as a retailer.

Prior to the merger Brown was the fourth largest manufacturer of shoes in pairs in the United States. The year after the merger, Brown's ranking as the fourth largest manufacturer of shoes in pairs had not changed even though

Kinney's production was included within Brown's totals (Dx. JJ, R. 3346, T. 2003). On the undisputed facts, therefore, the merger did not effect any change in the ranking of Brown as a manufacturer.

The situation with respect to retail sales is somewhat more complex. There are no figures available for many large retailers, such as International, Endicott-Johnson, General, Melville and Shoe Corporation of America, showing the exact extent of their retail sales. However, we know that Melville and Shoe Corporation of America each had more retail outlets in 1956 than Brown and Kinney combined (Gx. 59, R. 436, T. 547). In addition, Edison Brothers had retail sales greater than Brown and Kinney combined (Gx. 56, R. 432, T. 536). So did Sears, Roebuck and J. C. Penney, which are not even included in the so-called rankings made by the district court (Dx. L, R. 65, T. 1605; Dx. W, R. 3292, T. 1924). To what extent Brown's ranking as a retailer changed as a result of the merger is thus not clearly depicted in the record.

More important, however, the facts relating to the rank of Brown before and after the merger are virtually meaningless in analyzing the impact upon competition of the merger.

First, the district court's rankings are limited to "shoe firms", as nowhere defined by the district court. This limitation seriously distorts the state of competition in shoe retailing. Not included in the ranking are such firms as J. C. Penney, Sears, Roebuck, and Montgomery Ward. All of these firms had larger shoe sales at retail than Kinney, and the first two firms had larger shoe sales at retail than Brown and Kinney combined.

Even when the ranking is limited to shoe firms, the rankings are meaningless because they include firms which are exclusively retailers, firms which are primarily manufacturers, and firms performing both functions. Except for Brown and Kinney, we do not know in the case of firms which both manufacture and retail shoes how much of their sales is accounted for as manufacturers and how much is accounted for by retail sales.

To illustrate, suppose a shoe manufacturing firm has annual sales of $1 million and a shoe retailing firm has annual sales of $1.6 million. Since the two firms are at different levels of the industry and perform different functions, it is difficult, if not impossible, to assign "ranks" to them in relationship to one another. Even if we assume that the shoe retailing firm purchased shoes for resale at a cost of $1 million, we still would not know how many pairs of shoes each of the two firms sold. The shoe manufacturing firm may well have sold 100,000 pairs of shoes at $10 per pair, whereas the shoe retailing firm may have sold 200,000 pairs of shoes costing $5 per pair at a retail price of $8 per pair. If we assume that the shoe manufacturing firm sold only men's shoes, while the shoe retailing firm sold only women's shoes, ranking of the two firms would be equally meaningless.

The ranking in accordance with assets is likewise without significance. At best balance sheet data are a faulty measure of economic values. The value of a bundle of assets is determined not by what they cost but rather by what income they can yield. There need be no relation between these two. In the past decade there have been substantial increases in most prices. This is particularly true of construction and equipment costs.

Since accounting records are customarily kept on the basis of historical costs, the book value of a firm's assets will reflect assets acquired at widely different prices. Two manufacturing plants may be closely comparable in their capacity, yet balance sheet values, reflecting as they do historical costs, will indicate values for the assets which have no relation to their economic value or their ability to produce income for the owner. Because there are a large number of firms at each level of the shoe industry, each with different patterns of net asset acquisition and replacement through time, book value of assets is a poor measure of the relationship of these firms when price levels have changed substantially.

However, even if book values of firms were comparable, they still would be a poor measure of production capacity. In the shoe manufacturing industry extensive use is made of leased machinery. Leased machinery will not be included in the balance sheet of the firm leasing the machinery. It is clear that for measuring a firm's contribution to production capacity, a leased machine is as productive as one which is owned. If a firm rents a shoe machine, it scarcely follows that it is a lesser threat to competition because the book value of its assets is smaller.

Thus, the district court's recital that "Kinney ranked eighth asset-wise among all shoe firms in the nation in 1955, and was twelfth in number of pairs produced and seventh in net sales" (T. 50) not only does not advance analysis but also is incorrect.*

The district court's ranking of Kinney in terms of assets and net sales ignores such firms as Sears, Roebuck, J. C.

