In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC.,
Petitioner,

v.

BROADWAY-HALE STORES, INC., et al.,
Respondents.

Brief for Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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This brief is filed in reply both to Petitioner's Opening Brief and the Brief for the United States as Amicus Curiae, hereafter referred to as the "Solicitor General's Brief."

OPINIONS BELOW

The opinion of the Court of Appeals (R. 148-180) is reported at 255 F.2d 214. The opinion of the District Court (R. 133-134) and its Order and Judgment (R. 135-136) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1958 (R. 181). The jurisdiction of this Court was invoked

All emphasis in quotations in this brief has been added unless otherwise stated.

under 28 U.S.C. § 1254(1), and the petition for writ of certiorari was granted on October 13, 1958 (R. 182).

STATUTES INVOLVED

The Sherman Act, §§ 1 and 2; Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282.

Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"

Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act, § 4; Act of October 15, 1914, c. 323, § 4, 38 Stat. 731:

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

QUESTIONS PRESENTED

Petitioner's brief (p. 4) erroneously states that the question is whether a single trader injured by conduct forbidden by the Sherman Act may recover. To such a question the answer, of course, is yes. But the actual question is whether the conduct complained of

was forbidden or was merely a private controversy for resolution in state courts under state law. Specifically, the situation here presented and the questions involved are these:

A retailer conditions its purchase of certain brands of household appliances—a few of the many on the market—on willingness of the suppliers of those brands not to sell them to petitioner, a retailer next door who is but one of over 40 in the neighborhood and one of hundreds if not thousands in the city. A Sherman Act suit is filed. Affidavits on a motion for summary judgment, together with the allegations of the complaint, establish that the alleged conspiracy (to refrain from selling the named brands to petitioner) is neither aimed at nor strikes a class of persons but petitioner alone; is neither aimed at nor strikes any other retailer; is not intended to have and in fact does not have any effect on prices, on the availability of any product to the public, on the quality thereof, or on the availability to petitioner of innumerable competing brands. Further, the affidavits establish that no monopoly is involved, and that no injury whatever to the public was intended or effected.

In this situation:

1. Is the alleged conspiracy one "in restraint" of trade or commerce at all as the term "restraint" is used in the Sherman Act?

2. If so, is it an "unreasonable" restraint?

3. Does it have that substantial relationship to interstate commerce requisite to the application of the Sherman Act?

STATEMENT OF THE CASE

This case must be decided upon its own particular facts. We say this at the outset because the petitioner, and much more so the Solicitor General in his brief as amicus curiae, dissociate themselves from the facts of the case in an effort to read into the decision below more than is there.

The facts of *this* case are those stated in the opinion of the Court of Appeals, no more, no less.[1] And that court has said that "The facts prove no more than a squabble between two of many competitors in a highly competitive market area" (R. 180). The District Court made the same observation when it said "It is purely a private quarrel * * *" (R. 134).

A. The parties and the proceedings below.

Petitioner is a retailer of household appliances in a shop on Mission Street in San Francisco (R. 5). Mission Street is one of the secondary shopping districts outside the San Francisco downtown area. Respondent, Broadway-Hale Stores, Inc. (hereafter called "Hale"), is a retailer of appliances, having a number of stores, one of them on Mission Street next door to petitioner's shop (R. 5).

The 18 other respondents consist of ten manufacturers—two manufacturers of gas stoves, two of washers and dryers, three of refrigerators, two of electric ranges, one of phonographs, and seven of radios and television sets—and of eight local wholesale distributors of some of these manufacturers (R. 6-8).

Petitioner filed suit against respondents in 41 counts (R. 19). All were parties defendant to the first count but not to the others. Count One, like the other counts, contained allegations of discrimination, but respondents moved to clarify the confusion of parties and grievances, and a stipulated (R. 142-144) pre-trial order resulted, providing that Count One (R. 20)

> "is and shall in all further proceedings be interpreted and construed as one seeking relief solely with respect to a con-

1. Not only has petitioner never asserted that the opinion fails to state the facts correctly, but this Court has said that it exercises its certiorari jurisdiction to review principles of law, the settlement of which is of importance to the public, not to review the factual appraisal of a particular case by a Court of Appeals, particularly where that court's appraisal concurs with that of the District Court. *Labor Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 502; *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 400.

spiracy under the Sherman Act (Act of June 2, 1890, c. 647, as amended, 15 U.S.C.A. Sections 1 and 2), and not as seeking to assert any claim for relief under the Robinson-Patman Act (Act of June 19, 1936, c. 592, § 1, 15 U.S.C. § 13."

By virtue of this order Count One presented, in the words of the District Court (R. 134):

"just the case of a retail store in the Mission District of San Francisco—one of hundreds in the city engaged in selling the same kind of merchandise—which has a plaint that certain supplier defendants won't sell it some merchandise, allegedly at the behest of one of its competitors."

Or, in the words of the Court of Appeals:

"By pre-trial order count one was limited to a single conspiracy charging a Sherman Act violation" (R. 154)

* * * * * * *

"the restraint relied on * * * was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action." (Italics are the court's (R. 171)[2]

A series of orders ensued under R.C.P. Rule 42b, "by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action" (R. 135). This appeal concerns Count One alone.

Respondents then moved for summary judgment on Count One (R. 22, 128, 130, 132). The motion was supported by twelve affidavits (R. 25-125). Petitioner filed no affidavits in opposition,

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2. By virtue of the pre-trial order, the last forty counts became charges solely of violation of the Robinson-Patman Act (R. 19) and thus the vehicle for the charges of discrimination. These forty counts have been otherwise disposed of or are still pending, so that if petitioner has been aggrieved by discriminations, it may recover under those counts.

admitted the facts, and stood on an argument of law. The District Court granted the motion, stating (R. 133):

> "It appears from the allegations of count one of the complaint and from the undisputed affidavits supporting the motion for summary judgment that there is no genuine issue of fact respecting the claim for relief tendered by count one of the complaint."

The Court of Appeals affirmed in a careful opinion by Barnes, J., concluding (R. 180):

> "Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted."

B. Nature of the case.

1. THIS IS NOT A PLEADING CASE.

This is not a pleading case. On their first appearance in the case respondents made a motion to dismiss the complaint (R. 16-17). But they were aware of decisions like *United States v. Employing Plasterers Assn.*, 347 U.S. 186, which indicate that on a motion to dismiss limited to a complaint alone the allegations are often broadly construed, and that, if the case lacks merit, "an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56" (p. 189). They therefore asked the court to defer the motion, so that the issue could be decided on a motion for summary judgment where the court could act on undisputed fact.

As the Court of Appeals said (R. 154):

> "It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined."

2. THE CHARGE OF THE COMPLAINT; WHAT IT IS AND WHAT IT IS NOT.

Although this is not a pleading case, we start with the charge made by the amended complaint, for so far as respondents' affidavits did not address themselves to an allegation of the complaint, that allegation is to be taken as true for the purpose of the present proceedings.

The charging portions of Count One of the complaint are paragraphs 6 and 8. Paragraph 6 (R. 8) simply alleges that beginning prior to 1952 respondents "have restrained trade and commerce in the interstate distribution and sale" of the described goods in the San Francisco area

> "by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of such trade and commerce * * * and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and *have prevented plaintiff* from obtaining * * * appliances for resale; * * * and have refused to sell to or to enter into any contract to sell the products to *plaintiff*. * * * *More particularly,* the manfacturer-distributor defendants in pursuing a policy in favor of Hale and *against plaintiff,* have done and are continuing to do the following acts: * * *"

which consist of refusals to sell to petitioner (Par. 6, sub d and i).[3]

Paragraph 8 alleges (R. 11-12):

> "The defendant Hale * * * has also used its monopolistic buying power to deny to plaintiff its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, *in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.*"

This is the whole essence of the charge. In short, Count One is a simple charge that Hale declined to buy from respondent sup-

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3. The other subdivisions related to alleged discriminations. See footnote 2, p. 5 *supra.*

pliers if they also sold to petitioner, which had its store next door, and that as a result those suppliers "conspired" not to sell their brands to petitioner.

It is equally important, at the outset, to note what the complaint did *not* charge.

It did not charge that respondents conspired to refuse to sell to a *class* of persons of which petitioner is one. The charge is explicit: the alleged conspiracy was to refrain from selling to petitioner alone (R. 9-10). The complaint did not charge that the purpose of the conspiracy was to compel petitioner to conform to any plan relative to marketing or to punish it for not doing so. It did not charge that the conspiracy had any effect on prices, retail or wholesale, or was intended to; or that it reduced or interfered with the availability of any product to the public, or was intended to; or that it resulted in deterioration of quality of products, or was intended to. The charge, simply, is that the "conspiracy" was aimed at petitioner alone, with no purpose to affect the market and with no effect upon the market.

3. THE ADMITTED FACTS ON THE MOTION FOR SUMMARY JUDGMENT.

The undisputed affidavits filed by respondents in support of their motion for summary judgment (R. 25-125) established:

Petitioner and respondent Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 45-49, 51-53, 55-61, 64-115, 117-119, 122-124). The classified section of the San Francisco Telephone Directory contains fifteen pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other competing brands (R. 26-27). In addition to the seven brands of television sets, radios and phonographs mentioned in the complaint, there are twenty other competing brands sold in San Francisco. In addition to the three mentioned brands of refrigerators there are eighteen other competing brands. In

addition to the five mentioned brands of stoves, there are twenty-three competing brands; in addition to the two mentioned brands of clothes washers and dryers, there are thirty competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosley, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Petitioner does not charge that it was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to the action.

Moreover, numerous other retailers sell to the San Francisco public the very brands referred to in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows:

Admiral products	195 retailers	(R. 45)
Zenith products	153 retailers	(R. 49)
Whirlpool products	67 retailers	(R. 51)
RCA products	127 retailers	(R. 53)
Emerson products	109 retailers	(R. 55)
Philco products	175 retailers	(R. 59)
Rheem products	56 retailers	(R. 64)
GE products	110 retailers	(R. 71)[4]
Olympic products	33 retailers	(R. 117)
Tappan products	13 retailers	(R. 119)
O'Keefe & Merritt products	65 retailers	(R. 122)

Among these retailers are large nation-wide concerns[5] as well as local retailers which both courts below, with their judicial

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4. The figure given is for GE television dealers. The figure for GE major appliance dealers is 54 and for dealers in GE radios and traffic appliances it is 463.

5. For example, Butler Bros., R. 67, 72, 84; Macy's, R. 45, 48, 51, 55, 59, 65, 76, 95, 122; Electrolux Corp., R. 88; S. H. Kress Co., R. 94, 113; McKesson-Robbins, R. 96; Walgreen's, R. 108; J. C. Penney Co., R. 49, 100.

knowledge of the community, knew to be some of the largest i the area.[6]

In *the Mission district alone,* in San Francisco, there are 5; dealers selling the brands referred to in the complaint. Restrictin the area under consideration even more narrowly, to *Mission Stree* alone, a member of the public desiring to purchase an applianc and strolling down Mission Street for a span of but 11 blocks, o which petitioner's store is approximately in the center, would pas the shops of 43 retailers, selling the specific items and brands re ferred to in the complaint. Defendants' Exhibit A on the motion is a chart that strikingly exemplifies the fact; a copy is inserted opposite this page.[7]

Finally, it may be noted that while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 67; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have

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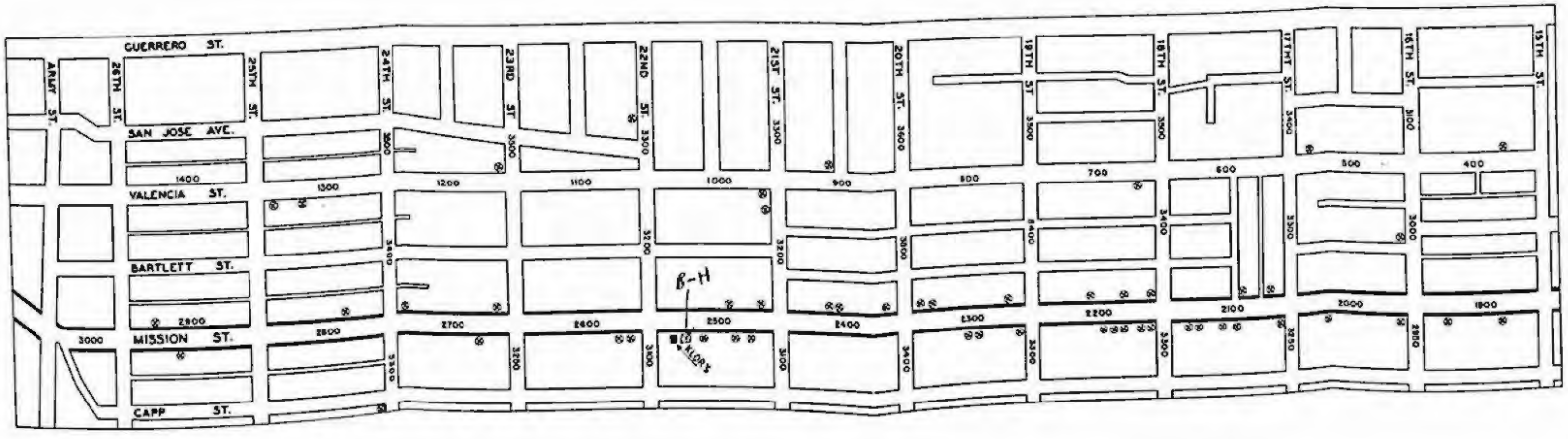
6. For example, City of Paris, R. 48, 55, 59, 73, 85; The Emporium, R. 48, 51, 65, 74, 88, 119, 122; Dohrmann's, R. 49, 65, 67, 73, 87, 119, 122; Schwabacher-Frey, R. 49, 51, 59, 77, 103; The White House, R. 55, 59, 108; I. Magnin's, R. 55; Gump's, R. 91; Sherman Clay & Co., R. 48, 77, 80, 104, 114; Kahn & Keville, R. 68, 75, 93; Lachman Bros., R. 49, 51, 56, 64, 69, 71, 75, 79, 94, 113, 122, 123; Redlick's, R. 64, 69, 71, 76, 80, 101, 113, 122, 123; Scott Plumbing Co., R. 69; Sterling Furniture Co., R. 48, 51, 65, 70, 77, 80, 105, 122; Charles Brown & Sons, R. 45, 49, 59, 72, 84; Union Furniture Store, R. 107, 115, 123; W. & J. Sloane Co., R. 48, 104, and L. R. Jackson Home Wares Co., R. 59, 93.

