IN THE

Supreme Court of the United States

October Term 1961

No. 4

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

APPELLANT'S REPLY BRIEF

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Introduction

The issue in this case is whether Brown's acquisition of Kinney violated Section 7 of the Clayton Act, *i.e.,* whether the effect of *that* acquisition may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country. Appellee's brief is not addressed to that issue.

There is hardly any reference to the economic consequences of the Kinney acquisition. The major emphasis of appellee's brief is upon a so-called (but unproved) merger trend in the industry and upon acquisitions by and the integration of other large shoe companies such as International and General. These other acquisitions, however, are not attacked as illegal; in fact, appellee consented to the acquisitions by General during what appellee refers to as the merger period. Appellee nowhere explains why acquisitions by other shoe firms make illegal Brown's acquisition of Kinney. Appellee cannot support the decision below by arguing (without proof) that there may be a lessening of competition as a result of acquisitions by Brown's competitors.

A clue, perhaps, lies in appellee's repeated assertion that there is in the industry a threat of oligopoly, and that proof of a tendency toward oligopoly would make the Kinney acquisition a violation of Section 7. This argument is not sustained on the facts and is, at best, irrelevant. Section 7 prohibits acquisitions which may substantially lessen competition or tend to create a monopoly. Appellee may not amend the statute to substitute "oligopoly" for "monopoly". We note further that appellee's brief demonstrates no "tendency to create an oligopoly", as shown at pages 6 to 14 below.

Appellee does not even attempt to prove that the acquisition of Kinney may have the effect of substantially lessening competition.

If appellee's brief is read against the question whether the *Kinney acquisition* may substantially lessen competition or tend to create a monopoly, it becomes clear that appellee cannot sustain this action.

Appellee concedes that the merging of Brown's and Kinney's shoe manufacturing operations does not have any of the consequences prohibited by Section 7 (G. Br., p. 54).

At the retail level, Kinney owned 352 out of the nation's total of 23,847 retail shoe stores, and Brown owned 125 retail shoe stores. Even these figures substantially overstate the importance of the two companies because shoe stores account for only about half of the total sales of shoes in the remaining 48,000 other shoe outlets; the remainder are sold by department stores, such as Macy's and Marshall Field's, and important shoe retailers, such as Sears and J. C. Penney, and a multitude of other stores which sell articles in addition to shoes. There are several shoe retailers larger than either Brown or Kinney, or both combined.

On a dollar basis, Brown's and Kinney's retail sales accounted for only 1.1% and 1.2%, respectively, of total national sales. These percentages will vary from area to area, but in areas accounting for about 50% of national retail shoe sales where one of them had retail operations the other did not, the acquisition could have no effect whatever on competition in such areas.

Appellee refers, lastly, to the fact that Brown's shoe factories could now theoretically replace other suppliers to the Kinney retail stores. Apart from the fact that this is not feasible because of the differences between the shoes Brown manufactures and those Kinney sells, Kinney's purchases from independent shoe manufacturers represented only about 1% of total sales by shoe manufacturers, and there is no evidence that there was or would be any diminution of the market available to other shoe manufacturers.

Important statistics which appellee ignores include:

(1) More dollar sales were made by the retail competitors of Brown and Kinney after the acquisition than before.

(2) Small retail shoe stores (one to ten unit operations) had greater dollar sales in 1958 than in 1954, the year before the acquisition.

(3) More shoes were sold by the manufacturer competitors of Brown and Kinney after the acquisition than before.

(4) More shoes were sold by the small shoe manufacturers (those not among the top 50), both absolutely and as a percentage of national sales, after the acquisition than before.

It is therefore understandable that appellee does not analyze the effect of the Kinney acquisition at the retail level in any of the numerous "sections of the country" found by the district court, and that appellee has no evidence to support any of its claims that the Kinney acquisition had any adverse effect on competition at the manufacturing level. Instead, appellee cites complaints about other large shoe companies; at the retail level it ignores the half of the sales made by others than shoe stores; and it confuses the statistics by attributing to Brown, as retail sales, shoes sold by its independent customers where the shoes were either manufactured by Brown or manufactured by others and wholesaled by Brown to the independent retailer.

Appellee further confuses the statistics by appendices which are based upon untenable assumptions (*e.g.*, per capita shoe purchases of 2.5 pairs in Texas City and 4.9 pairs in Dodge City), and by divorcing the statistics from the "sections of the country" found by the district court. Statistics are given for Texas City but not for Galveston, whose trading area includes Texas City.

Moreover, the statistics are made meaningless by lumping non-comparables, *e.g.*, by combining youths' sport shoes and little girls' patent leather dress shoes, by combining women's $4 and $12 shoes, etc.

Not only has the district court found untenable lines of commerce ((1) all men's shoes, irrespective of price and style; (2) all women's shoes, irrespective of price and style; (3) all infants', babies', boys', girls', youths' and misses' shoes, irrespective of age, sex, price, or style),* but has loosely and incorrectly defined the relevant geographic markets ("sections of the country") as political cities plus some undefined surrounding areas.**

For no section of the country is there a geographic definition except St. Louis, where Kinney has no retail outlets and no effect on competition was found. No attempt was made to define the boundaries of any other section of the country or to analyze the effect of the merger upon competition in any other section of the country.

Appellee speculates that the "small" shoe retailer may be doomed because efficient modern retail shoe chains like

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* To our demonstration that these are not "lines of commerce" within the meaning of Section 7 of the Clayton Act, appellee merely refers to the statutory language making acquisitions unlawful if they have the proscribed effect "in any line of commerce", and argues, in effect, from the language "any line of commerce" that anything may be a line of commerce. In that, appellee is mistaken; a line of commerce must be proved just like any other fact.

** Appellee offers no justifications for these "sections of the country". Again, appellee implicitly argues that a relevant geographic market may be assumed, without proof that it is not part of some larger market.

Kinney can sell better shoes at lower prices. We note in the first place that appellee has not even contended that Kinney's ability to sell better shoes at lower prices is the result of its acquisition by Brown.

Further, the record is completely clear that the "small" retailers are thriving. They have in no way been adversely affected by the acquisition of Kinney by Brown.

Even if the divestiture of Kinney forced it to raise the prices or lower the quality of its shoes, the "small" retailer would still be unable to get higher prices for his shoes unless Sears, Macy's, J. C. Penney, Edison Brothers, International, General and many other efficient shoe retailers were put out of business. It is hard to see how any such program would benefit the public.

Concentration

Appellee devotes much of its brief to an effort to show that there exists in the shoe industry a degree of concentration which, according to appellee, threatens not monopoly but oligopoly.* We therefore examine this contention both on the manufacturing and retail levels of the shoe industry and demonstrate that at neither level is oligopoly remotely in sight.

Shoe Manufacturing

As we pointed out in our main brief (pp. 15-16), there has been no tendency towards an increase in concentration in

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* Appellee concedes that "the still predominant characteristic of the industry . . . [is] large numbers of competing manufacturers selling to thousands of independent retailers and a few retail chains" (G. Br., p. 50).

shoe manufacturing over a 17-year period. In 1939, the largest four shoe manufacturers produced 23.2% of all shoes made on conventional shoe machinery; 17 years later, in 1956, that percentage remained exactly the same. Over the same period, the share of production of shoe manufacturers below the largest 50 increased from 48.7% in 1939 to 54.5% in 1956.

These figures do not include production of canvas-upper, rubber soled shoes. Production of this type of shoe, which appellee contends was made largely by different firms, increased from 23,600,000 pairs in 1947 to 57,138,000 pairs in 1955 (Dx. JJ, R. 3346, T. 2003). In short, if the figures for canvas-upper, rubber soled shoes were included in the concentration tables, the shares of the largest four would have decreased.

Appellee attempts to meet these undisputed facts by pointing to the number of manufacturing plants and book assets owned by the first four, the first 10 and the first 20 companies (G. Br., pp. 10-11).*

As we have pointed out in our main brief (pp. 201-03), book assets are a poor measure of measuring concentration,

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* Appellee makes a comparison between Weyenberg, on the one hand, and Brown, International, General and Endicott-Johnson on the other (G. Br., pp. 11-13). The comparison illustrates graphically how meaningless such a comparison is, as noted in our main brief (pp. 201-203). The comparison is between a manufacturer and firms which are both manufacturers and retailers, and in the case of Brown, a wholesaler in addition. There is no evidence in the record to indicate what assets of the various integrated firms were devoted to manufacturing, what assets were devoted to retailing and what assets were devoted to wholesaling. Only in the case of Brown do we have the breakdown of sales as between manufacturing, wholesaling and retailing. In 1950, Brown was a manufacturer only and its sales in that

because they do not reflect production or sales. A comparison of the mere numbers of plants ignores the size and efficiency of the compound unit. An idle plant, although it may be an asset on the books of the firm, is not a competitive force. The true measure of concentration, the true measure of the competitive force of a firm is what it produces and sells, and not the book value of its assets or the number of its plants.

Appellee also points to a decrease in the number of shoe firms between 1948, 1954 and 1958 (G. Br., p. 13). While we have reason to doubt the accuracy of this count, we nevertheless note that by any count (872, or 1000 or over 1000), there is a very large number of firms in the shoe manufacturing industry. What is more important, rather than the absolute number of firms, is that the largest firms have not increased their percentage of the total production of the industry and that the smallest firms have steadily increased their share of industry production.