* The district court asserts that there is no dispute about this matter. There is.

Penney and Montgomery Ward. All of these firms had more assets than Kinney and both Sears, Roebuck and J. C. Penney had greater shoe sales.

In addition, the analysis is faulty; the district court accepted appellee's view that only firms predominantly selling shoes should be looked to in making up rankings. On a parity of reasoning it would follow that Brown would be eliminated from all ranks if its ownership were vested in du Pont.

The district court's ranking in the number of pairs produced also fails to take into account the very different types of shoes manufactured by Brown and Kinney. As noted above, Kinney manufactures no women's shoes as such. Brown's most important category of production is women's shoes, accounting for approximately 56% of Brown's production (Dx. KKKKK1, R. 7078, T. 2593). The ranking of two firms without taking these differences into account is, we submit, utterly meaningless.

The fundamental objection to the "rank" evidence which the district court apparently relies upon to support its finding of dominance is this: even if it were the fact that Brown (with Kinney) would become the largest firm in the shoe industry according to certain indicia of size, this would not mean that it would be in a position to dominate the shoe business. The district court's finding to the contrary cannot be squared with this Court's holding in *Times-Picayune* v. *United States,* 345 U. S. 594, 612-3.

One of the most significant reasons why no such dominance could be achieved lies in the check inherent in the ease with which new firms can enter the shoe industry. As Judge Dawson noted in *American Crystal Sugar Co.* v.

Cuban-American Sugar Co., 152 F. Supp. 387, 400 (S.D. N.Y. 1956), *aff'd*, 259 F. 2d 524 (2d Cir. 1958):

> "In forecasting the effect merger will have upon competition it is important to determine the opportunity for new firms to enter the industry. For if there is reasonable access to an industry amelioration of market structure conditions is possible."

In the shoemaking industry the "countervailing pressures" exerted by new firms entering the industry are significant. The factors which might become barriers to entry are largely absent or of minor importance. In the shoe industry there are no significant barriers to entry such as high capital investment requirements, inaccessibility of technology because of patents or secrecy of know-how, or the need for large advertising or promotional outlays to develop consumer patronage (T. 2448).

"The best evidence of ease of entry is entry" (T. 2527). The rate of entry into the shoe industry each year is high. New firms have continued to show up in the shoe manufacturing business over the past decade at about the same rate each year (T. 1652). This high rate of entry in shoemaking is in direct and dramatic contrast to the absence of entry in the previous cases where a merger has been struck down under Section 7. Judge Dawson in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 400 (S.D. N.Y. 1956), *aff'd*, 259 F. 2d 524 (2d Cir. 1958) described the market he was concerned with in these terms:

> "The evidence indicates that no new sugar refiners can be anticipated. In the last thirty years no new firms have entered the industry. Currently the quota system [imposed by Congress by the National Sugar Act] is a staunch barrier to new entry."

In short, the sugar industry was found by the Second Circuit to be "peculiarly inhospitable to incursions from outside entrepreneurs." (259 F. 2d at 530).

In *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 606-07 (S.D. N.Y. 1958), Judge Weinfeld laid great stress on the following:

> "Since 1935 only two new integrated steel companies have been established in the iron and steel industry, Kaiser Steel Corp. and Lone Star Steel Co. Both companies entered the iron and steel industry with substantial Government assistance . . . The evidence establishes that the industry *is and will be frozen in the foreseeable future* into the present number of integrated steel producers." [emphasis added]

Like ease of entry, imports operate to erode away market power. Imports speed up the leveling of any temporary advantages gained by merger or otherwise because foreign producers compete in the same market as domestic producers where there is no tariff restriction sufficient to keep them out (T. 2524-5).

Imports have increased by nearly eight times over-all in the postwar period from 1947 to 1956 (Dx. FF, R. 3340, T. 2002). Different types of imported footwear have enjoyed different rates of growth depending upon market opportunities. Imports represent production about half the size of Brown's and nearly five times that of Kinney's.

Monopoly connotes "effective market control" *United States* v. *Griffith*, 334 U. S. 100, 107—the power to exclude competition and to raise prices without a substantial and unprofitable diversion of patronage. *Cf. American Tobacco Co.* v. *United States*, 328 U. S. 781, 811. To show a tendency toward monopoly, therefore, it must be proved that in consequence of an acquisition, there has been an actual, definite and perceptible advance toward the probable achievement of effective market control. There is no proof in the record of such an advance.