7. All the data on the chart are taken from the twelve affidavits.

KLOR'S INC. VS. BROADWAY - HALE ET. AL.

KLEIN'S LEGAL SERVICE
SCALE - 200 FEET TO THE INCH

CHART SHOWING LOCATION OF RETAILERS SELLING DEFENDANTS' PRODUCTS IN THE VICINITY OF PLAINTIFF'S STORE [BASED ON AFFIDAVITS FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT ON COUNT ONE OF THE COMPLAINT]



been no material variations. (This evidence appears in the 12 affidavits, R. 25 to 125.)

The sham claim of "monopoly"

While the complaint refers to monopoly and monopolization, and the briefs of both petitioner and the Solicitor General make much of these words, the affidavits on the motion for summary judgment demonstrated that these allegations were sham.

The charge of monopolization is in the following allegations of the complaint: That Hale operates a chain of stores (R. 5, Compl. para. 5); that the "combination, conspiracy and agreement tend to and do actually restrain and monopolize interstate commerce in the distribution and sale" of the named appliances "in favor of Hale" (R. 10, Compl. para. 6); that by reason of Hale's number of retail outlets it "enjoys a monopolistic buying power", has used that power to negotiate terms of purchase, and (as already quoted above) has used it

> "to deny to *plaintiff* its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants to not sell their products *to the plaintiff*." (R. 11-12, Compl. para. 8)

The affidavits established (1) that there are hundreds, if not thousands, of retail dealers selling the very brands in question in San Francisco; (2) that there are dozens of competing brands, and (3) that the number of retailers selling the very brands in question in San Francisco has steadily increased during the period of the alleged conspiracy. In view of these undisputed facts, it is clear, as both courts below held, that no genuine issue on monopolization exists.

As the Court of Appeals said (R. 179):

> "The first sentence of paragraph six of count one of plaintiff's complaint is of no assistance to appellant. It alleges only that 'defendants . . . have restrained trade and commerce . . . by contracting, combining, and conspiring together . . . in restraint and monopoly of such trade and commerce . . . and have thereby substantially lessened, limited and restrained competition in said trade and commerce . . .' This is no more than the pleader's conclusion that defendants have restrained trade and commerce by restraining trade and commerce. It states no facts from which illegal action can be perceived or inferred. Paragraph eight of count one speaks of Broadway-Hale's 'monopolistic buying power' enjoyed 'by reason of the large number of retail outlets it operates.' But the essence of this allegation is that Broadway-Hale 'has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.' We find no basis for determining that Broadway-Hale intended, or had the power if it so intended, to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public. It is well known that appliance sales are within a most highly competitive market."

4. ERRONEOUS ASSERTIONS BY PETITIONER AND THE SOLICITOR GENERAL AS FACT OF MATTERS NOT PRESENT IN THE CASE.

In a number of respects the briefs of petitioner and of the Solicitor General go outside the facts of this case:

1. The Solicitor-General's brief states (p. 9):

> "It is consistent with uncontradicted allegations of the complaint that petitioner was boycotted because he was the leading recognized price cutter among San Francisco retailers of the products covered by the complaint."

This amazing statement lacks the basis of a single word in the complaint or any other part of the record. Nowhere has there

heretofore been a suggestion that petitioner was a price cutter or that he was denied goods for that reason. The assertion runs counter to the whole basis on which petitioner presented the case to both courts below.

Petitioner has never contended, either in those courts or in this, that there was any price element in the case. On the contrary, it argued that the absence of that element was immaterial. Nor did the Solicitor General's memorandum filed in September, 1958, in support of the petition for certiorari claim the presence of any price element; on the contrary, it recognized that there was none.[8] In arguing the cause in both courts below respondents noted that no element of price was involved, and in reply petitioner merely argued that conspiracies fixing or regulating prices, limiting production or distribution or bringing about a deterioration of quality "are not alone the types of conduct prohibited by the Sherman Act" (R. 129). The opinion of the Court of Appeals describes the case presented to it thus (R. 171):

> "There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly."

2. Both petitioner's brief and that of the Solictor General make arguments based on "elimination" of a trader (e.g., Pet. Br. 42). But this case does not involve "elimination" of anybody. The complaint did not charge that petitioner was "eliminated" but only that certain brands of goods were denied to it. The uncontroverted showing was that many other brands—including some of the most famous in the country—were available to petitioner. As the Court of Appeals said (R. 171):

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8. That memorandum stated (p. 5):
"The unsoundness of the decision below is pointed up by consideration of the categories of *per se* violations. *If* petitioner's store had been the object of a price fixing conspiracy or a tying arrangement the restraint would be deemed *per se* unlawful."

"Here the restraint relied on, as we see from the complaint, was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action. Various other competing electrical appliances were shown by the record before the trial court to be available to Klor's, Inc.[41] * * *

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[41]"Twenty competing brands of television sets compared to the seven declared impossible to attain; eighteen competing brands of refrigerators, compared to three; twenty-three stoves, compared to five; thirty competing clothes washers and dryers, compared to two. * * *" (Italics are the court's.)

Again (R. 178):

"Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied."

3. Petitioner's brief erroneously asserts (p. 8) that

"The complaint * * * may be summarized as involving the following: * * * (3) A plan by these parties to allow Broadway-Hale a monopolistic position in the sale of their products" and "(5) A specific intent by Broadway-Hale to monopolize the retailing of household appliances."

If this is intended to mean that there was a plan to sell only to Hale, or to refuse to sell to anyone at all that Hale designated, there is not a word in the complaint to that effect. Further, the affidavits established that Hale is but one of thousands of retailers who buy and sell the products. Any assertion of "monopolistic position" in this situation is simply sham.[9]

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9. The statement (Br. 42) that Hale "could have eliminated one or a dozen of other competitors" or "could have embarked on a plan or program to deny to any competitor it so chose access to respondents' merchandise," is, similarly, merely sham speculation.

5. THE CASE AS MADE BY THE COMPLAINT AND THE UNDISPUTED SHOWING ON THE MOTION FOR SUMMARY JUDGMENT.

The case made by Count One of the complaint, after the stipulated pre-trial order, and the undisputed showing on the motion for summary judgment, is succinctly summed up by the Court of Appeals thus (R. 178):

> "Count one of the complaint, with which we are here solely concerned, alleges, in paragraph six, that defendant Broadway-Hale, in combination with each of the manufacturing-distributing defendants, prevented *plaintiff* [italics are the court's] from obtaining products to sell to the public. There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition, * * * there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale. On Mission Street, along with the plaintiff and Broadway-Hale, there are over forty retail dealers. Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied."

SUMMARY OF ARGUMENT

I. The moving force in the alleged conspiracy was Hale, a retailer. Had it sought and obtained an exclusive on each of the supplier-respondents' brands for the single city block on which Hale is located, there would plainly have been no violation of the Sherman Act. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822. But Hale did

not seek or receive even this slight exclusive arrangement. According to the charge, it simply did not desire to handle brands handled by petitioner, a next door neighbor, and it told each supplier-respondent to choose between its custom and petitioner's. The supplier then chose Hale's. A buyer's refusal to buy from a supplier should the latter sell to another, coupled with the supplier's agreement not to do so, is joint action—a two-party agreement—but it is not illegal. *Federal Trade Commission v. Raymond Co.*, 263 U.S. 565; *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 729; *Mackey v. Sears Roebuck & Co.*, 237 F.2d 869 (7 Cir.), pet. for cer. dism. 355 U.S. 865; *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821; accord under California antitrust law, *Rolley, Inc. v. Merle Norman Cosmetics*, 129 C.A. 2d 844, 278 P.2d 63.

A number of such two-party agreements, one between Hale and each supplier-respondent, would be equally legal. *Interborough News Co. v. Curtis Publishing Company*, 225 F.2d 289 (2 Cir.). Assuming that all respondents were parties to one agreement, the fact of one multiparty arrangement in place of several two-party arrangements does not create illegality *per se*. The test of illegality still remains the same; i.e., one of purpose, intent and effect on the market or the consuming public.

II. (1) The Sherman Act does not prohibit all conspiracies but only those "in restraint of trade or commerce". The key term, "restraint of trade", does not have a drily literal meaning. *Chicago Board of Trade v. United States*, 246 U.S. 231. This Court early held and ever since has consistently ruled that an injury to the public is the foundation upon which the Act's prohibitions rest. Specifically, it has held that the only conspiracies within the Act are those which, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or the course of trade. The Act does not prevent mere injury to an individual, and no private recovery is permissible

for acts not producing that general consequence to the public. *Nash v. United States,* 229 U.S. 373; *Wilder Mfg. v. Corn Products Co.,* 236 U.S. 165; *Mandeville Farms Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, and other cases cited in the Argument.

In *Apex Hosiery Co. v. Leader,* 310 U.S. 469, the Court gave definitive expression to the kind of restrictions on trade with which the Act is concerned. The Court rejected the contention that "the Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce", even where the parties so intended. It held that not all restrictions on trade are "restraints of trade" but only such as tend to a "special form of public injury", viz., restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services, i.e., tend to take from buyers or consumers the advantages which they derive from free competition in the market.

The restriction of the alleged conspiracy in this case was not even a "restraint of trade", because it neither had nor was intended to have any consequences or effect on the market or to the consumer.

(2) To be illegal under the Sherman Act, not only must a restriction amount to a "restraint of trade" but it must also be "unreasonable". *Standard Oil Co. v. United States,* 221 U.S. 1. While some kinds of agreements or practices have been deemed unreasonable *per se,* because of their inherent nature as having a pernicious effect on competition and because an ascertainment of reasonableness would involve an elaborate economic inquiry, the Court has not receded from the Rule of Reason generally. *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5; *United States v. E. I. du Pont Nemours & Co.,* 351 U.S. 377, 387. Apart from the classic instances of intrinsically anti-competitive practices, such as price fixing and division of territories, there must be a substantial interference with competition in the relevant market as a matter of

fact, a deprivation of the public of the fruits of a competitive order shown by the facts to be likely.

Even assuming that the alleged conspiracy here was a "restraint of trade", yet, unless it is held to be unreasonable *per se,* the judgment must be affirmed, for both courts below have concurred in the fact that there was no effect whatever on the market, either intended or effected. It was, as those courts said, "no more than a squabble between two of many competitors in a highly competitive market." For this reason, petitioner and the Solicitor General seek to extend the *per se* rule to this case. But if the *per se* rule is applicable here, little, if any, room remains anywhere for the Rule of Reason.

(3) The kind of case petitioner presents has frequently arisen, and without exception the courts have held that no violation of the Sherman Act exists, that the Act is not concerned with whether a particular retailer, sales agent, consignee or other dealer handles or sells a particular brand or commodity so long as there are many others selling it, there being no effect and no purpose to work an effect on prices, quality or quantity available to the public and no monopoly, particularly where numerous competing brands are available. Conversely, in every case where the Sherman Act has been held violated, the conspiracy was aimed at or struck a broader purpose or target than the one plaintiff; for example, its purpose was to fix prices, and the plaintiff was injured as an incident to the accomplishment of that purpose. The cases to this effect are numerous. Among them are *Shotkin v. General Electric Co.,* 171 F.2d 236 (10 Cir.) and *Feddersen Motors v. Ward,* 180 F.2d 519 (10 Cir.), which petitioner has conceded support the judgment but contends should now be overruled, and *Hudson Sales Corp. v. Waldrip,* 211 F.2d 268 (5 Cir.) cer. den. 348 U.S. 821.

(4) By virtue of the decisions mentioned in Section II(1) of this Summary, there early emerged and has been repeated in a mul-

titude of cases the statement that in order for there to be a violation of the Sherman Act, there must be a "public injury", and that the Act cannot be invoked in aid of a merely private controversy. This is a compendious mode of stating the principles of *Apex Hosiery Co. v. Leader, supra,* that to constitute a "restraint of trade" a restriction must have certain effects on the market, and also that it must be unreasonable. Petitioner claims that this requirement was "invalidated" by *Radovich v. National Football League,* 352 U.S. 445. No lower court has so interpreted the *Radovich* case, and decisions to the same effect as formerly continue to flow from the courts almost daily. For example, *Miller Motors v. Ford Motor Co.,* 252 F.2d 441 (4 Cir.); *Riggall v. Washington County Medical Society,* 249 F.2d 266, 268 (8 Cir.), cer. den. 355 U.S. 954 as well as other decisions of courts of appeals and numerous decisions of district courts. *Radovich* does not support petitioner. That case was decided on the allegations of the complaint alone, and the plaintiff "raised his action in the context of a general and overall destruction of competition in the football business, the injury to him being imposed as part of the plan [of one of two football conferences] to fight the All America Conference" and thereby monopolize the whole business of football. Radovich was not the target of the conspiracy; his injury was sustained as part of and incidental to a conspiracy of broader purpose falling directly within the meaning of "restraint" as explained in the *Apex* case. What this Court rejected in the *Radovich* case was the contention that a private suitor had to plead more than the government, in that he not only had to plead a violation of the Act and his own injury but something *additional.* But no violation is shown unless the kind of restraint involved has that special injury to the public of which the *Apex* case speaks.