Appellee argues that the lack of new entry into shoe manufacturing is highly significant (G. Br., p. 101). The undisputed evidence shows that the rate of new entry from year to year during the past 10 years has been the same (T. 1652). Typically, the new entrant is small. Time is required for him to develop and expand his business. In our main brief (p. 16), we cite examples of three

year were $89.3 million. In 1955, its manufacturing sales were $113 million. Appellee also attempts a comparison between Weyenberg's budget for national advertising and Brown's total advertising expenditures of about $5 million for its manufacturing, wholesaling and retailing operations (G. Br., p. 22). In 1955, the total amount Brown expended for advertising its branded lines was $2,940,330, or about 3% of sales of such shoes and only a part of that figure was for national advertising (Gx. 164, R. 647).

firms which had become outstandingly successful within less than 15 years, one having become the ninth largest shoe producer in the United States within 15 years of its entry into business.*

Appellee also suggests that with the most economical type of shoe factory becoming smaller, the small firms are placed at a disadvantage because they *may* own the larger uneconomical type of plant (G. Br., pp. 14-5). There is, however, no evidence in the record that any small manufacturer had invested in large plants. The firms which unsuccessfully experimented with large plants were Brown (Moberly) (T. 2162) and International (Hannibal and Cape Girardeau) (T. 1645).

All of appellee's suggestions cannot obscure the fact that the shoe manufacturing industry is marked by a lack of concentration, that concentration has not increased even as a result of the so-called merger trend and that the share of production of the smaller manufacturing firms (those below the largest fifty) has steadily increased over a long period of years.

Shoe Retailing

Appellee concentrates its efforts in shoe retailing to show that there has been an increase in concentration among shoe stores. We submit that an analysis of shoe retailing which is limited to shoe stores is not justified by the record.

Appellee admits that shoe stores account for only approximately half of national retail shoe sales (G. Br., p.

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* In addition to the new entrants mentioned in our main brief, there should be added Huth-James, which makes 1,200 pair per day of boots and men's and boys' shoes and started in business in 1947 (T. 895-96).

16). Yet, appellee completely disregards these more than 48,000 other retail shoe outlets. The outlets which appellee would thus ignore account for the other half of national retail shoe sales. Appellee would disregard department stores, such as Macy's and Marshall Field's, retailers such as J. C. Penney, Sears Roebuck, and Montgomery Ward, specialty stores and other important retail distributors of shoes. Appellee advances no reason for its exclusion of these important outlets.

Appellee attempts repeatedly and inconsistently to classify Wohl's operations as those of a retail shoe store (G. Br., pp. 18, 21). This characterization is inaccurate. As we have pointed out in our main brief (p. 51), Wohl is primarily an operator of leased shoe departments in department and specialty stores. The differences between Wohl's leased department operations and Kinney's family shoe store operations are marked, as pointed out in our main brief (pp. 90-97).

Appellee's main contention on retail concentration is based upon the 1958 Census of Business. We note that these figures were not before the district court and accordingly were not considered by it in reaching its conclusions.

An examination of the results of the 1958 Census, however, reveals that there has been no significant increase in concentration in shoe retailing in shoe stores since 1948. The table which follows is derived from the 1958 Census of Business to which appellee has made repeated reference (1958 Census of Business, Retail Trade, Single Units and Multiunits, BC58-RS3, p. 4-6).

PERCENT OF TOTAL DOLLAR SALES IN SHOE STORES*

	1958	1954	1948
Single Units	41.5%	43.6%	42.3%
1-10 Units (including single units)	58.8%	60.3%	60.3%
11-50 Units	7.0%	7.8%	8.9%
51-100 Units	1.7%	4.8%	10.0%
101 Units and over	32.9%	27.3%	20.8%
Total over 51 Units	34.6%	32.1%	30.8%

Before this table can be analyzed, we note that the figures for 1958 are not strictly comparable with those for 1954. The 1958 figures do not include leased shoe departments in any of their totals.**

Appellee appears to argue that all multiunit firms are necessarily chains (G. Br., p. 17). This is, of course, not true. All that multiunit means is two or more shoe stores under common ownership. The record reveals many instances of independent retailers owning more than one

* The figures given in the table are percentages. The Census also shows that dollar sales of single units and 1-10 units increased in 1954 over 1948 and again in 1958 over 1954.

** The Census explains this change as follows (1958 Census of Business, Retail Trade, Single Units and Multiunits, BC58-RS3, p. I):

> "2. Whereas in the 1954 Census, 'leased departments' (businesses operated as departments of a retail business, under different ownership) were counted as separate establishments and separately classified by kind of business, in the 1958 Census they have been combined with the retail business in which located. . . . In addition, there will be some redistribution in the data among the various kinds of business categories (e.g., the figures for a leased shoe department located in a department store which were tabulated in the 'shoe store' kind of business in 1954, are included with 'department store' figures in the 1958 Census. . . ."

If there was ever any support for classifying Wohl as a shoe store, that support, the classification made by the Census, has now disappeared.

store and indeed six of the independent retailer witnesses who testified at the trial own two or more stores (see our main brief, p. 31). For example, Sam Sullivan of Laredo, Texas, who was appellee's first retailer witness, owns three shoe stores and operates one leased department (T. 142).

The figures for 1958 reveal that the percentage share of sales of single units, when combined with multiunits from two to 10, have shown practically no change from 1948 through 1954 and 1958. Since these figures relate to the period of the so-called merger trend, we submit that this is most significant on the issue of concentration.

The shifts in position which took place between 1948 and 1954 consisted principally of a shift of multiunits of 51-100 upwards into the 101 units and over class. Thus if in 1948 a single owner had 98 stores and in 1954 he had 109 stores, there would be a shift in his grouping for Census purposes.*

A somewhat smaller shift from the 51-100 group to the 101 and over group occurred between 1954 and 1958.

Appellee fails to note in its discussion of shoe retailing the very important fact that the sales of the very largest individual retailers of shoes are relatively insignificant as a percentage of national retail shoe sales. The largest seller of shoes at retail in 1955 was Sears with $104,352,000 (Dx. L., R. 65, T. 1605). Edison Brothers was second with retail shoe sales of over $87,204,000 (Gx. 56, R. 432, T. 541) and J. C. Penney was third with retail footwear sales of over $85 million (Dx. W., R. 3292, T. 1924). Since estimated national retail shoe sales were approximately $3.5 billion

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* These figures relate to the Cannon chain (Gx. 22, R. 230).

in 1955, it is thus apparent that the largest seller of shoes (Sears) had only about 3% of national shoe sales.

As we have pointed out in our main brief (pp. 174-6), Brown and Kinney combined have retail sales of shoes of \$78 million, or only 2.3% of the national total of retail shoe sales.*

Since we know that only about half of the national retail shoe sales are made in shoe stores, it follows that only about 17.3% of such sales were made by multiunit sellers owning 51 units or more in 1958, and that only about 16% of such sales were made by sellers of this size in 1954, as demonstrated by the table at page 11 above. In 1956, there were at least 14 firms which had over 100 units (Gx. 59, R. 436-37).

The distribution of size among retail shoe sellers, therefore, does not bear out any notion that shoe retailing is heavily concentrated and certainly shows no tendency toward oligopoly.

In contrast to its attempt to minimize the effect of new entrants into shoe manufacturing, appellee makes no such effort as regards new entry into shoe retailing. For the record is clear that shoe retailing is easy to enter, that there are no barriers to entry and that entry is taking place continually, with new entrants having a marked degree of success (see our main brief, pp. 33-4).

Finally, appellee refers to Brown as the "moving factor" in the so-called merger trend (G. Br., p. 8). In that connection, it refers not only to mergers made by Brown, but also

* It is thus apparent that Kinney is not "the largest family shoe retailer in the country." (G. Br., p. 8).

to acquisitions made by other firms. Significantly, aside from the instant case, appellee has not attacked any merger in the shoe industry. The consent decree in the *General Shoe* case to which appellee proudly refers (G. Br., p. 14, fn. 5) had the effect of placing appellee's blessing on every acquisition made by General during the period of the so-called merger trend (*United States* v. *General Shoe Corporation*, 1956 Trade Cases, ¶68,271 (M. D. Tenn. 1956)).* No reason is given why Brown should be charged with the acts of other firms particularly when it is apparently conceded that such conduct did not violate amended Section 7 or any other law.

Section of the Country

Appellee suggests that the district court "fixed on sections of the country intermediate in size" between the political boundaries of cities suggested by appellee and standard metropolitan areas suggested by appellant (G. Br., p. 6). The district court's boundaries are of its own making, and there is nothing in the opinion of the district court to justify or explain them. We do not know the extent of the boundaries adopted by the district court. It is clear, however, that the district court did not adopt the boundaries contended for by appellee.

Appellee offers no justification for the district court's conclusions regarding the St. Louis area beyond asserting that they are sustained by the testimony and opinion of the expert witness called by appellant (G. Br., p. 74). In

* Indeed, the record reveals that in 1958 despite the consent decree, General acquired additional shoe making facilities (T. 1667-68).

our main brief (pp. 148 through 150), we demonstrated that the district court departed radically from the expert's testimony on this point, and there was no other evidence introduced on this point. Accordingly, there is no basis for the district court's findings with regard to St. Louis, and there is certainly no basis for assuming, as appellee would have us do, that what is true in the St. Louis area is true throughout the United States.

In this latter connection it should be noted that even the district court qualified its conclusion on the similarity between St. Louis and other areas by the vague phrase "to greater or lesser extent" (T. 63). What the extent of the greater or lesser is, is not indicated by the district court.

Appellee also argues that the testimony of retailer witnesses called by appellee supports the conclusion of the district court on the relevant sections of the country for shoe retailing.

It should be noted, however, that the testimony of the retailer witnesses, as cited, does not deal with the local area of shoe retailing competition. Rather, these witnesses testified about where customers for their own particular retail outlets came from (T. 201-02, 210, 255, 494, 618).

Since none of these witnesses was connected with either Brown or Kinney or purported to have any knowledge about the drawing power of either firm, it is difficult to see how their testimony could establish the trading area of a local Brown or Kinney outlet.