On the contrary, the undisputed evidence is that there has been no tendency towards concentration of production in the shoe industry. Indeed, the production shares of the largest four manufacturers fell from 25.4% in 1947 to 21.75% in 1955 (Dx. KK, R. 3348, T. 2004). This is shown graphically by Defendant's Exhibit LLLLL1 (R. 7116, T. 2593), which appears at page 207.

The lack of concentration in the shoe industry sharply distinguishes this case from other Section 7 cases. In *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 584 (S.D.N.Y. 1958), Judge Weinfeld found that:

> "The iron and steel industry is a highly concentrated one. It is an oligopoly. Twelve integrated companies control 83% of the industry capacity."

In *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524, 528 (2d Cir. 1958), the Court noted that in the relevant market,

> "about two-thirds of all the sugar sold was supplied by seven producers. . . ."

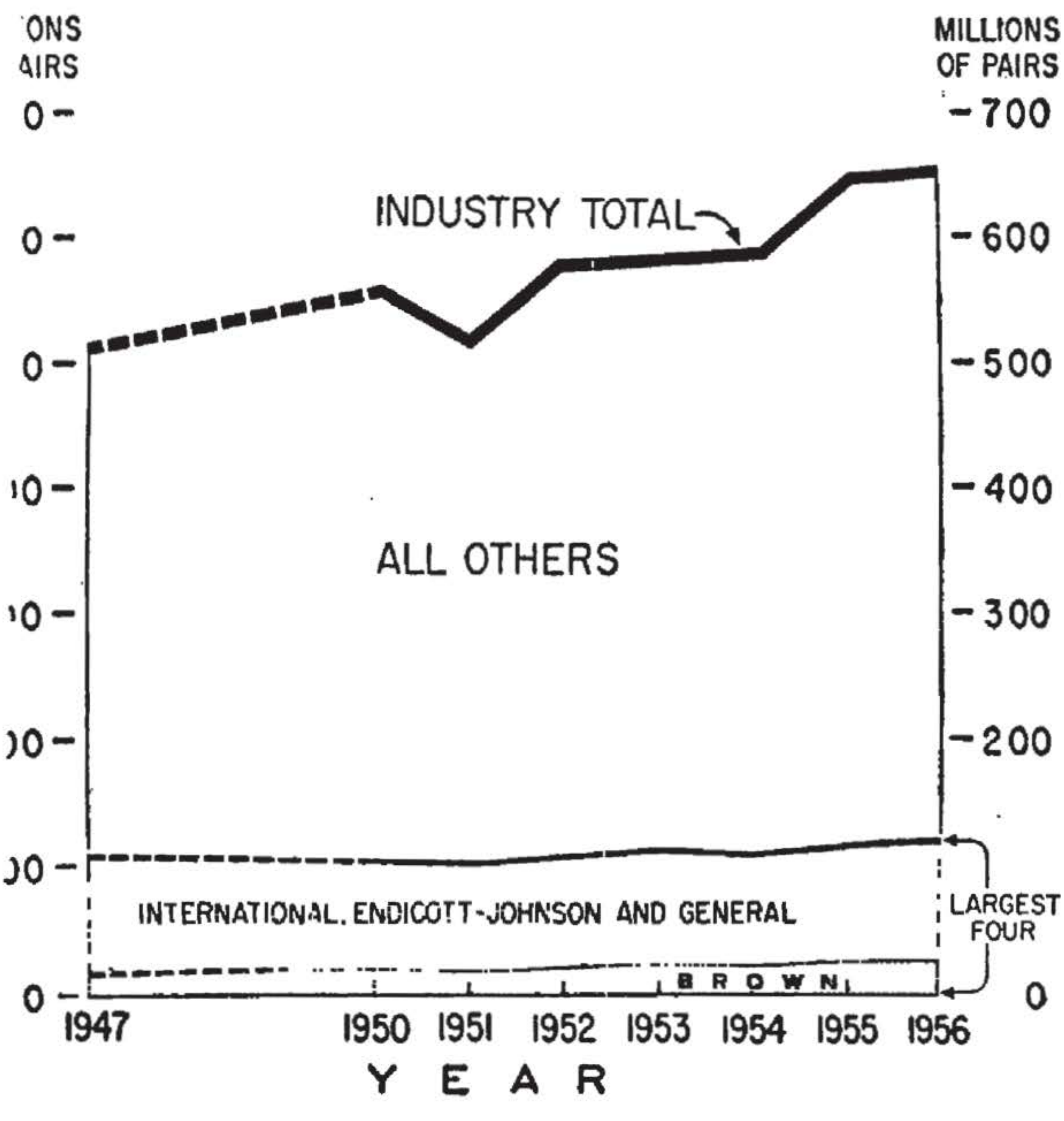
In *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307, 311 (D. Conn. 1953), *aff'd*, 206 F. 2d 738 (2d Cir. 1953), Judge Hincks found and was affirmed on appeal that:

> "The 'Big Six' of the watch industry (Elgin, Bulova, Benrus, Longines-Wittnauer, Hamilton and Gruen) account for about 90% of the sales of nationally advertised branded jewelled watches."

Exhibit LLLLL 1

IRAGE PRODUCTION OF SHOES AND SLIPPERS LUDING RUBBER AND INCLUDING CANVAS-UPPER IBBER SOLED SHOES, 1947 AND 1950-1956

LARGEST FOUR PRODUCERS AND INDUSTRY

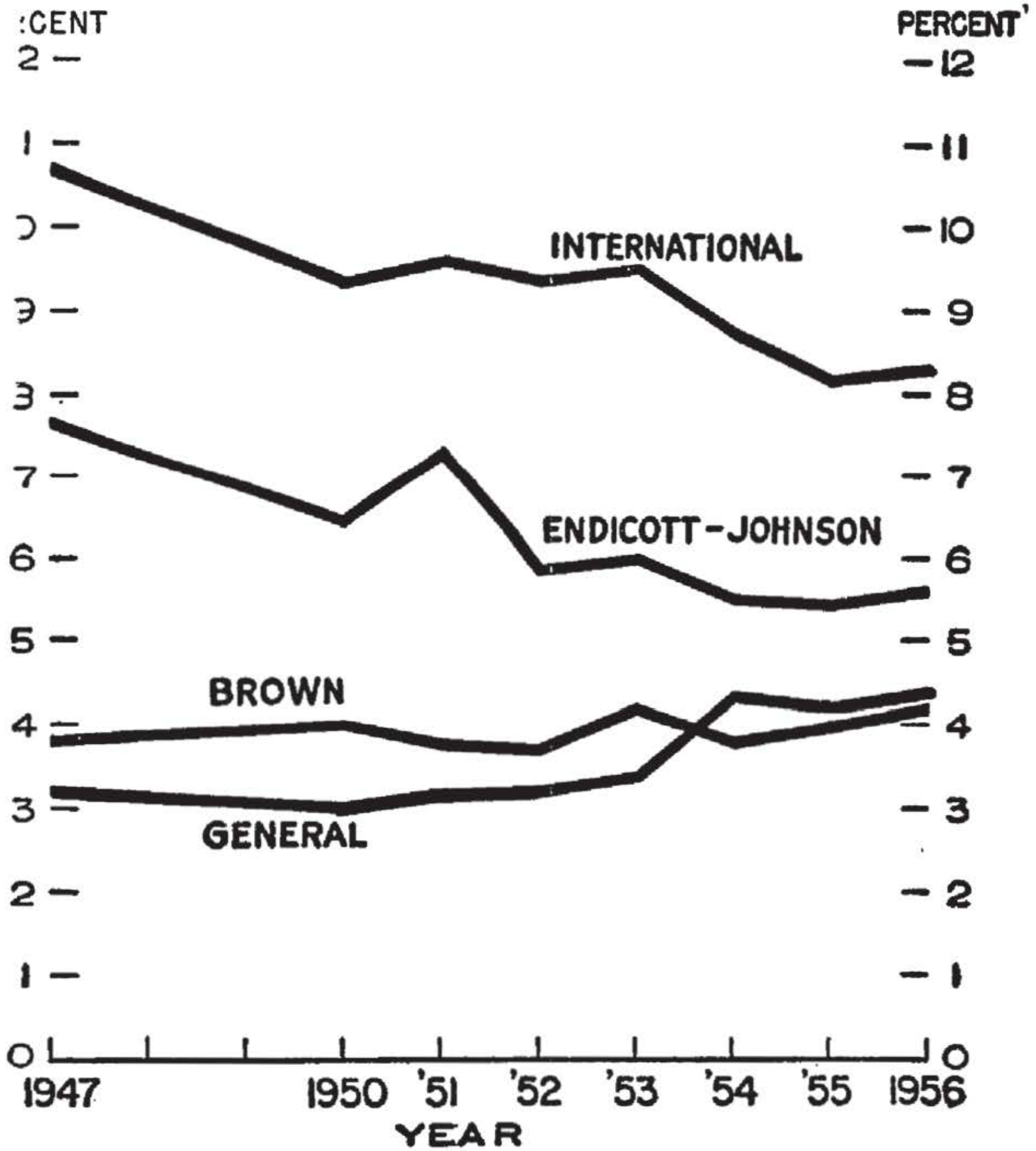


An examination of a longer span of years—from 1939 to 1956—which is illustrated by the tables at page 15, shows that there has been no tendency towards concentration in the shoe industry for any of the larger firms. The production shares of the largest eight and the largest fifteen have declined, while that of the largest four has not increased, but, indeed, has remained static. The market share of the largest twenty firms has declined from 38% in 1939 to 35.9% in 1956, while the share of the largest fifty has declined from 51.3% in 1939 to 45.5% in 1956. By contrast, the share of all the smaller firms has increased from 48.7% in 1939 to 54.5% in 1956 (Dx. LL, R. 3349, T. 2004).

Furthermore, there is every indication of vigorous rivalry among the largest four firms. Production shares of each of the largest four manufacturers have changed under the pressure of this competition. This is shown on Defendant's Exhibit LLLLL5 (R. 7125, T. 2593), which appears at page 209. Production shares of the two largest companies, International and Endicott-Johnson, are decreasing, whereas production shares of the two smaller of the big four, and particularly General, have been increasing. General replaced Brown as the third largest producer in 1954.

Exhibit LLLLL 5

.RES OF TOTAL PAIRS OF SHOES AND SLIPPERS DUCED BY EACH OF THE LARGEST FOUR MANUFACTURERS 1947, 1950 – 1956*



Despite the fact that Brown acquired manufacturing facilities and retail outlets during the period 1947-1956, Brown's share of national production of leather shoes has shown little tendency to increase and has been considerably below the average production share of the other big four manufacturers. Brown's share was 3.86% in 1947 and 4.16% in 1956, whereas the average share of the others of the big four was 7.17% in 1947 and 6.08 % in 1956 (Dx. KK, R. 3348, T. 2004).