(5) The gist of the position of the petitioner and the Solicitor General is a syllogism of two premises, that "group refusals to deal" are "group boycotts", and that "group boycotts" are illegal *per se.* Neither premise is sound.

A "boycott" is not merely a joint refusal to deal; it is a joint refusal to deal used as a means of coercing the boycotted persons to conform to the wishes of the boycotters. Taft, J. in *Toledo A.A. & N.M. Co. v. Pennsylvania Co.*, 54 Fed. 730 (C.C. N.D. Ohio); Thornton on Combinations in Restraint of Trade, p. 950. There was no such boycott here. While Hale is charged with refusing to purchase from the other respondents in order to induce them not to sell to petitioner, this action of Hale's was unilateral, not joint. The alleged concert of action was the refusal of the suppliers to sell to petitioner, but this was not done to coerce petitioner to do or refrain from doing anything.

But whether or not a joint refusal to deal is called a "boycott", it is not illegal *per se*. Like any alleged violation of the Sherman Act, its legality depends on the purpose, intent and effect. In every case where a boycott has been held illegal, it was a boycott of a whole *class* of persons, or to compel compliance with restrictive trade practices, or otherwise to affect prices, quality or availability to the public, or to work a monopoly. Our Argument analyzes each cited decision of this Court touching on the subject[10] to show that this is so. The lower courts have always so understood these cases and have rejected the contention that they mean that any joint refusal to deal is *per se* illegal; e.g., *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816; *Interborough News Co. v. Curtis Publishing Company*, 225 F.2d 289 (2 Cir.).

Petitioner and the Solicitor General would state the issue to be whether an injury to a "single trader" can be a violation of the Act. This is not the issue. A conspiracy injuring a single trader might, on the facts of the particular case, also involve

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10. *Binderup v. Pathe Exchange*, 263 U.S. 291; *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457; *United States v. Columbia Steel Co.*, 334 U.S. 495; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594; *Northern Pacific R. Co. v. United States*, 356 U.S. 1.

injury to the public; for example, where the consequence was to leave but one other person in business, thus creating a monopoly, or the purpose was to remove an obstacle to a price fixing scheme. But where injury to the single trader is the only purpose and effect, the Sherman Act has never been held to apply.

(6) No genuine issue of fact was involved that precluded a summary judgment. While existence of a conspiracy is a question of fact, respondents assumed its existence for the purpose of the motion. What was left was petitioner's argument that a conspiracy to refuse to sell to a single retailer, *without more,* is *per se* illegal. That presented a pure issue of law. The facts left no genuine issue as to monopolization, and no other factual matter was material.

III. That relation to interstate commerce necessary to bring the case within the Act was not present. While the amount of commerce involved in a case may not be relevant, the effect of the restraint upon what amount is involved must be "substantial". *Mandeville Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219. Here the effect was simply nil. All the decisions have agreed that in a case like the present, where one dealer has been unable to obtain certain goods but many others do handle those goods, interstate commerce is not involved, because there is no alteration whatever in the flow of the commodity, and the channels of commerce have not been used to work any effect on the public or the market.

IV. In a very real sense the case presents the issue whether the Sherman Act is to remain consonant with "the serious purposes for which it was framed" or is to become a sort of section of some Federal Commercial Code treating of private commercial torts. The legislative history and an unbroken chain of decisions have shown that the Act was not designed to create private rights, with respect to which the States were wholly competent to legislate, but was enacted for a broad public purpose, to reach what

were regarded as grave threats to the American system. In this respect the standards of the Act are the same as for the Federal Trade Commission Act *(International Shoe Co. v. Federal Trade Commission,* 280 U.S. 291, 298), and proceedings under the latter do not lie in a controversy essentially private in its nature, *Federal Trade Commission v. Klesner,* 280 U.S. 19.

The private action under the Sherman Act was authorized as a means of enlisting private aid in reaching acts injurious to the public, as an auxiliary means to pursue public wrongs. A multitude of cases so holds, and the several unusual privileges conferred by the Act on the private litigant, such as the recovery of treble instead of actual damages, are consistent only with recognition of that fact. *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 751. Whenever no more was perceived in a case than a private wrong, the plaintiff has been relegated to the common law or to state statutes.

Commercial torts often involve "restraints", if that term be granted the literal meaning *Apex Hosiery Co. v. Leader, supra,* denied it, and the additional charge of "conspiracy" is one easy to make with wide latitude in proving it. *Theater Enterprises v. Paramount Film Distributing Corporation,* 346 U.S. 537, 541. If now it should be held that "conspiracy" in a commercial tort is enough to create a Sherman Act case, the federal courts will be inundated with trivial or private disputes by the talismanic addition to every commercial quarrel of the epithet "conspiracy". In *Radovich v. National Football League, supra,* this Court rejected a contention that a private litigant must allege more (apart from his own damage) than the Government. Now petitioner and the Solicitor General ask the Court to hold that the private litigant need prove less. The decision below will not affect public suits, for the Government has heretofore always recognized that its duties and powers under the Act were not concerned with matters completely lacking public concern, like the present case. "The

understandable search by enforcement agencies for universals in the interest of simplified enforcement and the trend toward more extensive coverage of the Sherman Act should not be permitted to obscure the aims of the statute." Barber, "Refusals To Deal Under The Federal Antitrust Laws", 103 Univ. Pa. L. Rev. 847, 885.

In order to permit petitioner to proceed with his alleged grievance in a federal court, nearly fifty years of construction of the Sherman Act must be rejected.

ARGUMENT

Petitioner states the question to be whether a complaint which alleges *a violation* of the Sherman Act and consequent damage to the private plaintiff states a cause of action, if it fails to allege, as an *additional* element, a "public injury" (Br. 4). This is not the issue. *If* a plaintiff does allege facts constituting *a violation* of the Sherman Act, plus his private damage, he states a case. But the question is: what constitutes a violation of the Act?

The issue may be stated thus: Is an agreement among a retailer and two or more suppliers not to sell to a particular retailer next door in and of itself, *without more,* violative of the Sherman Act?—for here there was no more; no intent to reach anyone other than the one retailer, no intent to injure the public, and in fact no injury to any other retailer or the public, no monopolization, no effect whatever on the market. Petitioner's basic contention is that any "refusal to deal"—"pursuant to conspiracy"—"is *per se* illegal conduct even though directed at a single trader" (Pet. Br. 37; to the same effect, Sol. Gen. Br. 4).[11]

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11. The issue is not whether a conspiracy to the injury of "a single trader" can ever be a violation of the Act. It might be, as, for example, if the consequence was to leave but one other trader in the market. (See discussion at p. 63 *infra.*)

I. This case seen in perspective: The relation of two adjoining stores.

According to the complaint the moving force in the alleged conspiracy was Hale, a retailer of appliances. What the complaint charges is that Hale told each supplier-respondent that it would not patronize that supplier if it should sell to petitioner; the supplier thus had its choice of selling to Hale or selling to petitioner, and it preferred Hale's custom. This is explicitly stated in paragraph 8 of the amended complaint (R. 11, 12; quoted, p. 7, *supra.*) As petitioner's brief shows, this is its real claim. Thus it says (Br. 8):

> "It alleged that Broadway-Hale 'had used its monopolistic buying power' in dealing with the manufacturer-distributor respondents, and that it 'has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.' "[12]

Self-evidently, if this case involved but one supplier who chose Hale over petitioner at Hale's request, there would be no violation of the Act. The case stated by the complaint is that of two retailers located next door to each other, one of whom does not care to handle a brand its neighbor handles. There are plenty of brands in existence, more than enough for both. Should one handle Brand A, his neighbor prefers to handle Brand B.

The chart opposite page 10 shows that four appliance retailers other than Hale and petitioner were in the *same block,* two on the same side of the street, none a party to the alleged conspiracy. If Hale had demanded from a supplier an *exclusive* for its product on that block no one could possibly contend that an agreement to give it such an exclusive would violate the Sherman Act. *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822; reh. den. 355 U.S. 900, 357 U.S.

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12. To the same effect, Br. 32.

923; *Lawlor v. National Screen Service Corp.*, 352 U.S. 992. Yet here what Hale is alleged to have received was less than even that slight "exclusive", for its "exclusive" was only against its closest neighbor.

A buyer's refusal to buy from a supplier should the latter sell to a competitor, coupled with the supplier's preference of the former's trade, is not illegal under the Sherman Act. In *Federal Trade Commission v. Raymond Co.*, 263 U.S. 565, cited with approval in *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 729, this Court said (p. 573):

> "Thus a retail dealer 'has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.' *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 614; * * *. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440. Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment he desires to retain."[13]

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13. The Court quoted (p. 571) what the Circuit Court of Appeals had said:

> "So far as petitioner itself is concerned, it had the positive and lawful right to select any particular merchandise which it wished to purchase, and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it, or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer, * * * for any reason satisfactory to itself or for no reason at all."

In *Mackey v. Sears, Roebuck & Co.,* 237 F.2d 869 (7 Cir.), petition for certiorari dismissed, 355 U.S. 865, count one of the complaint alleged that defendant had informed plaintiff "it would discontinue its purchases [from plaintiff] unless [plaintiff] refrained from selling * * * to competitors of Sears" (p. 872, 1st col.). The court held (p. 872) that the count "did not state a claim under § 1 of the Sherman Act."[14]

Patently, an agreement between Hale and even one supplier to sell to it rather than petitioner would be *joint* action,—a "conspiracy," in the sense used by petitioner. But it would not be illegal. *Hudson Sales Corp. v. Waldrip,* 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821. As the court below said (R. 171):

> "If 'X Company,' a manufacturer, refuses to sell to Klor's, Inc., and sells to 'Y Company,' a retailer who also agrees to buy from 'X' as long as 'X' does not sell to Klors, more than one person is involved, and they have agreed not to sell, but their act is not necessarily illegal. To a minute degree, any refusal to sell is a restraint of trade, in the ordinary sense; but it is not necessarily a restraint in the Sherman Act sense."

It not being an illegal agreement for respondent Hale to say to a manufacturer of television sets, "I will not buy from you if you sell to my next door neighbor" and for the manufacturer to choose Hale, it could not become illegal for Hale to say the same thing to a manufacturer of stoves, a manufacturer of washing machines, and a manufacturer of radios, each acceding. Cf. *Interborough News Co. v. Curtis Publishing Co.,* 127 F. Supp. 286 (S.D. N.Y.), affirmed 225 F.2d 289 (2 Cir.).

Petitioner apparently adds to these facts an allegation that the several suppliers and Hale "conspired" together. If this is a mere epithet to describe a situation where each of several suppliers chose to sell Hale, it adds nothing. But assuming, as we have

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14. The law of California under its antitrust statute is to the same effect. *Rolley, Inc. v. Merle Norman Cosmetics,* 129 C.A. 2d 844, 278 P.2d 63.

done,[15] that it was intended to be more than an epithet and to make the charge of an actual agreement, what element has been added which makes illegal what was otherwise legal? The only new element is that there is one agreement with more than two parties instead of several two-party agreements (Cf. *Kotteakos v. United States*, 328 U.S. 750).

But, as we now proceed to see, the legality of any conspiracy under the Sherman Act, whether the parties to it are few or many, depends on *the purpose, intent and effect* on the market or the consuming public. The broader agreement is neither more of a restraint nor more unreasonable than several, merely because there are more parties to it. In order to determine whether there is a restraint or, if so, an unreasonable one, one must inquire into the facts.

II. The charged conspiracy involves no unreasonable "restraint of trade" within the meaning of the Sherman Act.

Section 1 of the Sherman Act provides that

> "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce"

is illegal (15 U.S.C. Sec. 1). Thus the Act does not prohibit all conspiracies but only those in restraint of trade and commerce.

The key phrase is "restraint of trade". When the statute was enacted, there were two possibilities of interpretation—to construe it literally or to construe it historically in the light of the common law, the evils the Act was designed to eliminate, and the grave purposes and objectives with which a federal government should justly

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15. Contrary to assertions of petitioner (e.g., Br. 14), the Court of Appeals made the same assumption. See quotations from its opinion at pp. 5, 15, *supra*. But we cannot avoid a reflection that it taxes credulity to suppose that a manufacturer of radios and televisions like Zenith (R. 6) conspired with a manufacturer of gas stoves like Rheem (R. 7) and a manufacturer of clothes washers and dryers like Whirpool-Seeger (R. 6), not to sell to petitioner.

concern itself. Almost from the beginning the Court made its choice: the key phrase could not be given a drily literal meaning. As Justice Brandeis later observed for the Court in *Chicago Board of Trade v. United States,* 246 U.S. 231, 238:

> "* * * the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."

It soon became clear that *two* requirements must be met before a conspiracy working a restriction on trade becomes a violation of the Sherman Act. It must be a "restraint of trade", within the meaning of the Act, and, additionally, it must be "unreasonable". Before questions of "reasonableness" or "*per se* unreasonableness" can arise, a case must first involve the kind of restriction that the Sherman Act means by "restraint". The distinction between the problem of what is a "restraint" and what kind of "restraints" are unreasonable is recognized in *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 502, where it is said that a certain type of combination

> "was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' "

A. THE RESTRICTION ON TRADE IN THIS CASE WAS NOT A "RESTRAINT" WITHIN THE MEANING OF THE SHERMAN ACT.

Prior to 1940, the courts used various expressions to define the scope of the Act. In 1911, in *Standard Oil Co. v. United States,* 221 U.S. 1, this Court said (p. 78) that

> "the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest * * *."