On the other hand, witnesses called by appellant who were connected with either Brown or Kinney gave quite different testimony about the trade area which the Brown or Kinney outlets enjoyed. For example, Wohl formerly leased departments in the Gus Blass store in Little Rock, Arkansas, and appellant's witness testified that the trading area of that store extended throughout the state of Arkansas (T. 2354; see also T. 2376).

Even the witnesses cited by appellee in its brief testified, for example, that his town was the trading center of the county (T. 293) or had a drawing radius of about 25 miles surrounding the local community (T. 284). A retailer from Davenport, Iowa, testified that he drew customers not only from Davenport but also from Rock Island and Moline, Illinois, across the Mississippi River (T. 618-19). His testimony was confirmed by appellant's witness who testified that Davenport drew from a radius of 60 miles around the city, including Rock Island and Moline (T. 2366).

Other retailer witnesses called by appellee who testified on this point are not cited by appellee in its brief. They too gave testimony at odds with that cited by appellee. Thus, one witness testified that his trade area included not only Lafayette, Indiana, where his store was located but also West Lafayette and that Lafayette enjoyed the trade of a county seat town (T. 876). Another retailer called by the appellee testified that Owensboro, Kentucky, drew its trade from a 25-mile radius (T. 609; see also T. 595, 737).

As we have also pointed out in our main brief (pp. 148-153), the pattern of retail shoe competition varies greatly from city to city and community to community. This is further confirmed by testimony from a retailer in Detroit that whereas his store at Grosse Pointe drew only from the immediate neighborhood (T. 463), his store located in another section of Detroit experienced its most intense competition from downtown department stores (T. 471). A retailer from Chicago testified that his trading area was basically the south side of Chicago (T. 553-54).

Appellee also argues that the proximity of a Brown outlet to a Kinney outlet follows a consistent pattern. As we have noted above, however, there is no testimony about the trading area of either a Brown or Kinney outlet which is consistent with the view of the district court or of that now advanced by the appellee. Appellee's analysis is on the basis of store locations within two blocks of one another. Two blocks may well represent two different merchandising worlds. Witness Fifth Avenue in New York and Seventh Avenue.

Little Rock, Arkansas, is an example. Absent real analysis one might infer from the fact that the Wohl and Kinney outlets are both on Main Street in adjoining blocks that there are no material locational differences between them. This inference would be wholly incorrect. When 3rd Street in Little Rock (the street separating the two locations) is crossed, a completely different merchandising area is entered. Wohl's former locations in the biggest department store in Arkansas (Gus Blass) north of 3rd Street were prime better grade locations. Kinney's location, south of 3rd Street, is in the men's shopping area, and is a very poor location for a family shoe store such as Kinney (T. 1986-87).

In addition, appellee has correctly stated that Kinney now has 118 suburban shopping center stores (G. Br., p. 30). Kinney also has outlets located on public highways frequently beyond city or suburban limits (T. 1443). In contrast, Wohl and Regal have very few outlets in suburban shopping centers.

Appellee states that "conduct may violate the Sherman and Clayton Acts that affects competition only in a number of separate cities" (G. Br., p. 77). The cases cited for this proposition do not, of course, involve the construction of "section of the country" as used in amended Section 7. All these cases involved the question whether commerce was affected by the conduct or transactions involved in those cases. Such cases clearly have no bearing on what constitutes a section of the country for the purposes of amended Section 7.

We contend that the proof adduced by appellee failed to establish any meaningful market within the meaning of amended Section 7. The record below was clear that the political boundaries of a city or town did not measure the economic market.

Appellee has misconstrued our argument relating to the elimination of "community" when Section 7 was amended in 1950. We do not contend that a city, metropolitan area or other defined geographic area cannot ever be a section of the country. What we do contend is that there must be proof of a market that is economically significant.

Appendix B is the touchstone of appellee's case on the effect of the merger on shoe retailing. The first community listed is Dodge City, Kansas. There is not a shred of evidence in the record to sustain a finding that Dodge City is an economically significant market. The second community on Appendix B is Texas City, Texas. As we note at page 44, Texas City is included as part of the Galveston Standard

Metropolitan Area by the Census. There is no evidence that Texas City is an economically significant market, and the only indication is to the contrary.

The third city on Appendix B is Council Bluffs, Iowa. The record is clear, as discussed in more detail at pages 46 and 47, that Council Bluffs is not an economically significant market in and of itself, but is rather part of the Omaha Standard Metropolitan Area.

Appellee argues that to require it to prove the nature and extent of the market in which the violation of amended Section 7 is claimed to exist would be "an unmanageable extension of any merger case" (G. Br., p. 76). In sum, appellee would substitute assumption and speculation for proof on one of the key issues in the case.

We submit that a meaningful economic market can be determined only if the market itself is examined. It cannot be measured by assumptions that the characteristics of one market will be the same as in every other market, as appellee would have this Court do.

Finally, appellee also suggests "the total impact of the merger could be appraised only by looking to the national retail picture as a whole." (G. Br., p. 81). This is certainly not the section of the country which the district court found for shoe retailing.

Lines of Commerce

Appellee suggests that the district court did not hold that its lines of commerce "were the only possible lines of commerce" in the shoe industry (G. Br., p. 52). It is clear from the district court's opinion that it rejected as immaterial all distinctions of price, quality, style and intended use (T. 58). No other lines of commerce were found by the district court, and certainly the district court did not suggest that there would be any appropriate lines of commerce narrower than those found by it.

Appellee scarcely attempts to support the district court's reasons which it gave for its conclusions on lines of commerce (G. Br., pp. 57-71).

In an attempt to give some support to the district court's lines of commerce, appellee contends that a shoe factory "will frequently manufacture two or more kinds of shoe within the general category" (G. Br., pp. 15 and 59). We are not clear what this statement is intended to convey. The witnesses cited were referring not to the production of different kinds of shoes in the same shoe factory, but to shoes of the same type made with different grades of materials (T. 704, 949).

Appellee also contends that there is flexibility among larger manufacturers in shifting grades of shoes within shoe factories (G. Br., p. 39). While it is possible and indeed desirable to upgrade the production of a shoe factory (T. 2153), it is not economically feasible to downgrade its production (see main brief, pp. 126-127). In short, it is not economically feasible for Brown to convert its quality grade production facilities to meet Kinney's requirements for popular price shoes.

Appellee argues that the retail prices of shoes sold by Brown, including shoes sold by retailers, both on and not connected with the Brown Franchise Program, overlap in price with Kinney's retail sales. This argument will simply not stand analysis. We have set the facts forth in considerable detail in our main brief at pages 88 through 90.

Appellee's reliance is upon Gx. 206 (G. Br., pp. 62, 63). As a preliminary matter, we note that Gx. 206 is not merely a comparison of Brown's retail sales and Kinney's retail sales, but also includes Brown's sales at wholesale of its nationally advertised branded shoes to independent retailers. This objection alone vitiates the attempted comparison.

Appellee's price comparison is made on a national basis. Such a comparison is relevant only to the national market in which shoe manufacturers sell to shoe retailers. Appellee's price comparison has no relationship to the local markets in which retailers sell shoes to consumers. As to such local retail markets, we submit that the only relevant price comparison must be made by a price comparison in each local market.

Appellee argues from Gx. 206 that "42% of Kinney's sales were in the \$7.00-\$9.99 bracket that also accounted for 48% of the Brown's men's shoes". An examination of Gx. 206 discloses that there is no "\$7.00-\$9.99 bracket." As Gx. 206 shows, Kinney sells 92% of its men's shoes at prices of \$8.99 per pair and below whereas 77.2% of the men's shoes manufactured or retailed by Brown sold at \$9.00 and above.

When we turn to women's shoes, appellee contends that "35% of those sold by Kinney were in the same \$4.00-\$6.99 bracket as 27% of those sold by Brown" (G. Br., p. 63). No such price bracket is sustained by an examination of

Gx. 206. Inspection of Gx. 206 reveals that 90.2% of all women's shoes sold by Kinney were sold at \$4.99 or less, and 83.2% of all women's shoes manufactured or retailed by Brown were sold at prices of \$5.00 per pair and above.

Appellee further asserts that 48% of Kinney's children's shoes were sold at prices between \$3.00 and \$5.99 and that 33% of Brown's sales fell into the same category (G. Br., p. 63). Again, an inspection of Gx. 206 indicates that Kinney sold 96.5% of its children's shoes at prices of \$4.99 per pair and below whereas of the children's shoes either manufactured or sold by Brown, 75.6% were at \$5.00 per pair or above. In addition, in the case of children's shoes, this analysis proposed by appellee does not give effect to the differences in price between various kinds of children's shoes, as we have indicated in our main brief, for example, at pages 62 through 63.

Appellee has not as yet explained how children's shoes can be part of a single line of commerce. It is difficult to understand how a little boy can wear a little girl's patent leather pump.

Indeed, appellee concedes the differences in merchandising techniques, styles, prices and other differences in the market place which we have demonstrated (G. Br., p. 59). We submit that these differences are vital. If, as appellee contends, such differences are unimportant in assessing competition in shoe retailing, it is difficult to understand why they should continue to characterize shoe retailing.

Appellee also argues that because Kinney buys men's, women's and children's shoes and Brown sells men's, women's and children's shoes, that those are appropriate lines of commerce for the vertical aspect of the merger (G. Br., pp. 60-62). We have analyzed, at pages 27 through 30 below, the lack of price and quality overlap between the shoes which Brown manufacturers and which Kinney purchases for sale at retail. The correlation between Brown's manufacturing sales and Kinney's purchases, which appellee contends for, is simply not present.