Mergers made by the big four have, thus, not been sufficient to increase their aggregate production share. In fact, their position has declined, indicating that bigness is not triumphant. The absence of the decisive advantages of size is especially indicated by the slipping of the production shares of the largest two manufacturers.

Nor is there any evidence that the combined firm possessed a scintilla of "dominance" in shoe retailing. The district court analyzed this question solely in terms of shoe retailing on a national basis. It did not, as indeed it could not do so, analyze the impact of the merger in any of the 141 localities it found to be sections of the country for shoe retailing. Hence, there is no basis for any finding of dominance by the combined firm in any of these 141 communities.

As we have heretofore noted at pages 174 through 177 and pages 176 through 181, a correct analysis of the impact of the merger on shoe retailing on a national basis not only destroys any notion of dominance by the combined firm but also demonstrates clearly that on a national basis—as selected by the district court—competition could not be lessened by the merger. As there noted, the combined firm has annual retail shoe sales of about \$78 million or 2.3% of the national total of approximately \$3.5 billion. Of the nation's over 22,000 shoe stores, the combined firm has 457, or 2.17% of the national total for shoe stores. Of the national total of over 70,000 shoe outlets, the combined firm has 640, or less than 1% (.91%) of the total.

It is against this background that the acquisition by Brown of Kinney—which adds less than 0.4% to Brown's share of national production, and only 1.1% to Brown's share of national retail sales—must be weighed.

CONCLUSION

The judgment below should be reversed and judgment in favor of the defendant-appellant dismissing the complaint should be directed.