In 1913, in *Nash v. United States,* 229 U.S. 373, 376 (per Holmes, J.), the Court summed up the *Standard Oil* case and the *American Tobacco* case[16] as establishing

> "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

This was quoted and reaffirmed in *Eastern States Lumber Assn. v. United States,* 234 U.S. 600, 610 (1913) and again by Chief Justice Hughes in *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 360 (1933).

Then in 1915, in *Wilder Mfg. Co. v. Corn Products Co.,* 236 U.S. 165, this Court made the matter more explicit, with its converse, by stating that "the prohibitions of the statute were enacted to prevent *not the mere injury to an individual* * * * *but the harm to the general public* which would be occasioned by the evils which it was contemplated would be prevented, and hence * * * the prohibitions of the statute * * * were co-extensive with such conceptions" (p. 174). In *Mandeville Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948), the Court reaffirmed the test of a private party's right to recover under the Act to be "whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals" (p. 243).

But the key case is *Apex Hosiery Co. v. Leader,* 310 U.S. 469, decided in 1940. It was here that this Court finally gave the definitive expression of the *kind of restraint* of trade with which the Act is concerned. The Court rejected the contention that "the Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce" (pp.

16. *United States v. American Tobacco Co.,* 221 U.S. 106, partic. at 179 (1911).

473, 484), even when the defendants "intended to restrain commerce" and such was the direct consequence (pp. 475, 485). Said the Court:

> "But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation. (p. 486)
>
> "* * * The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed. * * * (p. 489)
>
> "* * * the precise question which we are called upon to decide is whether that restraint * * *is the kind of 'restraint of trade or commerce' which the Act condemns. (p. 490)
>
> "* * * the mere fact of * * * restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. (p. 503)
>
> "* * * the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy. (p. 511)
>
> "The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. (p. 513)
>
> "* * * the phrase 'restraint of trade' * * * was made the means of defining the activities prohibited." (pp. 494, 495)

Having thus made clear that not all restrictions on competition are "restraints" within the purview of the Act, the Court spelled out the tests by which to determine what were the forbidden "restraints".

"The end sought was the prevention of restraints to free competition in business and commercial transactions *which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services,* all of which had come to be regarded as a special form of public injury." (p. 493)

And, as stated again, the Act aimed at the kind of restraints deemed illegal at common law,

"* * * the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, *which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.*" (p. 497)

"* * * this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs which flow from restraints* of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since * * * 1911 * * * in general restraints upon competition have been condemned only *when their purpose or effect was to raise or fix the market price.* It is in this sense that it is said that *the restraints,* actual or intended, prohibited by the Sherman Act are only those which are *so substantial as to affect market prices.* Restraint on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have *an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.*" (pp. 500, 501)

In short, to be a "restraint", a restriction must affect the market *to the detriment of the public as purchasers* of goods or services. If it does not do that, if it does not meet these tests, it is not a "restraint of trade".

The Apex doctrine is not confined to labor matters.

Contrary to petitioner's statement (Br. p. 17) *Apex Hosiery Co. v. Leader, supra,* was not decided on any ground peculiar to labor or labor organizations. The Court took pains to make that clear. It said (p. 512):

> "Apart from the Clayton Act it [the Sherman Act] makes no distinction between labor and non-labor cases. We * * * hold * * * both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market * * *. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable * * *."

No "restraint of trade" here.

In the present case there was, we submit, no "restraint of trade" at all, although there may have been a restriction; there were none of "the general consequences [the Act] forbids for the public" (*Mandeville, supra*), no "public injury", no consequence or effects on the market or to the consumer (*Apex, supra*)—and none intended.

But, even if it be assumed that the restriction rose to the dignity of a "restraint", it was not, for that reason illegal.

8. IF THERE WAS A "RESTRAINT OF TRADE", IT WAS NOT UNREASONABLE.

In meeting the first and early question whether the Sherman Act was to be given a literal meaning, this Court soon came to its enunciation of its Rule of Reason, that the Sherman Act applies only to "acts which were unreasonably restrictive of competitive conditions". *Standard Oil v. United States,* 221 U.S. 1, 58 (1911). In *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 387, the Court said:

> "It was judicially declared a proper interpretation of the Sherman Act in 1911, with a strong, clear-cut dissent chal-

> lenging its soundness on the ground that the specific words of the Act covered every contract that tended to restrain or monopolize. This Court has not receded from its position on the Rule. There is not, we think, any inconsistency between it and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act. It is logical that some agreements and practices are invalid *per se*, while others are illegal only as applied to particular situations."

At the last term, in *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5, it said:

> "Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition."

Even if we assume, then, that the alleged restriction in the instant case was a "restraint of trade", the next question is whether it was "unreasonable".

Unless it should be held that *factual inquiry into reasonableness* was precluded by an obdurate rule of law, the conclusion of both courts below that there was no effect on the market stands as a factual conclusion and disposes of the case.[17] Thus the question becomes simply this: In the case shown by the record, is the agreement unreasonable *per se?* Unless the answer to this question is in the negative, it would be difficult to conceive of any agreement working a restriction, outside of the field of labor, that would not be violative of the Sherman Act, *per se.*

In *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5, the Court said that:

> "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the pre-

17. See footnote 1 on p. 4, *supra.*

> cise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

The Court then listed the "practices which have heretofore been deemed to be unlawful in and of themselves". These we consider at page 59 *infra*. This alleged conspiracy in the present case was not of any of the types so delineated. And no elaborate economic inquiry was required. The record facts, even assuming an agreement, are all admitted. We submit that they do not constitute a *per se* violation.

The petitioner and the Solicitor General seek to extend the boundaries of *per se* violations. The latter's memorandum filed in support of the petition for certiorari in September 1958 argued (p. 5) that "[i]f petitioner's store had been the object of a price-fixing conspiracy or a tying arrangement, the restraint would be deemed *per se* unlawful", and therefore the alleged conspiracy should also be held illegal *per se*. This is merely an attempt to extend the *per se* rule, by analogy, until finally a jurisprudence of inflexible *per se* violation will supplant the flexible approach which this Court has established.[18] It ignores Chief Justice Hughes' statement in *Appalachian Coals, Inc. v. United States*, 288 U.S.

18. In his memorandum of September 1958, the Solicitor General asserted (pp. 3, 4) that "The court below has rejected [the] flexible approach" approved by this Court. But this approach is exactly the approach taken by the Court of Appeals. The assertion does not appear in the Solicitor General's brief filed after granting of the writ. It is the Solicitor General who asks the Court to reject the flexible approach in favor of an extension of *per se* rules.

344, 360, and *Sugar Institute v. United States,* 297 U.S. 553, 597, that "The restrictions the Act imposes are not mechanical or artificial."

The situation in this case was summarized by the Court of Appeals (R. 180):

> "The facts prove no more than a squabble between two of many competitors in a highly competitive market area. The facts prove no conduct in violation of the antitrust laws because there has been no conduct by which the 'public' could conceivably suffer injury."

And we note again the passage from the opinion (R. 178-9), quoted at p. 15, *supra,* where the court pointed to the fact that the complaint alleges that only the *plaintiff* (italics are the court's) was prevented from obtaining some of the many available brands of products, that there was no claim of "actual, attempted, or intended control of the market", that the facts "leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition", and that Hale neither intended nor had the power "to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public".

A learned commentator has described the decision below in these words:

> "Let me restate my understanding of Judge Barnes' thesis: those restraints which have traditionally been regarded as unlawful *per se* have been so classified because of their inherent capacity to injure the public. Typical are those mentioned by Mr. Justice Stone in *Apex Hosiery*: agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like. But apart from these classic instances of intrinsically anti-competitive practices, public injury—that is, a substantial interference with

competition in the relevant market—must be demonstrated as a matter of fact. This is just another way of saying that the rule of reason comes into play whenever the restraint falls outside the *per se* category. Unless the public is likely to be injured through a deprivation of the fruits of a competitive order, the restraint is not unreasonable."[19]

C. THERE ARE MANY CASES INVOLVING SIMILAR FACTS, AND THEY HAVE CONSISTENTLY HELD THAT THERE IS NO VIOLATION OF THE ACT.

The kind of case petitioner presents has appeared frequently in the books. Without exception every court has held that no cause of action exists under the Sherman Act. It has been held, repeatedly, that the Act is not concerned with whether a particular retailer, sales agent or consignee, handles or sells a particular brand of commodity so long as there are many others selling it, there being no effect, and no purpose to work an effect, on prices, quality or quantity available to the public and no monopoly. Conversely, in every case where the Sherman Act has been held violated, the conspiracy was aimed at or struck a broader purpose or target than a particular plaintiff in a highly competitive market—for example, its purpose was to fix prices and the particular plaintiff was injured as an incident to the accomplishment of that purpose.

Chronologically, early and oft-cited cases are *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830, 832 (N.D. Cal. 1939), a suit against 24 defendants, and *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938), both of which preceded *Apex Hosiery Co. v. Leader*, 310 U.S. 469.

Directly in point are *Shotkin v. General Electric Co.*, 171 F.2d 236 (10 Cir.), and *Feddersen Motors v. Ward*, 180 F.2d 519 (10 Cir.), leading cases. In the *Shotkin* case, a dealer charged some 80 defendants with a conspiracy to restrain and monopolize trade

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19. Milton Handler, "Recent Antitrust Developments", The Record of the Association of the Bar of the City of New York, October 1958, 426, 430.

by refusing to sell him electric appliances. Affirming dismissal on motion, the court said (p. 239):

> "Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature * * * There must be harm to the general public in the form of undue restriction of trade and commerce as the result of wrongful contract, combination or concert.
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> * * * * * * *
>
> "During all of the time referred to in the amended complaint, the defendant General Electric Company and its related companies, the defendant Westinghouse Electric & Manufacturing Company and its related companies, and the defendant Thomas A. Edison, Inc. and its related companies sold their products in all parts of the United States through dealers in virtually every city, town and village; and the inability of plaintiff to sell the products of all or any of them in interstate commerce as a part of his business in Denver would in the very nature of things have infinitesimally little effect upon such commerce."

In the *Feddersen* case an automobile dealer charged a conspiracy between the manufacturer and one of its dealers not to sell to him. Affirming a dismissal on motion, the court said that the complaint (p. 522):

> "alleged that the defendants formed a combination or conspiracy in restraint of interstate commerce * * * to force plaintiff out of business as a dealer in Hudson automobiles. * * * that defendants had discriminated against plaintiff in certain respects. * * * that the effect * * * was to burden, obstruct, and unduly restrain interstate commerce and trade in new Hudson automobiles. But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendant violated the act with harmful results to the public. * * * [or] that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from De-

troit, Michigan, into Colorado, or other destination; or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. * * * [or] that the contemplated purpose, tendency, inherent nature, or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in interstate commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest."[20]

The *Shotkin* and *Feddersen* cases, unless erroneous, call for affirmance of the judgment here. Petitioner so conceded below

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20. Petitioner (Br. 23) cites *New Home Appliance Center v. Thompson,* 250 F.2d 881 (10 Cir.) as a rejection of the *Shotkin* and *Feddersen* cases. This is not so. The *New Home Appliance* case was decided purely as a question of pleading, not on a motion for summary judgment, the court noting (p. 883) that "the free use of summary judgment is available to avoid exepensive trials of frivolous claims". The issue was simply the sufficiency of a complaint which alleged a conspiracy aimed not at the plaintiff alone but one aimed at the whole class of retail dealers, to fix prices, and to monopolize. The

> "purpose, object and effect [was] to deny retail appliance *dealers* in Denver, Colorado free access to the channels of interstate commerce by preventing them from making interstate purchases; and requiring them to purchase their requirements of home appliances from local wholesalers in Colorado, and thus *to fix the prices* at which such products were to be sold retail by Denver retail dealers; *to monopolize* interstate commerce in wholesale appliances and to eliminate the complainant as a competitor in such trade." (p. 882)
>
> * * * * * * *
>
> "It was specifically alleged that by such concerted action, the defendants had restrained and monopolized a substantial part of interstate commerce by eliminating the plaintiff's competition and raising prices for home appliances to consumers in Denver and vicinity." (p. 883)

These elements were lacking in the present case.