Competition Between Brown and Kinney at Retail

As we noted in our main brief, the district court's conclusion that Brown and Kinney competed at retail flowed automatically from its conclusion on lines of commerce. If the district court was in error on that point, its conclusions as to competition at retail between Brown and Kinney must also fall. Appellee now adopts a new tack.

Appellee argues that its witnesses "uniformly asserted that Kinney's shoes are actually sold in competition with Brown's shoes" (G. Br., p. 32). An examination of the testimony cited reveals that this broad statement is completely unsupported by the record. In our main brief (pp. 157-159), we have summarized the situation presented by the record where we noted that only 7 of the 24 witnesses called by appellee gave testimony relating to competition at retail between Brown and Kinney.

In the case of those witnesses, as well as other witnesses cited by appellee, as appellee's brief indicates (G. Br., pp.

32, 33), in many instances all that the witness said was that a particular shoe made by Brown was in his opinion competitive with a shoe sold by Kinney. A "Brown shoe" is thus a shoe manufactured by Brown whether or not Brown sells the shoe at retail. A "Kinney shoe" is a shoe sold by Kinney at retail whether or not Kinney manufactured the shoe. Appellee thus carries forward its fundamental error of confusing functional levels in the shoe industry.

Appellee's proposition is subject to a more fundamental objection. To say that Brown shoes are sold in competition with Kinney shoes ignores the identity of the sellers of the shoes. Appellee thus would isolate its analysis of competition to products without regard to the actions of sellers and buyers in the market place.

The independent retailer who purchases Brown's nationally advertised branded line and resells them to the consumer plays an important role in the shoe distribution process. It is he who makes the initial selection of shoes; it is he who decides how to price them and how they are to be sold at mark down sales.

The independent retailer decides which shoes will go into his window display and which shoes he will advertise in the local newspaper or on the local radio station.

To ignore the person who sells the shoes as a force in determining competition, indeed as a necessary part of the process of competition, is totally erroneous. Appellee's analysis likewise ignores the buyer's side of the transaction. It is the consumer's taste that ultimately governs, and to leave the consumer out of the process of competition, as appellee would do, is likewise wholly erroneous.

Similarly overstated is appellee's contention that customers changed brands and switched back and forth from Brown's shoes to Kinney's shoes (G. Br., p. 33). For example, all that one witness testified to was that people came into his store with Kinney sacks in their hands (T. 296, 297). No witness gave testimony directly supporting appellee's contention.

Appellee also appears to argue that the prices of the two firms in their retail operations are similar (G. Br., p. 34). In our main brief, we have analyzed this situation in considerable detail at pages 84 through 90. The record simply does not sustain this contention.

Appellee also stresses an alleged similarity in advertising between the two firms (G. Br., pp. 34-35). We have analyzed this matter in detail in our main brief at pages 94 through 97. Appellee here attempts to suggest that both Brown and Kinney are engaged at retail in selling shoes to the entire family. Regal sells only men's shoes (T. 2265) while Wohl's sales consist of 80% of women's shoes, 16% of children's shoes and 4% of men's shoes (T. 1736). On the other hand, Kinney's retail sales are divided between women's shoes (35%), children's shoes (51%) and men's shoes (14%) (T. 1443).

Appellee similarly suggests that the two firms are similar from the standpoint of style (G. Br., p. 35). We have set forth the undisputed facts on this matter at pages 90 through 91 of our main brief. It appears that what appellee has done is to confuse Brown as a manufacturer and Kinney as a retailer. The record is clear that both Wohl and Regal specialize in the sale at retail of high-style shoes, whereas Kinney does not sell such shoes.

Vertical Integration

Sales to Kinney

Appellee now concedes that Brown will not be able to supply all of Kinney's needs for leather shoes (G. Br., pp. 114-15). Thus, appellee admits that Brown cannot supply 65% of Kinney's men's shoe requirements, 70% of Kinney's women's shoe requirements and 50% of Kinney's children's shoe requirements (G. Br., p. 114). As shown at pages 27 through 30, even these percentages advanced by appellee exaggerate considerably Brown's ability to supply Kinney with its shoe requirements.

Appellee then argues that Brown will be able to supply more shoes to Kinney in the future.

In the first place, we have pointed out in our main brief (pp. 190-91), there is no incentive for Brown to take over a substantial part of Kinney's purchases because the production of Brown's factories which sells shoes in Kinney's higher priced categories have not been profitable.*

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* Appellee contends that production of these divisions increased from slightly more than $19 million in 1950 to almost $34 million in 1957. These figures are incorrect. The error lies in assuming that all of the sales of the United Men's Division shown on Gx. 36 were of "make-up shoes". In fact, less than 10% of the sales of United Men's Division are of such shoes (T. 2082). On this basis the comparative figures are $12,022,295 for 1950 and $19,914,532 for 1957. However, appellee fails to note that Brown was operating a fourth make-up division in 1950, which was called Deloy. In 1950 Deloy had sales of $2,743,119. Thus Brown's total make-up sales in 1950 were $14.7 million and increased by $5.2 million by 1957. In addition, an increase in sales may well take place without any increase or indeed a decrease in profits. The record thus stands uncontradicted that the production of make-up shoes has not been profitable for Brown.

Second, the record is clear that no one manufacturer could possibly supply all of the retail shoe requirements of a firm such as Kinney. It needs too many types and styles of shoes for any one manufacturer to be in a position to supply it.

Third, Kinney sells at retail about 2 million pairs per year of canvas-upper, rubber soled shoes (T. 1501). Brown does not manufacture this type of shoe.

Appellee attempts to prove the ability of Brown to supply Kinney with its shoe requirements through a comparison of retail sales between Kinney sales and Brown retail sales and sales of Brown branded shoes on an overall basis (G. Br., p. 114, referring to Gx. 252, R. 2868-78). This comparison simply will not wash.* Gx. 252 does not represent a true comparison between Brown's production and Kinney's purchases because it lumps all women's shoes together, all men's shoes together and all children's shoes together.

As the table at page 75 of our main brief shows, women's dress shoes are produced by Brown at substantially higher prices than its women's casuals or sports shoes. Kinney sells virtually no women's dress shoes at above $4.99 (see table at page 68 of our main brief). Less than 3% of Brown's production of women's dress shoes sells for less

* On page 39 of its brief, appellee attempts a further comparison of Brown's sales and Kinney's purchases by resorting to Gx. 252. There the comparison is of purchases which fall within a $2.00 price range of Brown's sales of men's shoes and of a $3.00 price range for women's and children's shoes. Significantly omitted is the fact that these prices are wholesale prices. A difference of $2.00 per pair in the wholesale price is the equivalent of a minimum of $3.33 per pair at retail and a difference of $3.00 per pair at wholesale is thus equivalent to $5.00 per pair at retail.

than $3.00 per pair at wholesale (which is $5.00 per pair at retail). Hence it is obvious that Kinney could not obtain women's dress shoes from Brown for sale at its prevailing price ranges. The same considerations apply to men's shoes as well.

When we come to children's shoes, appellee's comparison breaks down altogether. For it lumps together youths' and boys' shoes with babies' and infants' shoes and these two categories with misses' and children's shoes. Such a comparison is one of oranges, apples and pears.

In our main brief, we have set forth as appendices a comparison between Brown's production and Kinney's purchases for women's shoes, men's (other than work), shoes and youths' and boys' shoes. We set forth as appendices to this brief the additional data with respect to misses' and children's shoes and infants' and babies' shoes. The data contained in the appendices and in the analysis which follows is in terms of wholesale price per pair.

In women's shoes, for instance, the great majority of Kinney's purchases, *i.e.* 89%, were *below* $2.41 per pair at wholesale, whereas Brown sold only 1% of its women's shoes in this low price range. Brown's production was 99% *above* $2.41 in price, whereas only 11% of Kinney's purchases were in this higher price range (see our main brief, p. 6a).

If the age-sex categories are further broken down into use types, the price line analysis shows a complete separation of Kinney's purchases and Brown sales in every significant category.

For example, Kinney's women's dress shoe departments purchased 99.8% of their requirements in the price category of $2.50 to $3.00 in which Brown sold only 0.7% of its women's dress shoes. Brown sold 97.4% of its women's dress shoes over $3.00 (see p. 1a below).

In men's shoes, other than work, the great bulk of Kinney's purchases of such men's shoes, *i.e.*, 87.4%, were under $5.40, while the great bulk of Brown's sales, *i.e.*, 76.5%, were above $5.40 (see our main brief, p. 7a).

The only significant overlap appears to be in men's work shoes which were a very small proportion of Kinney's purchases and of Brown's manufacturing sales, *i.e.*, less than 3% (see table at page 76 of our main brief). Even here, over 30% of Kinney's purchases were under $3.60 while about 99% of Brown's purchases were above that price (Dx. SSSSS, R. 7085, Dx. ZZ, R. 4391).

In other age-sex categories an even more pronounced price line separation is evident, that is, when youths' and boys' shoes are separated from misses' and children's and infants' and babies'. Over 90% of Kinney's purchases of youths' and boys' shoes were at prices below $2.41 whereas less than one-tenth of 1% of Brown's production was in this lower price range. More than 99% of Brown's production is above $3.01 whereas Kinney has only 2.1% of its purchases in this price range (see our main brief, p. 8a).

In misses' and children's shoes, Brown's overlap with Kinney shows the effect of generally lower shoe prices with consequent narrowing of the price range differentials. Even so, Brown and Kinney had a maximum overlap of

11.9% of either Brown's sales or Kinney purchases of misses' and children's shoes. Brown sold 85.8% of its production at over \$2.40 whereas Kinney purchased 87.1% of its shoes below this price (see p. 2a below).