Respectfully submitted,

Arthur H. Dean
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APPENDIX

Statutes Involved

Amended Section 7 of the Clayton Act

Section 7, as amended, 64 Stat. 1125 (15 U.S.C. § 18):

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 15 (15 U.S.C. § 25):

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 12, 13, 14-21, and 22-27 of this title, and it shall be the duty of the several United States Attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

Statutes Involved

Section 7 of the Clayton Act, As Originally Enacted

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

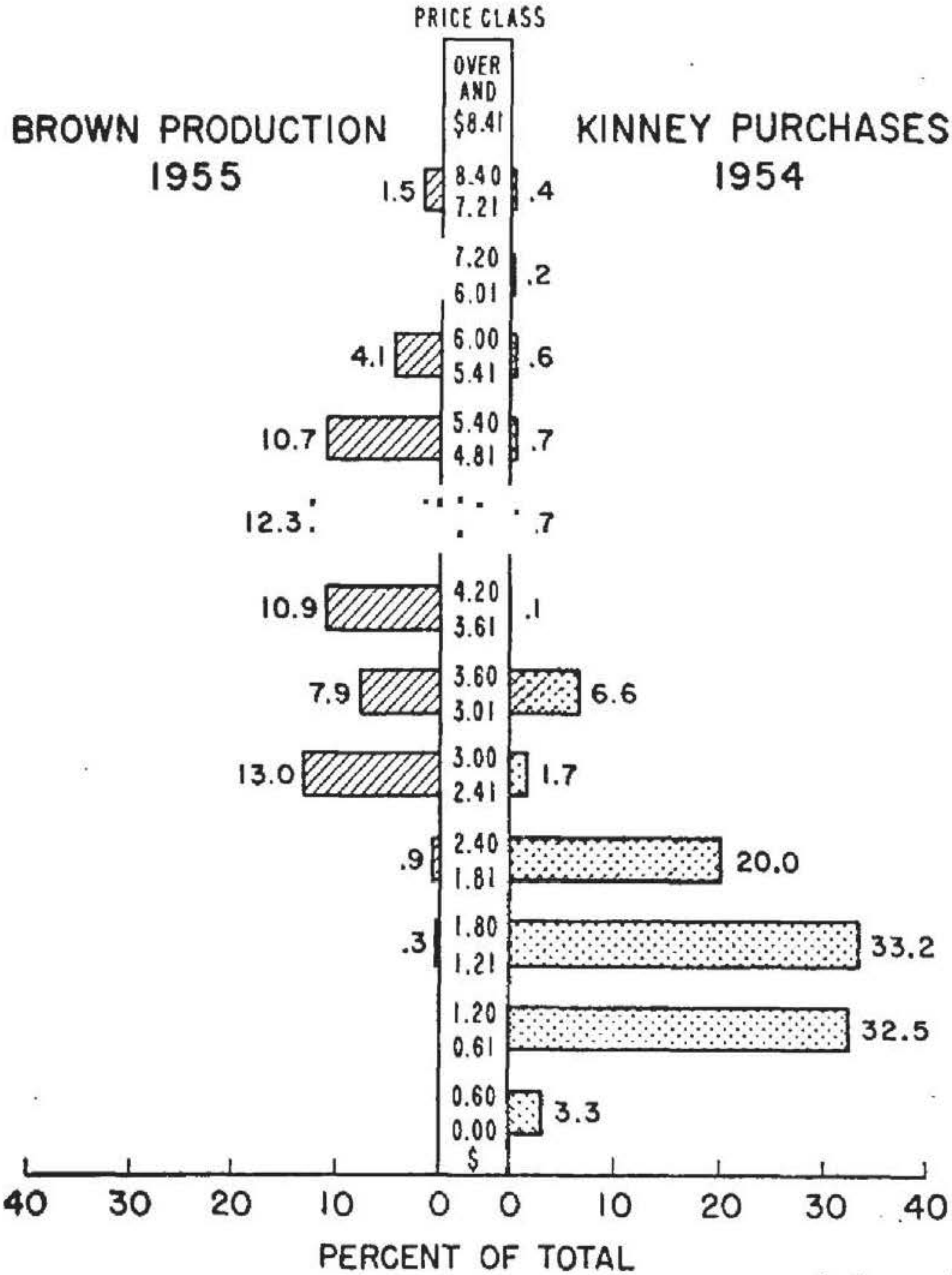
"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided." 38 Stat. 731, 732.