(R. 174, 175), but argued that these cases were repudiated in *Radovich v. National Football League,* 352 U.S. 445, an argument we examine at pp. 42-49, *infra.*

In *Hudson Sales Corp. v. Waldrip,* 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821, a dealer sued the manufacturer and another dealer for conspiring to terminate his sales representation. The court noted that

> "It was established, indeed admitted, that when plaintiff gave up the Philco Agency, whether he gave it up as he claims under compulsion or as defendant claims of his own volition, another person took the agency over immediately and there is no proof whatever that his giving up Philco affected either competition or price, or that there were fewer Philcos sold, as a result of the change, than had been sold by plaintiff." (p. 273)

The court referred to the

> "many cases dealing with suits of this general nature, which have firmly established the principle that an essential to a private recovery is a showing of a public injury, and that only unreasonable restraints of interstate commerce, restraints which substantially affect competition or which have the purpose or effect of raising or fixing market prices, are condemned under Section 1 of the Sherman Act * * *." (pp. 270, 271)

Many decisions were summed up in *Miller Motors v. Ford Motor Co.,* 252 F.2d 441 (4 Cir.)[21] affirming 149 F. Supp. 790 (M.D. N.C. 1957), and many similar District Court decisions may be cited. For example, in *Neumann v. Bastian-Blessing Co.,* 70 F. Supp. 447, 479 (N.D. Ill.) the court referred to the plaintiff's "fallacious assumption that his medium of sale and distri-

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21. The opinion in that case was by Judge Sobeloff. We think it worthy of comment that Judge Barnes, formerly Chief of the Antitrust Division and the author of the opinion in the instant case, and Judge Sobeloff, formerly Solicitor-General, are in accord on the governing principles of law.

bution is the sole and only effective means of marketing competitors' products * * * and that his removal necessarily results in a monopoly." It said:

> "No facts are alleged from which the court can construe the effect of such alleged conspiracy to result in an injury to the public *since it is not stated that the public has been deprived of the continued sale and distribution of such equipment or suffered any other injury from the defendant's alleged wrongful acts,* or that there was such a restraint on competition as to violate the Act."[21a]

In *Admiral Theatre Corp. v. Paramount Film Dist. Corp., et al.* 140 F. Supp. 686 (D. Neb.), the court, assuming "the existence of a combination and conspiracy among the defendants, having as its object a refusal to negotiate as above stated" (p. 689), granted a summary judgment of dismissal, saying:

> "* * * the question * * * boils down to this: whether the arrangement or combination of which plaintiff complains, is one which can be said to be in restraint of trade, i.e. injurious in any perceptible degree to the movie-going public in Omaha, Nebraska, or to any considerable portion of it, in tendency or effect, and whether the object of such conspiracy violated any legal right of the plaintiff protected by the Sherman Act.
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> * * *
>
> "Assuming that plaintiff was denied the right to 'negotiate' for exclusive second run, with reasonable clearance, as a consequence of the instant conspiracy, who can gainsay that the movie-going public in Omaha, Nebraska, where the impact of the conspiracy is placed and the area of competition is fixed, was not injured thereby." (pp. 696-7).

21a. In *Riedley v. Hudson Motor Car Co.,* 82 F. Supp. 8 (W.D. Ky.), the court noted the absence of any claim

> "that the termination of his dealership contract will affect the public in the ability to purchase Hudson automobiles and accessories. No claim is made that the elimination of plaintiff as a dealer will result in lessening the supply of Hudson automobiles, parts and accessories through their dealerships or to the market generally." (p. 10)

Many other cases decided after *Apex Hosiery Co. v. Leader, supra,* can be cited to the same effect; e.g., *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.,* 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816; *Kinnear Weed Corp. v. Humble Oil & Refining Co.,* 214 F.2d 891 (5 Cir.), cer. den. 348 U.S. 912; *District of Columbia Citizen Pub. Co. v. Merchants & Manufacturers Ass'n.,* 83 F. Supp. 994 (D.D.C.); *Swartz v. Forward Ass'n.,* 41 F. Supp. 294 (D. Mass.); *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822, reh. den. 355 U.S. 900, 357 U.S. 923.

Comparison of petitioner's case with the foregoing decisions.

Petitioner's case is weaker than that of plaintiff in any of the decisions cited above, for two reasons:

1. Virtually all those cases were decided on demurrer or motion to dismiss, i.e., taking the allegations of the complaint at utmost value. The instant case was decided with the benefit of uncontradicted factual clarification on motion for summary judgment.

2. In many of the decisions, as in the automobile dealership cases or the *Kraft-Phenix Cheese* case, the result of the "conspiracy" was to create a *sole* dealership in a given area of a particular brand. Yet it was held that the competition with other brands negatived a monopoly. This accords with the decision in *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377 (the *Cellophane* case) that competition must be judged in the light of all products competing for the same consumer's dollar.[22] It said (p. 393):

> "* * * this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power

22. While the Court divided in that case on the issue whether cellophane was in competition with other types of packaging materials, there was no disagreement on the principle.

> must be appraised in terms of the competitive market for the product."

So also in *Northern Pacific R. Co. v. United States,* 356 U.S. 1 at 7, this Court observed that

> "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

In the present case, not only were there countless competing brands widely handled, but the same brands are being sold by hundreds of other retailers in San Francisco.

D. "PUBLIC INJURY" AND THE RADOVICH CASE.

As a result of this Court's decisions discussed at pp. 28, 29, *supra,* such as the *Corn Products* case, one of the expressions which emerged in the cases and is repeated almost daily as new decisions are rendered is that there must be a *"public injury"* in order for there to be a violation of the Sherman Act, and that the Act cannot be invoked in aid of a merely private controversy. This was but a compendious mode of expressing the principle stated more elaborately in *Apex Hosiery Co. v. Leader, supra,* that to constitute a "restraint of trade" a restriction on trade must have certain effects on the market. Or it may be a cryptic mode of expressing the principle that restraints must be unreasonable. But it is a convenient and compact way of saying that one may not sue under the Sherman Act for damages flowing from a conspiracy unless there has been *a violation of the Sherman Act* and that not all conspiracies violate that Act because not all restrictions on trade are restraints of trade or otherwise fall under its purview.

Virtually all of the decisions cited at pp. 36 to 41, *supra* hold this requirement of "public injury" to be elementary.[23] Many other

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23. *Glenn Coal Co. v. Dickinson,* 72 F.2d 885 (4 Cir.) contains a review of the authorities prior to 1930.

decisions rendered prior to *Radovich v. National Football League,* 352 U.S. 445, did the same.[24] And in the District Court petitioner conceded that a public injury was necessary.[25]

But petitioner now claims that this Court swept this settled requirement out of the law in *Radovich v. National Football League,* 352 U.S. 445, and worked an "invalidation of the doctrine of 'public injury' " (Br 28).

No lower court has shared petitioner's view of what *Radovich* held, for the decisions stating and applying the requirement of a public injury have continued to flow from the courts. Thus in *Miller Motors v. Ford Motor Co.,* 252 F.2d 441 (4 Cir.), Judge Sobeloff said (pp. 447, 448):

> "Therefore, there being no showing of any public injury resulting from a restraint of commerce in automobiles or advertising, it cannot be said that the Sherman Act has been violated. * * *
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> "* * * The hybrid nature of a private antitrust suit dictates that, to succeed, the plaintiff must prove not only that

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24. E.g.: *Konecky v. Jewish Press,* 288 Fed. 179, 182 (8 Cir. 1923); *Brosious v. Pepsi-Cola Co.,* 155 F.2d 99, 104 (3 Cir. 1946); *Interborough News Co. v. Curtis Publishing Co.,* 225 F.2d 289 (2 Cir. 1955), aff'g 127 F. Supp. 286 (S.D.N.Y. 1954); *Schwing Motor Co. v. Hudson Sales Corp.,* 138 F. Supp. 899, 903 (D. Md. 1956), aff'd 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823 (1957); *Northern California Monument Dealers Ass'n v. Interment Ass'n,* 120 F. Supp. 93, 95 (N.D. Cal. 1954); *Brenner v. The Texas Company,* 140 F. Supp. 240, 243 (N.D. Cal. 1956).

25. "The Court: Well, all that I was endeavoring to do, Mr. Goldstein, was to get the question down to a somewhat simple basis. The private right in antitrust arises out of the private damage because of the public wrong.

Mr. Goldstein: Yes, sir.

The Court: In other words, it doesn't arise out of a private wrong; it arises out of a public wrong.

Mr. Goldstein: There must be, as I have conceded, there must be some public interest.

The Court: And the private individual where there is a public wrong has only a cause of action when he can show that the public wrong caused him some damage.

Mr. Goldstein: Yes, sir." (R. 145-146)

> the defendant has infringed one or more of the antitrust laws to the public injury, but also that such infringement has resulted in private injury to the plaintiff in its business or property."

In *Riggall v. Washington County Medical Society,* 249 F.2d 266, 268 (8 Cir.), cer. den. 355 U.S. 954, it was said:

> "* * * the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians. There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce. * * * Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically."

Other recent decisions of courts of appeals are *Rogers v. Douglas Tobacco Board of Trade,* 244 F.2d 471, 483 (5 Cir. 1957), and *Miller v. Town of Suffield,* 249 F.2d 16, 17 (2 Cir. 1957) cer. den. 356 U.S. 978.

Decisions of the District Court to the same effect since *Radovich* are numerous. In *Nelligan v. Ford Motor Co.,* 161 F. Supp. 738, it was said (p. 745):

> "Firmly ingrained in anti-trust law is that before a plaintiff may recover in a treble damage suit, he must show public injury."

In *Sandidge v. Rogers,* 1958 Trade Cases, Para. 69,191 (S.D. Ind. Oct. 15, 1958), granting summary judgment, the court said:

> "The facts in these proceedings disclose that the plaintiff has been damaged in her business and her property but the

> facts in no respect affect either the consuming public, or competition in the relevant market nor does it tend to do so."

Still other decisions are *Radiant Burners, Inc. v. American Gas Assn.* 1958 Trade Cases, Para. 69,173 (N.D. Ill. Oct. 8, 1958), *Sperry Rand Corporation v. Nassau Research and Development Associates,* 152 F. Supp. 91, 95 (E.D. N.Y. 1957) and *Delaune v. Hibernia National Bank of New Orleans,* 1958 Trade Cases Para. 69,123 (E.D. La. 1958).

We turn to the *Radovich* case itself. The prime question there was whether football, like baseball, is immune from the Sherman Act.[26] That question does not concern us. As petitioner states (Br. 20) the *Radovich* petition for certiorari presented a second question, viz.—

> "Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient *if it states violations of the anti-trust laws* and injury thereby?"

But the patent answer to a question such as that is "yes"; *if* a complaint *states a violation of the antitrust laws* with injury therefrom, it is sufficient. The question starts on the basis that the kind of *restraint* there charged *was* a violation; that is, that it would have sustained a suit by the government. And respondents there conceded this to be true, once it was assumed that football came within the Act. But they contended that *in addition* to alleging facts showing a violation of the Sherman Act, a complaint by a private party had to allege something more about public injury.[27]

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26. The Court said (352 U.S. at 447):
> "We granted certiorari, 352 U.S. 818, in order to clarify the application of the *Toolson* doctrine and determine whether the business of football comes within the scope of the Sherman Act."

27. Petitioner's brief here (p. 21) correctly quotes from respondents' brief in the *Radovich* case, thus:
> "Hence, to state a claim for relief, a complaint must allege facts which would establish that the violations of the Sherman Act by which plaintiff allegedly has been damaged, are of such nature that the public itself has sustained a substantial injury."

This was an attempt to go beyond the teaching of *Apex Hosiery Co. v. Leader, supra.*

We need but compare the facts of the *Radovich* case with the present to see how widely different they are. In the first place, the complaint in the *Radovich* case was dismissed on a motion directed to the pleading alone. Consequently, the sole test of the sufficiency of plaintiff's case was the allegations of his complaint.[28] In the present case dismissal was upon motion for summary judgment, in which undisputed facts were adduced to control and clarify the pleading.

In the *Radovich* case, this Court said (352 U.S. 445, 448):

> "Since the complaint was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged."

What the *Radovich* complaint alleged, according to this Court's opinion (pp. 448, 449), is that the blacklist which there injured the plaintiff

> "was the result of a conspiracy among the respondents to *monopolize commerce* in professional football among the States. The purpose of the conspiracy was to 'control, regulate and dictate the terms upon which organized professional football shall be played *throughout the United States*' * * *. *It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League.*
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> * * *
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> "* * * Each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract. These contracts are enforced by agreement of the clubs to blacklist *any* player violating them and to visit severe penalties on recalcitrant member clubs."

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28. Petitioner argues (Br. 23) that the *Radovich* case was dismissed after answers had been filed. But since it was disposed of on motion to dismiss, only the complaint could be considered.

Thus the *Radovich* conspiracy was not aimed at the lone plaintiff. He was incidental. It was a conspiracy to monopolize a whole industry, to boycott a whole conference and all its players, so as to destroy the competition of the entire conference and thereby to produce a monopoly of all professional football in a single conference. Confronted with these wide allegations, the Court said (p. 453):

> "While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, 'we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress * * *' "

Petitioner refers to the briefs in the *Radovich* case.[29] They are indeed revealing. Radovich's opening brief in this Court stated (p. 9):

> "In issue here is whether the complaint alleges conduct exempt from the antitrust laws and whether the complaint should set forth matters which show an adverse effect on the public, *other than that pleaded.*"

Thus the issue presented was whether the allegations of the particular complaint showed a sufficient adverse effect on the public. Radovich's brief further stated (p. 11):

> "Petitioner's complaint is readily within the antitrust laws. Under his allegations of respondents' attempted domination and control of football, ruination of the All America Conference, and elimination of competition, *petitioner has raised his action in the context of a general and overall destruction of competition in the football business.*"

His reply brief gave the same explanation of his complaint. It stated (p. 8):

> "Petitioner has alleged that he was injured as part of a plan to monopolize the business of football by exclusion of the All-America Conference, by the elimination of competition

29. Briefs in No. 94, U.S. Supreme Court, October Term, 1956.

between the two sets of defendants and by the elimination of competition between the constituent members of each league."

Again (p. 9):

"Injury to petitioner was clearly imposed *as part of the plan to fight the All America Conference* * * *

"This action unmistakenly [sic] concerns a period of time when the respondents were engaged in the monopolization of the business of football and a 'trade war' against the All America Conference."

In short, the case was one of injury sustained by a particular plaintiff as part of and incidental to a conspiracy of broader purpose falling directly within the meaning of "restraint" as explained in *Apex Hosiery Co. v. Leader, supra,* and is poles apart from the instant case.

This Court's opinion in *Radovich* showed no purpose to depart from the teachings of *Apex Hosiery Co. v. Leader.* It reasserted them and simply held that the complaint in that case met those tests. In holding the complaint to be sufficient, it said in footnote 10 (p. 453):

"In *Apex Hosiery Co. v. Leader,* 310 U. S. 469 (1940) this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*'" (Emphasis is the Court's.)