Infants' and babies' shoe purchases by Kinney demonstrate the lack of overlap with Brown manufacturing sales even in this lowest and narrowest of price ranges of any age-sex class. Maximum overlap involved only 15.3% of Brown's sales of this class of shoe. Kinney purchased over 99% of its shoes under \$2.40, whereas Brown sold almost 70% of its shoes over that price (see p. 3a below).

Appellee apparently argues that Brown has more and more emphasized cheaper grades of shoes (G. Br., p. 114). There is no support for this assertion in the record. The assertion is based upon three misconceptions. First, as we have noted at page 26 above, appellee has grossly overstated the increase in sales of Brown's make-up divisions. Second, 85% of Brown's manufacturing sales are in its nationally advertised branded shoes which are sold for prices markedly higher than Kinney's retail prices. Third, appellee apparently relies upon a study showing a larger market for medium and popular priced shoes and a smaller market for higher priced shoes (G. Br., p. 20, referring to Gx. 47, R. 364-93). An examination of Gx. 47, however, discloses that shoes in the medium price range, the range in which Brown manufactures its nationally advertised branded shoes, had increased sales to as great an extent, if not greater, than shoes in the popular price ranges in which Kinney purchases for resale at retail. The only price categories which declined were in high price shoes which Brown does not manufacture and in some categories of popular price shoes which Kinney sells.

But even if we assume, which we do not, that Kinney in the future would purchase more from Brown than it has in the past, Kinney's total leather shoe purchases in 1957 amounted to $19.1 million or approximately 1% of total national production of such shoes.

Recognizing the similarity between this case and *Tampa Electric Co.* v. *Nashville Coal Company,* 365 U. S. 320, appellee attempts to distinguish the *Tampa* case from this case by pointing to (1) a trend towards concentration in the shoe industry, and (2) the merger of a buyer and seller, both of whom already enjoyed "special positions of dominance in the market" (G. Br. 17). As we have pointed out in our main brief and above at pages 6 through 12, it is clear that there is no trend toward concentration however the matter is viewed. Nor does the record sustain a finding of dominance by either firm in any market.

Appellee also argues that a pair of shoes sold by Brown to Wohl displaced a pair of shoes which would have been sold by an outside manufacturer to Wohl.

There is no evidence in the record to support this statement. Appellee argues that one manufacturer lost business as a result of Brown's merger with Wohl. We have discussed this situation at pages 186-87 of our main brief. Not only was there no loss of business as a result of the Brown-Wohl merger, there was actually an increase of business in the two cases discussed after Wohl merged with Brown. But all this evidence is subject to the further and more basic objection that it had nothing whatsoever to do with Kinney. Wohl, operating leased shoe departments where nationally advertised shoes are an important factor in merchandising, buys substantial quantities of nationally advertised branded shoes; Kinney in its popular price chain operations does not buy such shoes, with immaterial exceptions.

Of all the manufacturer witnesses called by appellee, only one was a Kinney supplier and he did not testify to any damage caused to him as a result of Kinney's merger with Brown (Gx. 251, R. 2854, T. 2819).

A second group of manufacturers testified about the problems in selling their product to stores who were already satisfied customers of other manufacturers, including Brown. All of these manufacturers were sellers of nationally advertised branded shoes. All of these manufacturers sold at prices well above Kinney's price range. None had even attemped to sell shoes to Kinney. With one possible exception, all had steadily rising sales and healthy profits from 1950 through 1957.*

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* In brief, the situation of the manufacturing firms whose executives were called by appellee may be stated as follows:

Deb Shoe Company's total sales increased steadily. Total sales in 1956 were $8,500,000 and about $9,000,000 in 1957 (T. 969).

Radcliffe Shoes of Brockton, Massachusetts, continued to have sales success in spite of the recent general industry recession (T. 721).

Heydays Shoes, Inc., of St. Louis, Missouri, had sales increases of 15% in 1955, 18% in 1956 and 31% in 1957, with net worth increases of $160,000 in the year 1955 to 1956. Total net worth was $631,559 in 1956 and $849,207 in 1957 (T. 785-87).

Leverenz Shoe Company of Sheboygan, Wisconsin, had net worth increases from about $286,000 in 1946, to $747,300 in 1955 and $855,170 in 1957, along with sales increases from about $1,835,400 in 1946 to $3,046,000 in 1955 and $3,807,346 in 1957 (T. 982-84).

Belleville Shoe Manufacturing Company of Belleville, Illinois, had net worth increases from $200,438 in 1946 to $642,040 in 1955, $687,040 in 1956 and $736,947 in 1957 (T. 847-50).

So-called Advantages of Vertical Integration

As we have pointed out in our main brief (pp. 180-196), there are no advantages conferred by vertical integration *per se*. Indeed, the objective evidence in the record demonstrates that vertical integration does not confer competitive advantages in and of itself.

One of the oldest integrated shoe firms in the United States is Endicott-Johnson. During the period from 1945 through 1956, Endicott-Johnson increased its owned retail outlets from 488 to 540 units (G. Br., p. 18). In 1947, Endicott-Johnson manufactured 7.66% of all shoes produced in the United States on conventional shoe machinery. In 1956 its production had fallen to 5.62% of national production (see our main brief, p. 16).

Appellee argues that as a result of the merger "Brown will be able to secure even greater concessions from its suppliers in the future" (G. Br., p. 121).

As we have pointed out in our main brief (pp. 194-95), no advantages in purchasing either raw materials or finished shoes will accrue to the merged firm. Brown and Kinney purchase essentially different qualities of materials and finished products.

The record also makes it clear that a manufacturer cannot force its finished product upon its own retail stores with

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Huth-James Shoe Company of Milwaukee, Wisconsin, also showed net worth increases over the last few years in spite of sales fluctuations both up and down since 1955 (T. 908).

Weyenberg Shoe Manufacturing Company of Milwaukee, Wisconsin, had sales increases from $15,642,366 in 1954 to $16,714,-242 in 1957, or over a million dollars, with a net profit of $1,114,792 in 1957, and with net profits of over $1 million in every year from 1953 through 1957 reaching a peak of $1,538,111 in 1955 (T. 528-29).

any degree of success, unless the consumer wishes to purchase the shoes. Indeed, in the 1930's Kinney attempted to force upon its own retail outlets its own factory products. The result was disastrous (T. 1436-7).

The fact that a shoe operation may be vertically integrated does not, of course, mean that the retail shoe outlets are entirely supplied by shoe factories of the same firm.

Thus, Wohl purchases about 70% of its shoes from manufacturers other than Brown, and about 80% of Kinney's shoes are purchased from manufacturers which are not affiliated with it.

As we have pointed out in our main brief (p. 23), according to the Census of 1954 only 7% of the dollar value of shipments of shoes went directly from manufacturers to their own retail outlets. Appellee concedes this fact (G. Br., p. 106), but then alleges that this figure does not include any of Brown's sales to Wohl.*

There is no reason for believing that Brown's sales to Wohl's retail division are not accounted for in the 7% of sales mentioned.

Brown's sales to Wohl's wholesale division in 1955 amounted to $5,119,000 (T. 1932) or less than .3% of the national sales by shoe manufacturers in dollars. Since Wohl's wholesale division resells the shoes which it pur-

* Appellee has confused Wohl's retail division with Wohl's wholesale division. These divisions purchase shoes separately (T. 1830). Appellee is also confused about the relation between Wohl's wholesale division and independent retailers operating on the Wohl Plan (G. Br., p. 25). Wohl's wholesale division had total sales of $15,630,000 in 1955, of which from 25% to 28% are made to independent retailers on the Wohl Plan (see our main brief, pp. 46-9).

chases from Brown to independent retailers, there is no reason to include such sales as sales to owned retail outlets.

Appellee appears to argue that its case is made out through a speech made by Mr. Clark Gamble, President of Brown (G. Br., pp. 110-11, referring to Gx. 219, R. 1300). First, it may be noted that Mr. Gamble was specifically referring to Brown's acquisition of Regal which appellee does not challenge. Indeed, Regal has proved unprofitable (T. 2274). More important, appellee's argument depends on its proof "of a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs." (G. Br., p. 110).

No such proof is supplied by Mr. Gamble's speech or indeed by any other evidence in the record. The undisputed facts show that Brown's acquisition of Kinney was undertaken for the legitimate business needs of both firms (see main brief, pp. 100-102).

The only witnesses called by appellee to testify upon the supposed advantages of vertical integration were without exception persons who had had no experience with a vertically integrated firm. Indeed, even the testimony which such witnesses were competent to give related not to the advantages of a vertically integrated firm, but rather related to possible injury to them as competitors.

It should be noted that there was no evidence which related to any competitive injury by any person in the shoe industry arising from the Brown-Kinney merger, notwithstanding the fact that the trial took place over two years after the merger had been effected and appellee had had ample time to develop such evidence if it existed.

Having failed to prove any competitive injury to any retailer as a result of the Brown-Kinney merger, appellee resorts to speculative arguments (G. Br., pp. 40, 133-4).

Thus, appellee argues that the "normal problems [of the independent retailer] in meeting chain store prices . . . are significantly intensified . . . when they are forced to compete with their own supplier" (G. Br., p. 40). In the first place, independent retailers do not generally "meet" chain store prices, for chain stores operate generally in the popular price field and independent retailers in the medium and higher price fields (T. 350). Significantly, the citations relied on to support this argument patently do not do so.*

Appellee intimates that there was evidence in the record to the effect that chains were able to sell shoes at retail prices which closely approximated the wholesale prices which an independent retailer had to pay for such shoes (G. Br., p. 133). There is no evidence to support this proposition. All that the evidence indicated was that chains sold the same style of shoes at prices below those charged by independent retailers for the same style of shoe. Indeed, the witness, who testified that there was a $2 price differential between his shoes and those in the chain store, also testified that there was a $2 differential in the quality of the merchandise (T. 350-51).