WOMEN'S SHOES
BROWN PRODUCTION AND KINNEY PURCHASES

Percent Distribution by MANUFACTURER'S SELLING PRICE



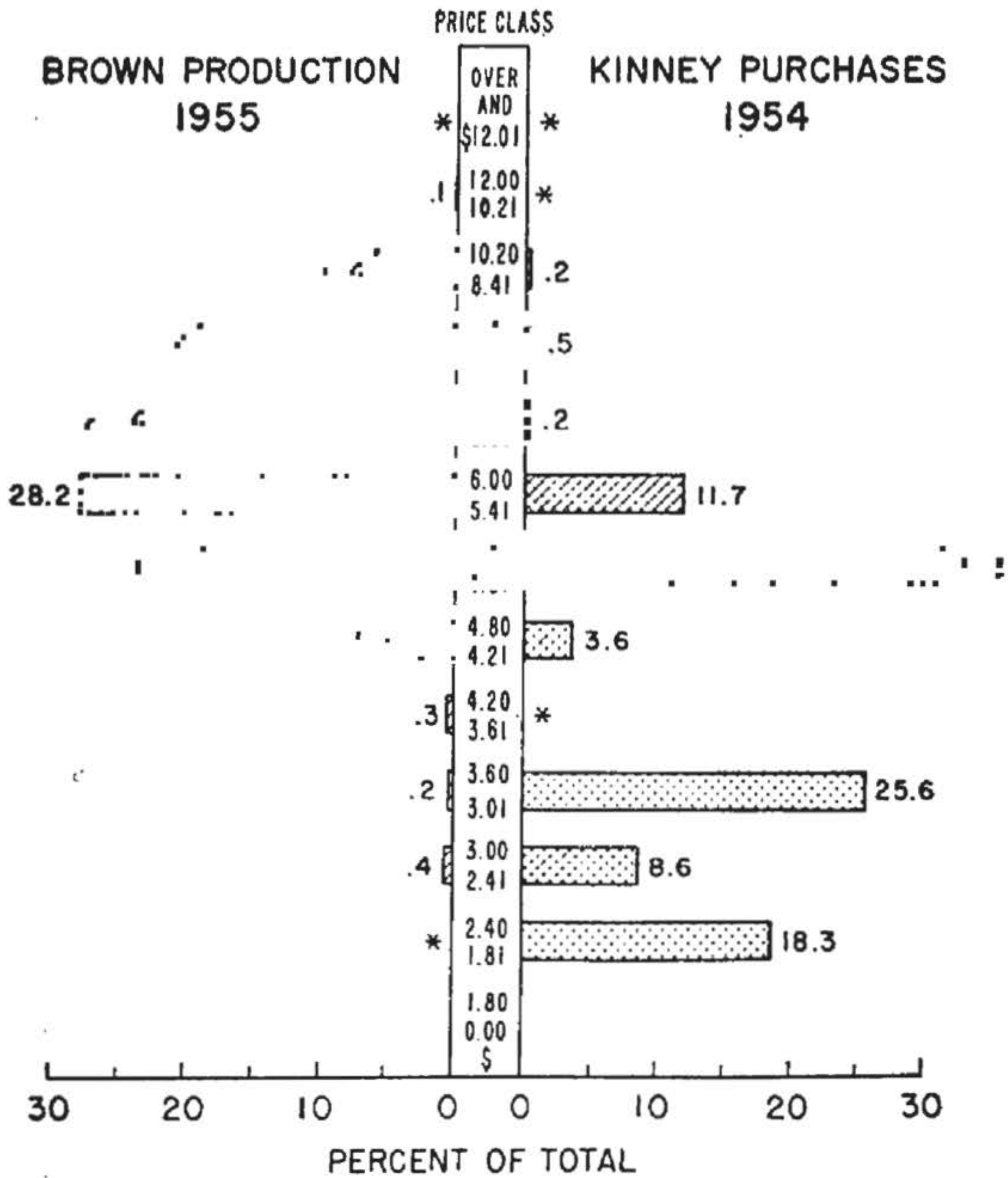
Source: Ex's. EEEEEE and ZZ

The use of Brown 1955 data and Kinney 1954 data in th parison is expressly sanctioned by an agreement betw parties.