Other than the element of injury to himself, the private litigant need prove no more than would the government in a public prosecution. But "public injury" is still a *sine qua non* of the element *of violation.* As stated by the Court of Appeals in its opinion here (R. 173-174):

"However, the private right is not a remedy for a private wrong created by federal law. The private right is a method

of enforcing public rights and thereby providing additional means of enforcing the prohibitions of the statute. * * * Before there can be any 'forbidden practices' there must be an improper restraint of trade or commerce; once this is established or reasonably put in issue, the private right and the consequent private protection arise. Without the prohibited restraint, there is no private right for there has been no violation, *i.e.*, there has been no conduct of defendants, which is or conceivably could be injurious to the public welfare. * * * [plaintiff] need not allege, additionally, that the public has been injured by defendants' conduct. But to have the prohibited restraint there must be facts from which it can be determined that the 'conduct charged * * * was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce.' (*Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir., 1954, 214 F.2d 891.)"

Pleading not involved.

The present case is not concerned with *modes of pleading.* A complaint need not use the words "public injury", for the law is not concerned with formalisms or formulae. It is enough if it charges a *kind* of restriction on trade that has an injurious effect on the public. Some kinds of restrictions, like price-fixing, of their very nature are regarded by the law as having that kind of effect. But unless the restriction involved is of *that* kind, proof addressed to the consequence on the public in the market is material.

E. AN ALLEGED CONSPIRACY DOES NOT BECOME ILLEGAL BY LABELING IT A "BOYCOTT".

Both petitioner (Br. 29, 37, 38) and the Solicitor General (Br. 4, 10) argue that a "group refusal to deal" is, without more, a violation of the Sherman Act *per se.* This they do by a supposed syllogism. As the first premise they call a joint refusal a "boycott"; as a second premise they say that a "group boycott" is illegal *per se.* This is mechanical law, and there is neither substance to it nor authority to support it.

As remarked by a District Judge of large experience in antitrust matters, Judge Yankwich, *in Encore Stores, Inc. v. May Department Stores Co.*, 164 F. Supp. 82, 85 (July 7, 1958, S.D. Cal.):

> "Calling the action of the defendants and their alleged co-conspirators a 'boycott' of the plaintiff no more settles the problem than the similar attempt of the Government in United States v. 20th Century-Fox Film Corporation, supra, to call the refusal of the motion picture companies to sell films for television 'a boycott'."

As the Court of Appeals here said, after analyzing the cases (R. 176):

> "Plaintiff cites us many cases involving group boycotts, discrimination, and the use of large scale buying power to drive out a competitor. And he supplies us with many quotations which at first blush appear to support his position. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here."

Once again, the basic fact of the present case is to be reiterated: This case concerns but one store out of hundreds; the alleged conspiracy was not aimed at a class but at petitioner, alone, and had no other consequence. It was part of no broader restrictive scheme or purpose. In *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816, the court, rejecting the argument (p. 88) that "a combined refusal to deal constitutes under all circumstances a prohibited restraint, that public injury inevitably follows and that the amount of commerce is immaterial", said (p. 90):

> "The effect upon competition, like that upon the flow of commerce, was 'de minimis;' it could have had no 'appreciable' effect upon either. The restraint asserted was as impotent in its relation to either commerce or competition as a lighted match to the temperature of all outdoors."

The opinion of the District Court in the *Ruddy Brook* case had said, 103 F. Supp. 290, 291 (N.D. Ill.):

> "It is clear from the allegations of the complaint that plaintiff is concerned only with a single, isolated incident involving plaintiff and defendants, and has completely failed to sufficiently plead that the public has been, or may be, affected in any way by defendants' alleged conduct. * * * In other words, the net effect of the entire complaint is that the defendants have succeeded in boycotting a single business concern and have eliminated competition among themselves only insofar as it relates to the sale of fire insurance to that one business concern."

The contention that every joint refusal to sell is (1) a group boycott and (2) that every group boycott is a *per se* violation of the Sherman Act is unsound in both its premises.

1. A boycott is a joint refusal to deal with one in order to coerce him to desired conduct: There was no such refusal here.

While the word "boycott" has sometimes been used loosely to described a group refusal to deal with another, its true meaning is that of group refusal to deal with one or more as a means of coercing them to follow the wishes of the group, as, for example, to compel those coerced to join a price-fixing scheme or to prevent them from dealing with third persons.[30] Judge Taft, in *Toledo,*

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30. Thornton "Combinations in Restraint of Trade" (W. H. Anderson Co., 1928) p. 950:

> "§ 606b. *Boycott Defined.*—A boycott has been defined as a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats unless others do so, the many will cause similar loss to them. It has also been defined as a combination of several persons to cause a loss to third persons by causing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to them; or an organization formed to exclude a person from business relations with others by persuasion, intimidation and other acts, which tend to violence, and thereby cause

A.A. & N.M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 738 (C.C. N.D. Ohio) said that this is the meaning:

> "* * * As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them."

In the cases in which a group refusal has been held illegal as violating the Sherman Act, the term "boycott" was used in Judge Taft's sense; that is, a joint refusal to deal with persons in order to coerce them into conforming to the wishes of the boycotters.

There was no "boycott" here. Respondent Hale allegedly refused to deal with the supplier-respondents in order to compel them to conform to Hale's wishes, but Hale's refusal to deal with the suppliers was entirely unilateral; it was not in concert with anyone. The alleged concerted action consisted of the refusal of the suppliers to sell to petitioner, but this refusal was not to coerce petitioner to do or refrain from doing anything; it was simply a refusal to deal. Had respondents refused to deal with petitioner so long as he failed to conform to one or another mar-

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him, through fear of resulting injury, to submit to dictation in the management of his affairs."

Bouvier's Law Dictionary:

> "A confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators."

Anderson's Law Dictionary:

> "A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who, by noncompliance with the demand, has rendered himself obnoxious to the immediate parties, and, perhaps, to their personal and fraternal associates."

A boycott may be legal or illegal under non-federal and common law principles of tort law depending on the facts and not the label, and the cases referring to boycotts must be read with this in mind.

keting practice they desired, this might be called a boycott; but that is not this case.[31]

2. It is not the joint refusal to deal that constitutes illegality but its purpose or effect.

But assuming that *any* refusal to deal is a "boycott", the contention that it is always illegal *per se* lacks merit.

To be a violation of the Sherman Act, any joint refusal to deal must meet the test of *Apex Hosiery Co. v. Leader, supra.* If it is accompanied by the added factor of a purpose to coerce the boycotted parties to conform to the will of the boycotters, i.e., if it is a boycott in the Taft sense, the added factor may tend to supply the element of public injury required by the *Apex* case. Again, if the boycott is of a whole *class* of people, this element may be present. But if the "boycott" is of a *single* person, the conspiracy *falls or does not fall within the Act depending on whether the necessary element of public injury can be found in other facts.*

In support of the contention that a group boycott is illegal *per se,* petitioner and the Solicitor General cite *Binderup v. Pathe Exchange,* 263 U.S. 291, *Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, *United States v. Columbia Steel Co.,* 334 U.S. 495, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, and *Northern Pacific R. Co. v. United States,* 356 U.S. 1. A boycott was involved in only the first two of these cases, and in each *the target was the public,* injured by an attempted fixing of

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31. The Solicitor General's brief contains an argument that if a public injury is necessary to a violation of the Act

> "those bent on restrictive trade policies would be enabled to pursue those policies at large by making a few conspicuous examples of nonconforming individual traders" (p. 13).

Had it been charged or proved that the respondents were "bent on restrictive trade policies" and had acted against petitioner as an example to whip other traders into line to conform to respondents' wishes, this would be a different case. But that was not charged, was not proved, and is wholly absent in this case.

price or working a monopoly. None of these cases supports petitioner's contention, and, as we shall see (pp. 60-63, *infra*) lower courts in other cases have rejected the very assertion about the purport of these decisions made by petitioner. But first we examine these decisions directly.

In *Binderup v. Pathe Exchange,* 263 U.S. 291, the plaintiff operated a chain of motion picture theatres in Nebraska (p. 301), and defendants were distributors. As the Court said (pp. 302, 303):

> "The complaint further alleges that these distributors control the distribution of *all* films in the United States and that the *films cannot be procured from others.* * * * It is alleged that * * * the Omaha Film Board of Trade was organized for the purpose of enabling these distributors *to control prices and dictate terms to their patrons* in Nebraska and other States."

This the Court repeated (p. 311):

> "The distributors, * * * controlled the distribution of *all* films in the United States and the exhibitor *could not procure them from others.* The direct result of the alleged conspiracy and combination not to sell to the exhibitor, therefore, was to put an end to his participation in that business."

Thus the *Binderup* case was not only a monopoly case but a case of a conspiracy having price fixing as its object and directed at a class.

Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, involved a trade association and combination of manufacturers, sellers and distributors of women's garments and textiles to destroy the competition of the entire class of manufacturers who copied designs. The boycott and refusal to sell to retailers who sold garments made by the other manufacturers was but a tool to the end. By the boycott they compelled 12,000 retailers throughout the entire United States to agree not to buy from any manufacturer who copied designs. There were 176 manufacturers who were Guild members, they occupied "a commanding position in their line of business" and since "most retail dealers [had] to stock some of the products of these manufacturers," the power of

the combination was great (p. 462). The purpose and consequence of the conspiracy was to put out of business a whole class of competing manufacturers and thus to remove a source of supply to the public. The boycott was such in the strictest sense of the Taft definition (p. 52, *supra*).

That the case is not relevant is shown by its citation, on the subject of boycotts, of *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, where a nation-wide association of retail dealers combined to boycott *all* wholesale lumber dealers who sold anywhere directly to the customer. Cases of mass boycotts, affecting large numbers of manufacturers and dealers, simply have no application to a case such as the present, as is epitomized in the passage from *Neumann v. Bastian-Blessing Co.*, 70 F. Supp. 447, quoted at pp. 39, 40, *supra*. In both the *Shotkin* and *Feddersen* cases, pp. 36-38, *supra*, the court cited the *Fashion Originators'* case, and then, applying the law to the facts, similar to those in the present case, held that there was no cause of action under the Sherman Act.

The other decisions of this Court cited on the subject did not in fact involve boycotts but contain passing reference to boycotts or refusals to sell. The earliest is *United States v. Columbia Steel Co.*, 334 U.S. 495, where the Court said (p. 522):

> "For example, where a complaint charges that the defendants have engaged in price fixing, *or have concertedly refused to deal with non-members of an association,*[21] or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*. Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*.

"[21] *Associated Press v. United States*, 326 U.S. 1; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600; *Montague & Co. v. Lowry*, 193 U.S. 38. See *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457."

It will be seen that the reference here to refusal to deal is to a refusal to deal with "*non-members* of an association", i.e., a refusal directed against a whole class of persons. And all four of the cases cited to the proposition are of that nature. For example, in the *Associated Press* case,

> "The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited *all AP* members from selling news to *non-members* and which granted *each* member powers to block *its* non-member competitors from membership." (326 U.S. 1, 4)

And by contrast to the facts of this case (p. 13):

> "Inability to buy news from the largest news agency, or any one of its multitude of members can have most serious effects on the publication of competitive newspapers * * *."

If the Court had meant to hold that mere concert of two or more not to deal with another was illegal *per se,* it would have been unnecessary to discuss the peculiar nature of the news publishing business.

We have already seen that both the *Eastern States* case and the *Fashion Originators'* case were boycotts of a whole class. The next case cited in the *Columbia Steel* case—*Montague & Co. v. Lowry*—vividly illustrates that fact. It involved a conspiracy of tile manufacturers in the United States and six San Francisco tile dealers : "In its scope it included * * * every manufacturer of tiles wherever situate in the United States * * *" (115 Fed. 27, 29). The Court epitomized the situation thus (193 U.S. 38, 45):

> "*It is not the simple case of manufacturers* [note the plural] *of an article of commerce between the several States refusing to sell to certain other persons.* The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers

> not members of the association, and not to sell unset tiles to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tiles is, as we have said, not only narrowed but the prices charged by the San Francisco dealers for the unset tiles to those not members of the association are more than doubled."

Thus all manufacturers were forced to join the association by a boycott of the *whole class* of those who did not; this in turn deprived the whole class of non-member dealers of a source of supply, and all to the end and purpose of fixing prices.

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, is cited by petitioner for the sentence (p. 214):

> "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."

But the Court was not stating a universal rule; it was speaking of "Seagram and Calvert", i.e., two parties conspiring for the *purposes* involved in that case. The case was one of "agreement among competitors to fix maximum resale *prices* of their products" (p. 213), where "the complaint charged that respondents had agreed or conspired to sell liquor only to those Indiana wholesalers who would resell at prices fixed by Seagram and Calvert, and that this agreement deprived petitioner of a continuing supply of liquor to its great damage" (p. 212). Thus plaintiff was but one of a class injured by the archetype of illegal conspiracy, one

to fix prices to the public. The case is like *United States v. Frankfurt Distilleries,* 324 U.S. 293, which neither petitioner nor the Solicitor General cites. That case involved a price-fixing conspiracy with a boycott to coerce all who would not conform.

The next citation chronologically, *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, involved no problem similar to anything here; it was a "tie in" case, and defendants' conduct was held not to be illegal. It is cited by petitioner because of the statement (p. 645):

> "Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except *en bloc,* viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 214 (1951); *Associated Press v. United States,* 326 U.S. 1 (1945); see *United States v. Columbia Steel Co.,* 334 U.S. 495, 522 (1948), different criteria have long applied to qualify the rights of an individual seller."