The argument then shifts to the proposition that Brown might take its nationally advertised branded lines away

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* The argument continues with a citation to a witness who is said to have testified that "manufacturers quote him wholesale prices virtually identical with those charged by the manufacturer's chain" (G. Br., p. 40). The testimony of the witness was that he did not obtain any quotations from manufacturers (T. 389).

from an independent retailer and put them into a Kinney store (G. Br., p. 40). No instance that this had happened or might happen was ever intimated in the testimony. Indeed, it would make no business sense for Brown to attempt any such move, for its most profitable business as a manufacturer is in its nationally advertised branded lines which it sells to independent retailers, and sales of nationally advertised branded shoes comprise 85% in dollars of Brown's manufacturing business.

Appellee argues that to the extent that Kinney buys its shoes from Brown, it will be able to sell such shoes at lower prices at retail because of an alleged savings in salesmen's salaries (G. Br., p. 136). Quite apart from the speculative character of the testimony cited, the witness recognized that even the integrated firm must employ persons who fulfill the salesman's functions (T. 356-60).

If any of the advantages of vertical integration which appellee speculates about had been truly present, we should have expected to see vertically integrated firms successful to the point where their rivals could not stay in business. The undisputed facts regarding the position of smaller manufacturers and smaller retailers over the period of the so-called merger trend directly give the lie to any such advantages of vertical integration (see above at pages 6 through 12).

Finally, we note here again the very largest retailers of shoes in the United States (Sears Roebuck, Penney and Edison Brothers) are not vertically integrated. Surely, if vertical integration carried with it the advantages suggested by appellee, these firms would have been the first to take advantage of it.

Effect on Competition at Retail

Appellee does not attempt an analysis of the merger on competition in any section of the country found by the district court. Rather it lumps all markets together on the apparent assumption that all are alike. As we have pointed out, this assumption is completely invalid.

The retailer witnesses called by appellee were not asked to give, nor did they give any, testimony relating to the impact of the merger on competition in the communities in which they sold at retail. According to appellee (G. Br., p. 124), all that these retailer witnesses noted was that Brown and Kinney "were among the important forces for the improvement of merchandising techniques and services of value to the public."

In fact, appellee's sole reliance on this issue is on the tables appended as appendices to its brief.

It is clear that essential to appellee's case is the inclusion of retailers on the Brown Franchise Program and the Wohl Plan in its projected figures for the combined firm's retail sales.

Appellee now concedes that these operations are entirely at the risk of the independent retailers on these plans. In short, it concedes that the independent retailer in each instance "gets the profits or losses from the operation" (G. Br., p. 108).

However, appellee misconceives a number of features of the plans.

First, neither the Brown Franchise Program nor the Wohl Plan involved, as part of their terms, financial assistance to the independent retailer. Brown assists independent dealers from time to time in buying another store (T. 2068). This assistance is made available to those not on the Brown Franchise Program as well as to retailers on it (T. 2068). Similarly available to all independent retailers who are customers of Brown are neon signs, architectural service and other merchandising assistance (T. 2074).

Appellee fails to note that these independent retailers are free to leave the Brown Franchise Program at any time, at most upon 30 days notice (see our main brief, p. 45).

Appellee argues that Brown effectively controls the retail prices at which shoes manufactured by it are sold by its independent dealers, including those on the Franchise Program. This argument has no support in the record. The testimony cited by appellee (G. Br., p. 24, footnote 11) reveals a very different picture from that suggested by appellee.

As we pointed out in our main brief (p. 40 footnote), there are generally recognized mark ups in use in the retail shoe business. As a matter of experience, it has been found that unless these mark ups are secured, a profitable retail operation can not be achieved (T. 552-53). The suggested resale prices utilized by Brown and other manufacturers merely reflect these traditional mark ups. It may also be noted that the district court made no finding in regard to price control.

The record is also clear that dealers on the Brown Franchise Program or the Wohl Plan are not prohibited from carrying lines of other shoe manufacturers. Indeed, the record dramatically illustrates just the contrary (T. 333, 692).

An independent dealer on the Franchise Program is in no different situation from any other independent retailer to whom Brown sells. In both cases it is the independent retailer who decides which shoes to order from Brown, and it is the independent retailer who decides upon the terms upon which he will sell to his customers. In both cases, it is the independent retailer, whether on the Franchise Program or not, who makes his own sales, determines his own sales policies and reaps the benefit of his own sales efforts. Indeed, the record clearly attests to the complete independence of retailers on the Brown Franchise Program and the Wohl Plan (see *e.g.*, T. 333, 467-68, 497, 566-67).

Appellee has now proposed in the appendices annexed to its brief a series of computations which purport to take into account sales by Kinney and by Brown at retail. To these appellee has added the sales made by independent retailers on the Brown Franchise Program or the Wohl Plan.

First, we note that these computations were not presented to the district court, and hence it is clear that the district court did not adopt them.

Second, the denominators used to compute the percentages shown do not include data relating to the immediate surrounding areas of the cities, and therefore the data does not relate to the "section of the country" selected by the district court. Moreover, the record is devoid of any evidence relating to the structure of competition in shoe retailing in most of the areas. With respect to 100 of the 115 cities listed in Appendix C (women's shoes), 74 of the 88 cities listed in Appendix D (men's shoes), and 42 of the 48 cities listed in Appendix E (children's shoes), appellee introduced no testimony whatsoever.

The figures purporting to show Brown's share of retail sales in the selected cities is exaggerated by the inclusion of shoes sold at retail by independent retailers operating under the Brown Franchise Program or the Wohl Plan who *purchased* shoes from Brown or Wohl. As we have pointed out, Brown does not "control" these retail sales.

Appellee's method assigns to Brown and Kinney a share of the retail market composed of both the shoes it sells at retail and the shoes it sells to retailers at wholesale. The denominator consists, however, only of retail sales. The fallaciousness of this concept is demonstrated by the absurd results which would follow if it were applied in a thoroughgoing way to the whole shoe industry. This is apparent when it is recalled that 70% of the shoes which Wohl sells at retail that 60% of the shoes which Wohl sells at wholesale to independent retailers on the Wohl Plan (T. 1832-3) and 80% of the shoes which Kinney sells at retail are purchased from outside shoe companies other than Brown.

When appellee's theory is applied to manufacturers, wholesalers and retailers in a single geographical area, the notion of appellee's "percentage" is wholly exploded. Let us assume that in a single geographical area 10 pairs of shoes are sold at retail in a year. Each pair of shoes is sold by a different manufacturer and a different retailer. 8 pairs of shoes are sold by 8 manufacturers directly to 8 different retailers and 2 pairs of shoes are sold by 2 manufacturers to 2 different wholesalers who in turn sell to

2 different retailers. The resulting "shares" would be as follows:

> Each manufacturer (10) would be assigned 10%.
>
> Each wholesaler (2) would be assigned 10%.
>
> Each retailer (10) would be assigned 10%.
>
> The resulting "percentages" would thus add up to 220%.

It is abundantly clear that what we have here is a numerator of apples and bananas and oranges over a denominator of oranges. Percentages cannot be derived where items differing qualitatively are compared one with the other. It it therefore nonsense to claim, as appellee does, that its figures represent a "percentage".

The "percentages" which appellee employs in the appendix are *not* the percentages it contended for upon trial (Ex. 214). Appellee there sought to allocate to Brown the sales of all independent retailers purchasing shoes from Brown, as indicated in its brief (G. Br., p. 125, fn. 58). These figures were not adopted by the district court.

Finally, appellee's estimates of total shoe sales in pairs shown in Appendix B are based on assumptions that are in direct conflict with the facts.

Plaintiff's total pairage estimates for its selected cities are based on the assumption that the average price of shoes purchased is the same for each city regardless of its characteristics. That is, that the price is not affected by such influences as climatic factors, occupational and ethnic differences, family size, income levels and income distributions. This is unrealistic and can be a source of great error.

Per capita income actually varies greatly from area to area. In the 34 states in which appellee's selected cities are located, per capita personal income ranges from 49% of the United States average to 134% of this average.

A brief analysis of appellee's Appendix B will illustrate the deficiency of appellee's statistics. The first city on the list is Dodge City, Kansas, where Kinney had a retail outlet and Brown did not operate a retail outlet. According to appellee, the population of Dodge City in 1955 was 11,700 (Gx. 7, R. 55). According to Appendix B, the total sales of shoes in pairs in Dodge City amounted to 57,600 or 4.9 pairs per capita. Since we know that the national consumption of shoes is approximately 3.5 pairs per capita (G. Br., p. 10, n. 2), it is obvious that appellee is assuming that Dodge City has some special characteristic not revealed by appellee's statistics. The Kinney store in Dodge City had total sales in 1955 of $76,000, including leather shoes, other footwear and non-shoe items (Dx. NNNN, R. 5816). This hardly supports the notion of the "huge Kinney store" to which appellee makes frequent reference.*

The next city on appellee's Appendix B is Texas City, Texas. In 1955, it had a population of 23,500 (Gx. 7, R. 55). According to Appendix B, 59,300 pairs of shoes were sold in that city in 1955. The number of pairs per capita, according to appellee's figures, was 2.5. Again, Brown had no out-

* In 1955, Kinney had total retail sales of $41 million, including footwear and non-footwear items. It operated 351 outlets. This represents an average of $114,000 in retail sales for each Kinney store.

let in Texas City. The Kinney store there had total sales in 1955 of $94,342, including all footwear items as well as non-footwear items (Dx. NNNN, R. 5811).

No reason is advanced why people in Texas City, Texas, with double the population of Dodge City should purchase only approximately the same number of shoes. Nor is there any evidence that either Dodge City or Texas City is an economically significant market.