MEN'S OTHER THAN WORK SHOES

BROWN PRODUCTION AND KINNEY PURCHASES

Percent Distribution by MANUFACTURER'S SELLING PRICE



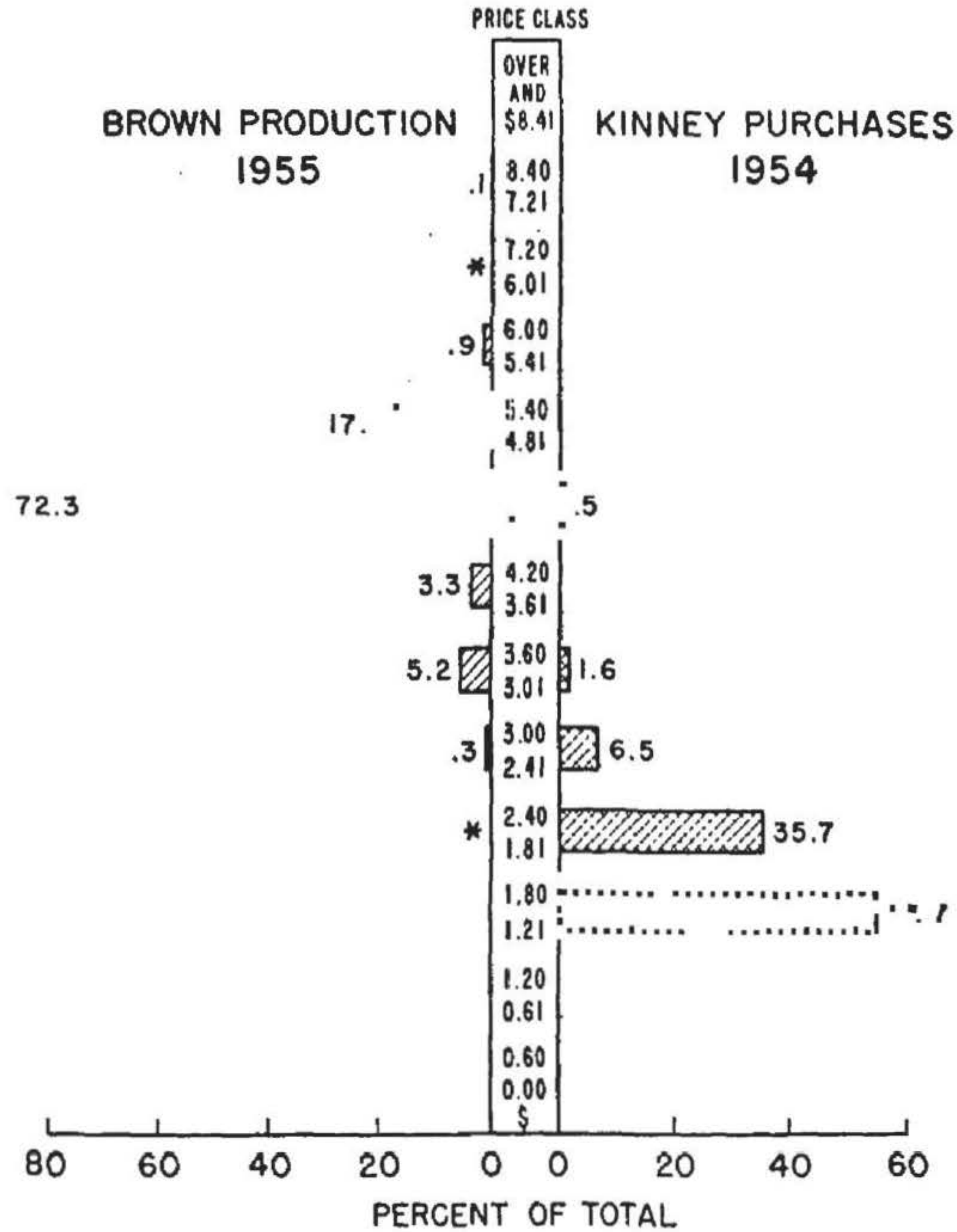
*LESS THAN 0.1%

Source: Ex's. CCCCCC and ZZ

The use of Brown 1955 data and Kinney 1954 data in this comparison is expressly sanctioned by an agreement between the parties.

YOUTHS' AND BOYS' SHOES
BROWN PRODUCTION AND KINNEY PURCHASES

Percent Distribution by MANUFACTURER'S SELLING PRICE



*LESS THAN 0.1%

Source: Ex's. GGGGGG and ZZ

The use of Brown 1955 data and Kinney 1954 data in parison is expressly sanctioned by an agreement be parties.