The Court was addressing itself to refusals to sell to any one except on certain restrictive conditions. And the cases cited to the quoted statement are those already discussed. No one reading the *Times-Picayune* case can escape observing its profound emphasis on effects on the "marketplace" (p. 605) or the need that the seller enjoy a monopolistic position for the tying product (p. 608) or that a " 'substantial' volume of commerce" in the tied product be restrained (p. 607) or that competitors be foreclosed from a "substantial market" (p. 610) or on the necessity that the "volume of commerce affected [be] not 'insignificant or insubstantial' " (p. 610). A case involving more "insignificance" than the present could hardly be imagined.

The last of the citations of petitioner and the Solicitor General is *Northern Pacific R. Co. v. United States,* 356 U.S. 1. It involved

no boycott or joint refusal to sell;[32] the sole reference is in a passage (see p. 34, *supra*) where the Court, in explaining the rule of *per se* unreasonableness, said (p. 5):

> "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271; aff'd 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392."

The authority cited in this passage with respect to "group boycotts" is the *Fashion Originators'* case, and that case, we have seen, related to "boycott" in its true sense of a coercion on an entire class to produce consequences injurious to the public.

It will be observed further that the term used is not "boycott" but "group boycott". Since "boycott" itself means combined action by two or more, and since the term "group boycott" is presumably not a tautology but was used to signify something more than "boycott", it would seem to signify not a boycott by a group but the boycott of a group; that is, a boycott directed against a class of persons. This is the factual setting of the cases in which the term "group boycott" is used and in the other cases where a joint refusal has been held illegal.

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32. Like *International Salt Co. v. United States*, which it cites, *Northern Pacific R. Co. v. United States*, is a tie-in case. Northern Pacific owned several million acres of land, of which, necessarily, it had a monopoly, and leased the land on a host of arrangements requiring shipment on Northern Pacific alone. Thereby it excluded *all* transportation competitors, and the consuming public, the lessees of the land, were excluded from access to *all* other suppliers of transportation. International Salt, the country's largest producer of salt for industrial uses (p. 394), had a patent monopoly on certain salt dispensing machines, which it leased on condition the lessee use its salt. The tie-in excluded *all* competing salt manufacturers from a market consisting of over 900 lessees.

The understanding by the lower courts of this Court's decisions.

These various decisions of this Court have more than once been cited to lower courts as authority for a flat rule that any joint refusal to deal is illegal *per se*. The contention has uniformly been rejected. In *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821, the Court said (footnote 10, p. 273):

> "Keifer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219; and * * * are not at all to the contrary. * * * the first head note in Kiefer-Stewart reads, 'An agreement among competitors in interstate commerce to fix maximum resale prices of their products violates the Sherman Act.' "

A full elucidation of the subject appears in *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286 (S.D. N.Y.), affirmed in 225 F.2d 289 (2 Cir. 1955), where plaintiff charged defendants with conspiracy not to deal with him. A motion to dismiss was granted at the close of plaintiff's case,[33] overruling the same mechanical argument as made by petitioner here. The Court of Appeals said (pp. 293, 294):

> "The nub of the matter is that the peculiar features of schemes for price fixing and elimination of competition * * * are wholly absent here.
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> * * * * * * *
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> "These observations also suffice to dispose of the claim that there was an illegal boycott and therefore a *per se* violation of the Sherman Act. * * *
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> "Other authorities on which plaintiff leans heavily furnish no support to plaintiff's contentions because in each of them there was some feature of price fixing or stifling of competition. * * * Fashion Originators' Guild v. Federal Trade Commission, 1941, 312 U. S. 457, 668, 61 S. Ct. 703, 85 L.

33. Dismissal at the close of a plaintiff's proof is a directed verdict (R.C.P. Rule 50a), and a summary judgment is proper if a directed verdict would be proper on the same facts. *Marion County Coop. Ass'n v. Carnation Co.*, 214 F.2d 557 (8 Cir. 1954); *Byrnes v. Mutual Life Ins. Co. of New York*, 217 F.2d 497, 501 (9 Cir.).

Ed. 949; Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219."

The District Court had said (127 F. Supp. 286, 300-301):

"Plaintiff's abstract proposition of law urged in this case that a 'boycott' by others of even one person engaged in interstate commerce is now to be deemed a *per se* violation of § 1 of the Act, and that no inquiry need be made in such case as to the substantiality of the restraint imposed by the boycott on the affected commerce, appears, at first glance, to be supported by the more recent decisions of the Supreme Court. [Citing Times-Picayune, Kiefer-Stewart and the Columbia Steel cases] However, I have doubt that such all-encompassing condemnation of group refusals to deal, as plaintiff urges, was intended by those cases. *On analysis, it seems that the boycott itself was not condemned as an unreasonable restraint of trade* in each of those cases, but *rather the Court condemned either what was sought to be accomplished by* the concerted refusals to deal *or what was the necessary result* thereof. *Hence, branding of defendants' acts a 'boycott' and therefore a per se violation of the Act is not justified* by a mere showing of the refusal by defendants to deal with plaintiff and their choice to deal with the 13 competing wholesalers."

"The 'purpose' of the accused agreement, *i.e.,* the result sought to be achieved, is decisive in determining liability to a party claiming to be injured by reason of the claimed violation of § 1.

* * * * * * *

"The final test to be applied * * * to determine whether § 1 of the Sherman Act was violated is whether the defendants' several refusals to deal with plaintiff necessarily had or will have any substantial pernicious effect on the commerce concerned in the sense that an adverse effect therefrom will be felt by the public. No such element of public injury is proven by the testimony and exhibits in the case. I am not persuaded that as a result of defendants' conduct, the purchasing public had to pay any increase in price, suffered any

> diminution in the quality or kind of service prevalent in the market prior to the defendants' acts complained of, or that there was any effect resultant from defendants' act detrimental to any person but the plaintiff."

In footnote 13 it analyzed all the prior decisions of this Court discussed above:

> "In Eastern States Retail Lumber Dealers' Ass'n v. United States, supra, the refusals to deal were found to in fact suppress competition and interfere with the natural flow of commerce, 234 U.S. at page 614, 34 S.Ct. 951, and it appears that they tended toward the creation of a monopoly in favor of the members of the association. In Binderup v. Pathe Exchange, supra, the case was in the Supreme Court on appeal from the affirmance of a motion to dismiss the complaint which alleged *inter alia* that the group refusal to deal was *intended* [italics in original] to restrain the interstate commerce involved. 263 U.S. at page 312, 44 S.Ct. 96. In Fashion Originators' Guild of America v. Federal Trade Comm., supra, the boycott was held to tend toward the creation of a monopoly in the participants. 312 U.S. at page 466, 61 S. Ct. 703. In Associated Press v. United States, supra, the Court condemned an arrangement or combination 'designed to stifle competition', 326 U.S. at page 19, 65 S. Ct. at page 1424, which was unreasonable in the light of 'the significance of the restraint in relation to [the] particular industry'. 326 U.S. at page 27, 65 S. Ct. at page 1428. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra, the concerted refusals to deal were condemned not as such but because they were the implementation of a 'combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce * * *', which is illegal *per se*. 340 U.S. at page 213, 71 S. Ct. at page 260; Times-Picayune Pub. Co. v. United States, supra [345 U.S. 594, 73 S. Ct. 889], dealt with an individual's refusal to deal. The dictum 'group boycotts, or concerted refusals to deal, clearly run afoul of § 1 * * *' is followed by citations to Kiefer-Stewart

Co. v. Joseph E. Seagram & Sons and Associated Press v. United States, both discussed herein."

Conspiracies to the injury of a "single trader".

As already noted (p. 23, *supra*), both petitioner and the Solicitor General seek to phrase the issue in terms of whether a violation of the Act can be worked by an injury to a "single trader" (E.g., Sol. Gen. Br. p. 5). This is not the issue. A conspiracy injuring a single trader might, on the facts of a particular case, also involve injury to the public; for example, if the consequence were to leave but one other trader in the market, thereby creating a monopoly, or the purpose was to eliminate an obstacle to a price fixing scheme. That is precisely the character of the two cases cited by the Solitictor General, the *Binderup* case (discussed, p. 54, *supra*) and *Lorain Journal v. United States,* 342 U.S. 143. The latter was not a conspiracy case, but a case of single party monopoly by a newspaper over the mass dissemination of local and national news and advertising in its community with 99% of the coverage of the community's families. There was no other daily newspaper. After another started a radio station, the defendant refused to accept advertising from anyone who advertised over the radio station, its express purpose and intent being to destroy the station completely (pp. 149, 151).

> "Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station." (p. 150)

Furthermore,

> "WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of interstate as well as local commerce." (p. 151)

The Solicitor General also cites *Loewe v. Lawlor,* 208 U.S. 274; *Duplex Printing Press Co. v. Deering,* 254 U.S. 443; and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.,* 274 U.S. 37. These were the cases of labor disputes that aroused so much controversy. They were analyzed in *Apex Hosiery Co. v. Leader,* 310 U.S. 469, and have no more vitality than *Apex* left them. In the *Apex* case, the Court described these cases (p. 505, 506):

> "* * * in *Loewe v. Lawlor,* 208 U.S. 274 * * * [t]he combination or conspiracy charged was that of a nation-wide labor organization to force *all* manufacturers of fur hats *in the* United States to organize their workers by maintaining a boycott against the purchase of the product of non-union manufacturers shipped in interstate commerce. * * * by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants * * * This Court pointed out that the restraint was precisely like that in *Eastern States Retail Lumber Dealers Co. v. United States,* 234 U.S. 600, 610, 614. * * * Like problems found a like solution in *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, and in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn.,* 274 U.S. 37; * * *
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> * * * * * * *
>
> "It will be observed that in each of these cases where the Act was held applicable to labor unions, *the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it.*"

The Solicitor General (Br. 3) describes the decision of the Court of Appeals in the present case as stating that

> "concerted conduct 'directed at harming the opportunity of a single trader to compete' (R. 172) is not an unreasonable, prohibited restraint if, notwithstanding such restraint, the market is subject to strong competitive forces and defendants have neither sought nor obtained power to exercise market control".

This is too narrow a description, for it mentions only certain facts showing absence of public injury. The court did not exclude other factors that might involve public injury; it held (R. 171) that there was neither intent nor purpose to affect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly, and no effect. No matter how viewed, there is no public interest involved.

F. ANSWERS TO MISCELLANEOUS CITATIONS AND TO THE CONTENTION THAT THE JUDGMENT RESTS ON A DISPUTED ISSUE OF FACT.

The petitioner's brief cites several cases we have not yet mentioned. They have no possible bearing, and we summarize them in a footnote.[34]

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34. *Hart v. B. F. Keith Vaudeville Exchange,* 262 U.S. 271 dealt not with whether a claim for relief was stated, but purely with whether the District Court erred in dismissing for lack of jurisdiction. "* * * when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction 'however wanting in merit' may be the averments intended to establish a federal right." (pp. 273-4). Petitioner's brief in the present case is replete with statements that the courts below held that they were without "jurisdiction" (E.g., Br. 11, 12, 13, 20, 24). No issue of jurisdiction is involved. The courts both had and exercised jurisdiction to decide the cause.

In *Chattanooga Foundry and Pipe Works v. Atlanta,* 203 U.S. 390, affirming *Atlanta v. Chattanooga Foundry & Pipe Works,* 127 Fed. 23, a buyer of pipe sued the members of the combination held to be unlawful in *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, affirming *United States v. Addyston Pipe and Steel Co.,* 85 Fed. 271, which are cited in *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5 for the principle that conspiracies to apportion territory are illegal.

United States v. Patten, 226 U.S. 525, involved a corner in all the cotton grown in the southern states in 1910 and all cotton left over from all prior years (pp. 535, 536), the purpose being "thereby to enhance artificially its price throughout the country" (p. 540).

Ramsay Co. v. Bill Posters Assn., 260 U.S. 501 was like *Montague & Co. v. Lowry,* 193 U.S. 38, which it cites (discussed at p. 56, *supra*). An association conspired to monopolize the business of bill posting in the entire country, limited membership, prohibited members from competing with each other or accepting work from *any* advertiser who gave any business to *any* non-member, fixed price schedules, and withdrew

Petitioner asserts that there were "genuine issues of fact" precluding a summary judgment (Br. 34-44), repeatedly arguing (e.g., pp. 37, 38, 40) that the "affidavits of respondents did not meet the question of the existence of the conspiracy". But, for the purposes of the motion, we assumed the truth of the allegation of a "conspiracy". The existence of a conspiracy is a question of fact, but whether the fact, in the setting of the other admitted facts, constitutes a violation of the Act is a question of law, wholly

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patronage from manufacturers furnishing posters to *any* non-member.

C. E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, came up on the complaint alone. It involved the same industry and the same type of activity as the *Ramsay* case (p. 258). The illegality of what was charged was admitted (p. 260), and the sole question raised was whether an allegation that plaintiff had been injured without alleging that he was unable to obtain posters from other sources adequately alleged damage. Petitioner cites this case to the point that ability to obtain goods from sources other than defendants is immaterial. But there the violation was clear, in view of the widespread nature of the boycott of the whole class of independents.

Anderson v. Shipowners Assn. of the Pacific, 272 U.S. 359, was a combination of those operating, owning or controlling substantially all American merchant vessels operating from Pacific Coast ports, whereby each agreed to employ no seaman unless approved by the Association.

The gist of *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 was that (p. 41) "ten competitors in interstate commerce, controlling sixty per cent of the entire film business, have agreed to restrict their liberty of action by refusing to contract for display of pictures except upon a Standard Form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with *any* Distributor, all with the manifest purpose to coerce the Exhibitor and limit the freedom of trade."