Appellee's Appendix B can be checked by comparing it with the figures revealed by Dx. CCCCCCC (R. 7315-7843) which analyzes 58 areas where both Brown and Kinney had retail outlets. In that exhibit, there are listed figures for Kinney's dollar sales within the political boundaries for cities for 51 of the cities listed on appellee's Appendix B.*

Texas City, Texas, is included within the Standard Metropolitan Area of Galveston, Texas (1958 Census of Business, Retail Trade, Single Units and Multiunits, BC58-RS3, p. XII). Since there is a Brown outlet in Galveston, we have computed on Dx. CCCCCCC Kinney's share of sales in the Galveston Standard Metropolitan Area. That share comes to 3.4% of all sales in the Galveston Standard Metropolitan Area (R. 7652) in contrast to 30.1% shown for Kinney in Apendix B.

The first city on Appendix B which is subject to direct comparison is Ardmore, Oklahoma. Appendix B assigns

* Also included on Appendix B are Council Bluffs, Iowa, and St. Paul, Minnesota for which Dx. CCCCCCC gives no separate figures for the respective city areas. Council Bluffs is included in the Omaha Standard Metropolitan Area and St. Paul is included in the Minneapolis Standard Metropolitan Area.

to Kinney a percentage of 14.6% of all shoe sales in pairs. Dx. CCCCCCC discloses that of total dollar sales in Ardmore, Kinney had only 9.6% (R. 7814).*

The next city listed on Appendix B where both Brown and Kinney had outlets is at Ottumwa, Iowa. Appendix B alleges that Kinney had 26.1% of all shoe sales. Dx. CCCCCCC reveals that Kinney had 16.5% of all shoe sales in dollars within the city (R. 7805).

An analysis of 51 cities listed on Appendix B and also analyzed in Dx. CCCCCCC reveals that in only two cases is the share attributed to Kinney by Appendix B less than that shown by appellant's figures. In 34 cities, the Kinney percentage shown on Appendix B is at least 125% of that shown by appellant's proof and in 15 cities, the Kinney percentage shown on Appendix B is at least 140% of that shown by appellant's figures.

Of the 51 cities listed on Appendix B which can be thus compared with appellant's figures, in 11 cities Kinney is shown as having 10% or more total sales within that city. In nine of these 11 cities, the Kinney percentage shown on Appendix B is at least 125% of the percentage shown by Dx. CCCCCCC, and in seven of these 11 cities, the Kinney

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* Appellant's figures are based upon the 1954 Census which gives only dollar figures for retail shoe sales. Because the Census figures were available for only 1954, appellant's comparison between Brown and Kinney is made for that year. However, appellant included all of Kinney's sales of footwear, including leather shoes, tennis shoes, house slippers and rubbers. Appellee's figures, on the other hand, included only Kinney's sales of leather footwear. Because of this difference, Kinney's sales in pairs for 1955 of leather footwear alone were almost uniformly less than its sales in pairs of footwear of all types in 1954. In addition, national retail sales of footwear increased in 1955 over 1954.

percentage shown on Appendix B is at least 140% of that disclosed by Dx. CCCCCCC.

The total pairs listed on Appendix B total slightly over 52,200,000. National consumption of shoes in 1955 was approximately 600,000,000 pairs. In short, the 113 cities and communities listed on Appendix B account for less than 10% of national shoe consumption.

As we have noted in our main brief (pp. 175-6), for the nation as a whole, the Brown-Kinney share of total dollar retail sales is 2.3%. When all the areas in the nation as a whole where there is both a Brown and Kinney outlet are examined, the combined share of Brown and Kinney rises to only 2.9%. As pointed out in our main brief (p. 176), however, total dollar retail sales of shoes in overlap areas amount to more than $1,745,000,000, or slightly over 50% of the national total. In sum, reconciliation of the undisputed facts with the pairage figures shown on Appendix B is impossible.

The foregoing analysis is on the basis proposed by appellee, namely, by analyzing each community in terms of political boundaries. The district court did not adopt this contention and appellee no longer proposes it.

Appellee appears to argue, however, that it makes very little difference whether city figures are used or whether standard metropolitan areas are also included.

The third city listed on Appendix B is Council Bluffs, Iowa. That city is located directly across the Missouri River from Omaha, Nebraska. Appellee's witness from Council Bluffs testified that he had plenty of competition from Omaha (T. 670). As he colloquially put the matter, "A little fellow can't pull them over from the big side, but the big side can pull plenty over from the little one'' (T. 670). When Council Bluffs is placed in its proper perspective as part of the Omaha Standard Metropolitan Area, there is revealed a very different picture from that disclosed by Appendix B.

In the Omaha Standard Metropolitan Area, Kinney had had 5.5% of total dollar sales, whereas Brown had only 1.2% of total dollar sales. (Dx. CCCCCCC, R. 7409). In addition to the outlets of Brown and Kinney in Council Bluffs, there are also included Brown and Kinney outlets in Omaha itself.

Appellee has also proposed that ''the total impact of the merger could be appraised only by looking at the national retail picture as a whole.'' (G. Br., p. 81).

We have made such an analysis in our main brief (pp. 174-178). The undisputed facts there cited demonstrate clearly that on a national basis the Brown-Kinney merger could not possibly affect competition in shoe retailing.

We also submit that if shoe retailing is to be analyzed on a national basis, it is entirely inappropriate to include independent retailers on the Brown Franchise Program or the Wohl Plan. These independent retailers are almost invariably found in a single community. They do not participate in any national market.

CONCLUSION

Appellee's contention that the merger will increase concentration in the shoe industry has not been proved. Even if it were proved, appellee's case would not be made out.

In a sense, any horizontal merger results in an increase (albeit temporary) in the business of the combined firm. But Congress did not forbid all mergers. Congress proscribed only mergers having certain effects—those which have the reasonable probability (not possibility) of resulting in a substantial lessening of competition or a tendency to monopoly in economically significant markets. The undisputed facts show that neither of the forbidden results will flow from the Brown-Kinney merger.

Appellee now concedes that the merger of Brown and Kinney as manufacturers does not violate amended Section 7. It has all but abandoned the reasoning adopted by the district court on lines of commerce, and its attempt to show that the two firms are similar in respect of such vital matters as price, quality, style and merchandising techniques has utterly failed.

Appellee failed to prove any relevant market in shoe retailing. There is no proof of any adverse effects of the Brown-Kinney merger on competition in any relevant market. Conspicuously lacking is any proof of competitive injury as a result of the Brown-Kinney merger.

The shoe industry is highly competitive at all levels. There are a great many shoe manufacturers and an even larger number of shoe retailers. Bigness is not triumphant in the shoe industry. Smaller manufacturers and smaller retailers have grown and prospered even during the period of the so-called merger trend. It is against this background that the Brown-Kinney merger must be assessed.

The judgment below should be reversed and judgment in favor of defendant-appellant dismissing the complaint should be directed.

Respectfully submitted,

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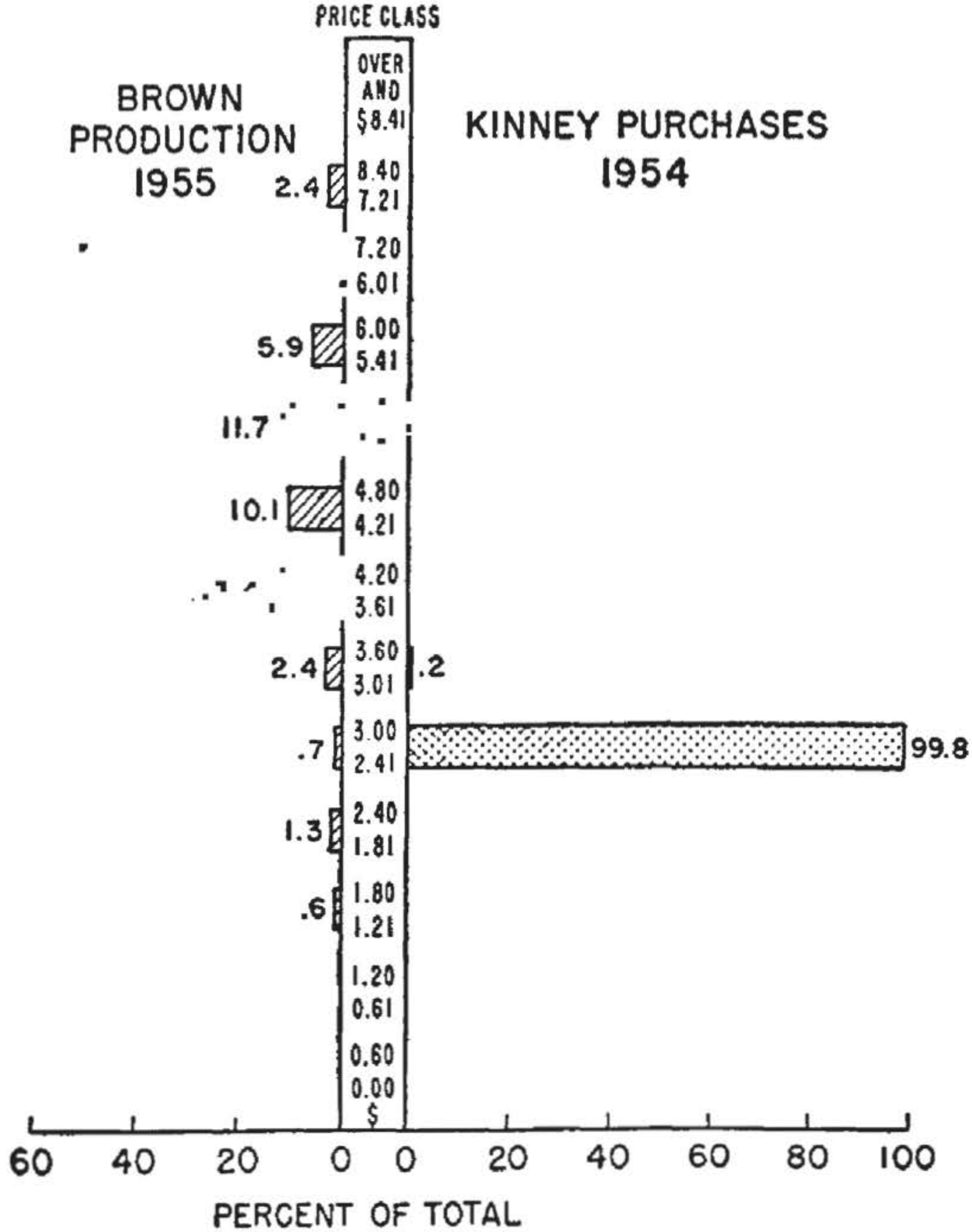
WOMEN'S DRESS SHOES
BROWN PRODUCTION AND KINNEY PURCHASES

Percent Distribution by
MANUFACTURER'S SELLING PRICE



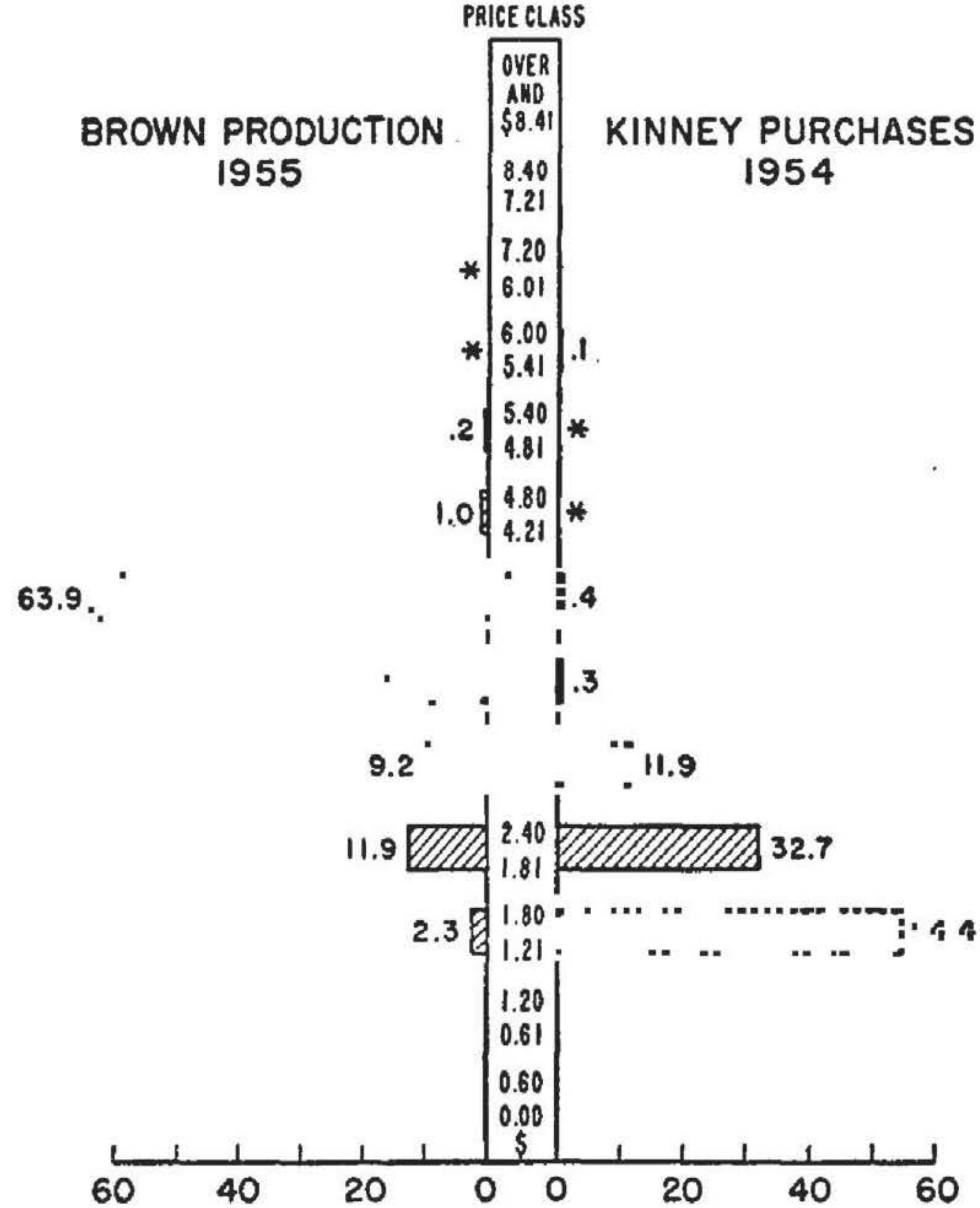
*LESS THAN 0.1%

Sources: Dx. EEEEEE (R. 7106) and Dx. ZZ (R. 4391)

The use of Brown 1955 data and Kinney 1954 data in this comparison is expressly sanctioned by an agreement between the parties.

MISSES' AND CHILDREN'S SHOES
BROWN PRODUCTION AND KINNEY PURCHASES

Percent Distribution by MANUFACTURER'S SELLING PRICE



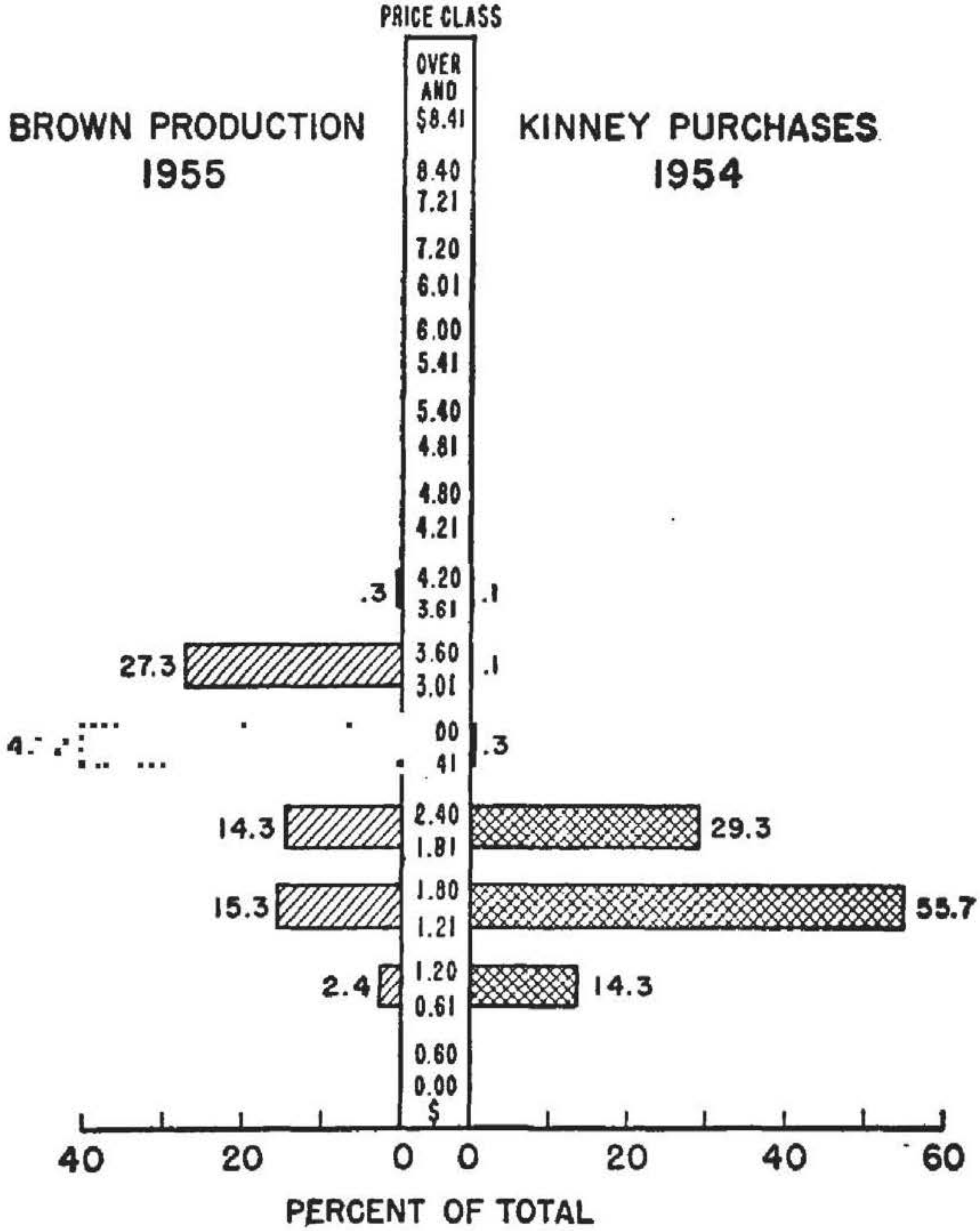
*LESS THAN 0.1%

Sources: Dx. IIIIII (R. 7112) and Dx. ZZ (R. 4391)

The use of Brown 1955 data and Kinney 1954 data in this comparison is expressly sanctioned by an agreement between the parties.

INFANTS' AND BABIES' SHOES
BROWN PRODUCTION AND KINNEY PURCHASES

Percent Distribution by MANUFACTURER'S SELLING PRICE



Sources: Dx. WWWWW (R. 7093) and Dx. ZZ (R. 4391)

The use of Brown 1955 data and Kinney 1954 data in this comparison is expressly sanctioned by an agreement between the parties.