Moore v. Mead's Fine Bread Co., 348 U.S. 115, was a Robinson-Patman Act case, not a Sherman Act case.

United States v. South-Eastern Underwriters Assn., 322 U.S. 533, involved a conspiracy of those controlling 90% of the fire insurance and allied lines sold by stock companies in six states to fix premium rates, monopolize the business, and to that end to use boycotts and other coercion to force all non-members into the conspiracy (p. 535) and to compel all seeking insurance to buy from the conspirators. Defendants admitted (p. 536) that this was illegal if insurance was commerce, the sole issue in the case.

In *United States v. Griffith*, 334 U.S. 100, defendants were theater circuits which possessed the only theater in from 51% to 62% of the towns they served and used that position for the "acquisition or retention of effective market control" (p. 107).

ripe for decision on summary judgment.[35] Petitioner's argument comes down to the pure contention of law already discussed that mere joint refusal to deal is *per se* illegal conduct (p. 37).[36]

Petitioner argues that respondents' affidavits did not go into a variety of factual matters, such as the number of retail stores Hale operates and the dollar volume of its purchases. But none of these subjects was relevant. The fact that "literally hundreds if not thousands" of other retail stores do handle the products in question in San Francisco, that the number has constantly grown, and that numerous brands were available to petitioner pierced as sham the contention of monopolization. Issues of immateral fact cannot preclude grant of summary judgment. If on undisputed facts, the law requires decision for a party, he is entitled to judgment regardless of the existence of issues of fact which, however they might be resolved after a trial, would not alter the result.[37]

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35. *Gary Theatres Co. v. Columbia Pictures Corp.,* 120 F.2d 891, 894 (7 Cir. 1941), quoted in *Sandidge v. Rogers,* 1958 Trade Cases, para. 69,191 (S.D. Ind. Oct., 1958):

"Whether a conspiracy exists is a question of ultimate fact but whether the facts bring defendants within the prohibition of the statute is a question of law."

Admiral Theatre Corp. v. Paramount Film Dist. Corp., 140 F. Supp. 686, 696 (D. Neb.):

"That, we perceive, presents a question of law that can and should be determined on the state of the instant record, by way of motion for summary judgment."

36. E.g., it argues (p. 40)

"* * * But clearly when an action involves a conspiracy *per se* in restraint of trade, market control is not an indispensable issue."

37. F.R.C.P. Rule 56 provides:

"* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue *as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

III. The charged conspiracy did not have the relation to interstate commerce necessary in order to come under the Sherman Act.

As said in *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 495:

> "The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes * * * ."

While it has been held that the amount of commerce is not important, conversely the nature of the restraint and its effect on what commerce is involved is crucial (*Apex,* p. 485). *Mandeville Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, summing up the present state of the law, held that the effect on interstate commerce must be "substantial" (p. 234). *Radovich v. National Football League,* 352 U.S. 445, repeated that the effect "must be substantial" (p. 453). Petitioner recognizes this requirement, for its brief states (p. 19) that "The filing of a bona fide complaint disclosing conduct in or affecting a *substantial amount* of interstate trade or commerce * * * meets the jurisdiction requirements of Section 4 of the Clayton Act." Granting that the complaint, as a pleading, sufficiently alleged the requisite interstate commerce, the undisputed showing on the motion for summary judgment showed that the effect on commerce was simply *nil.* As said in *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.,* 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816:

> "The effect upon competition, *like that upon the flow of commerce,* was 'de minimis;' it could have had no 'appreciable' effect upon either. The restraint asserted was as impotent in its relation to either commerce or competition as a lighted match to the temperature of all outdoors." (p. 90)

We need but recapitulate the uncontradicted facts. Petitioner was able to obtain numerous brands of commodities, and the *cer-*

tain brands he was not able to buy were bought and sold by hundreds of other retailers in San Francisco, dozens of them in the Mission District alone. As many of the items are sold as before. The flow of products in interstate commerce has not diminished at all. Interstate commerce can be said to have been involved only in the sense that the brands of merchandise originated, it is alleged, outside of California and might have been purchased by petitioner if not denied him. But that merchandise still comes into California, to San Francisco, and to Mission Street. San Franciscans have washed the same amount of clothes, cooked the same number of meals, heard or seen the same number of radio and television programs, and bought the same number of washers, stoves and receiving sets, regardless of what retailer sold them.

All the decisions in precisely the kind of case petitioner presents have held that the necessary relation to interstate commerce is absent. Many have been cited in the foregoing pages of this brief. For example, in *Shotkin v. General Electric Co.,* 171 F.2d 236, 239 (10 Cir.), the court said,

> "the inability of plaintiff to sell the products of all or any of them in interstate commerce as a part of his business in Denver would in the very nature of things have infinitesimally little effect upon such commerce."[38]

In *Northern California Monument Dealers Ass'n v. Interment Ass'n,* 120 F. Supp. 93 (N.D. Cal.) the court said (p. 95):

> "Secondly, the subject of interstate commerce must be examined from the viewpoint of injury to the public. It is essential in this respect that the pleadings allege facts from which it can be determined as a matter of law that the alleged conspiracy contemplated or tended to restrain interstate commerce with harmful effect to the public interest."

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38. And see quotations at pp. 37, 38, *supra* from *Feddersen Motors v. Ward,* 180 F.2d 519 (10 Cir.), and at p. 61 from *Interborough News Co. v. Curtis Publishing Co.,* 127 F. Supp. 286.

And as stated on granting defendants' motion for summary judgment in *Brenner v. The Texas Company,* 140 F. Supp. 240, 243 (N.D. Cal.):

> "* * * reason tells us that even if the defendant companies did conspire to stop selling gasoline to plaintiff [a service station operator in Alameda County, California], nevertheless the motorists of California and Alameda County would continue to purchase the same amount of gasoline as they had prior to the closing of plaintiff's station. In which case neither more nor less gasoline would be available for export from California, thereby not affecting interstate commerce at all."

Not only has the quantity of merchandise flowing in commerce been undiminished, but the channels of commerce have not been used to work any kind of effect on the market or the consuming public. No matter from what angle this case is canvassed, there is a total lack of the necessary involvement of interstate commerce.

To borrow a statement from *Industrial Ass'n v. United States,* 268 U.S. 64, 84:

> "To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states, to a situation so * * * lacking in substance, would be to cast doubt upon the serious purpose with which it was framed."

IV. The Sherman Act did not establish a rule of private commercial tort law.

At pages 2, 3 and 23, *supra,* we stated the questions presented in this case. But in a very real sense, the essential issue may well be expressed thus: Is the Sherman Act to become a sort of section of a Federal Commercial Code treating of the law of commercial torts, or is its scope to remain consonant with "the serious purpose with which it was framed",[39] and with its de-

39. *Industrial Ass'n v. United States,* 268 U.S. 64, 84.

scription as a charter of liberty designed to protect the public in the market place?

No doubt Congress could have acted to create *private rights* in a field where the constitutional grant over interstate commerce empowered it to do so, just as it saw fit to do in the Interstate Commerce Act.[40] But it has always been understood that in the Sherman Act Congress did not so act. No more than the Federal Trade Commission Act was the Sherman Act designed as a prescription of rules of private commercial tort law. *International Shoe Co. v. Federal Trade Commission,* 280 U.S. 291, 298. In *Federal Trade Commission v. Klesner,* 280 U.S. 19, this Court, speaking through Mr. Justice Brandeis, overthrew an order by the Commission against an interior decorator to cease using the name "Shade Shop" as unfair competition with one Sammons, a prior user. The Court said (pp. 27-29):

> "But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. * * *
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> * * * * * * *
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> "The alleged unfair competition here complained of arose out of a controversy essentially private in its nature. * * * It is not claimed that the article supplied by Klesner was inferior to that of Sammons, or that the public suffered otherwise financially by Klesner's use of the words 'Shade Shop' * * *."

The Sherman Act was designed for a broad public purpose, to reach what were regarded as grave threats to the American

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40. Cf. remark in *Federal Trade Commission v. Klesner,* 280 U.S. 19, 26:

> "The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the Interstate Commerce Act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar."

system.[41] In consequence of the many decisions of this Court, beginning with the *Standard Oil* case of 1911 and extending through the *Corn Products* case to the *Apex* and *Mandeville* cases, a veritable host of decisions has repeated that the treble damage action was authorized, not as the instrument of new private rights created by federal act, but as a means of enlisting private aid in reaching acts injurious to the public.[42] Without exception, when-

41. The legislative history has often been reviewed by this Court, and it would be idle to duplicate the massive research underlying Justice Stone's opinion in *Apex Hosiery Co. v. Leader*, 310 U.S. 469. However, a few quotations are illustrative.

Senator Sherman, in support of the original bill, stated, 21 Cong. Rec. pp. 2456-57:

> "* * * Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. * * * but these [state] courts are limited in their jurisdiction to the State, and, in our complex system of government are admitted to be unable to deal with the great evil that now threatens us.
>
> "* * * The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.
>
> * * * * * * *
>
> "* * * It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States."

Again, p. 2460:

> "I accept the law as stated by Mr. Dodd, that all combinations are not void, a proposition which no one doubts, but I assert that the tendency of all combinations of corporations, such as those commonly called trusts, and the inevitable effect of them, is to prevent competition and to restrain trade. This must be manifest to every intelligent mind. Still this can not be assumed as against any combination unless upon a fair hearing it should appear to a court of competent jurisdiction that the agreement composing such combination is necessarily injurious to the public and destructive to fair trade.
>
> "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."

42. E.g., *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9 Cir.).

ever courts have perceived nothing in a case but a private wrong, they have relegated the complaining party to the common law or to state statutes.[43] In doing so they have often noted the unusual position conferred upon the private litigant. He may bring his action in a district court regardless of the amount in controversy (15 U.S.C. Sec. 15) unlike other suits arising "under the Constitution, laws or treaties of the United States" (28 U.S.C. § 1331). He may use the judgment in a prior government suit to establish a *prima facie* case of antitrust violation (15 U.S.C. § 16). If successful

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43. For example, *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky.) quoted at p. 40, *supra*,

> "* * * the alleged wrong complained of in this action is a private wrong to plaintiff, and therefore not one within the prohibition of the actions authorized by * * * Title 15 U.S.C.A. Section 1." (p. 11)

District of Columbia Cit. Pub. Co. v. Merchants & Manufacturers Ass'n, 83 F. Supp. 994, 997 D.C.:

> "* * * although there may exist an actionable wrong, the individual's right to redress cannot be asserted by virtue of the Sherman Act."

Two of the latest cases are *Sandidge v. Rogers*, 1958 Trade Cases, para. 69,191 (S.D. Ind. Oct. 1958) and *Radiant Burners, Inc. v. American Gas Assn.*, 1958 Trade Cases, para. 69,173 (N.D. Ill. Oct. 8, 1958). In the *Sandidge* case the court said:

> "The primary purpose of the Anti-Trust Laws is to prevent restraints of interstate commerce in the public interest, and to afford protection of the public from the subversive or coercive influences of monopolistic efforts and the right granted to plaintiff as a private suitor to seek reparation is secondary and subordinate in purpose.
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> * * * * * * *
>
> "Plaintiff's second amended complaint alleges tortious acts and resulting grievous losses which might have been the subject of a common law action, or one prescribed by a state statute. However, her action when exposed by the uncontroverted facts fails under the Anti-Trust Laws of the United States."

In the *Radiant Burners* case, the court made a similar remark. Dismissing an amended complaint the court said:

> "In particular, the amended complaint fails to show an injury to the public sufficient to warrant imposition of the sanctions of the Anti-Trust Laws. The primary purpose of those laws is to protect the public; the private remedy of triple damages is incidental to that primary objective * * *. The plaintiff may, or may not, have some form of action against the defendants. It is clear, however, that it does not have an action under the Anti-Trust laws."

he is awarded the extraordinary remedy of treble damages plus attorney's fees. These privileges are inconsistent with vindication of a mere private wrong; they are consistent only with recognition of the private suit as an auxiliary means to pursue public wrongs. As said in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 751:

> "Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute *are identical with the public interest in having a statute enforced,* it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. * * * It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."[44]

The Court has never departed from these principles. To subtract them from the law would be to outmode an enormous bulk of reported decisions and to hold that the Sherman Act is merely another statute for the vindication of private wrongs flowing from conspiracy. The cases of alleged commercial torts that might be said to involve some "restraint", if that term is granted the literal meaning *Apex* denied it, are numerous. From the very nature of a "commercial tort" the "restraints" will involve commerce and, very likely, interstate commerce. The additional charge of

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44. Cf. *Radiant Burners v. American Gas Assn.*, 1957 Trade Cases para. 68,909 (N.D. Ill. 1957):

> "The anti-trust laws, providing as they do the harsh penalty of triple damages, were not intended to promote the vindication of purely private wrongs, but to protect the public and the economy of the country from the crippling effects of monopoly."

conspiracy is an easy one to make, and wide latitude is permitted in proving it (Cf. *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541; *Fanchon & Marco v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 89-90 (S.D. Cal. 1951), aff'd 215 F.2d 167 (9 Cir.), cer. den. 345 U.S. 964. If "conspiracy" in a commercial tort is enough to create a Sherman Act case, the charge of conspiracy will become a talisman to convert all commercial quarrels into federal antitrust litigation. Reversal of the decision will overwhelm the federal courts with a veritable flood of trivial or private disputes, for to every commercial quarrel will be added the epithet "conspiracy".

The Solicitor General's brief asserts (p. 6) that "This Court [in *Radovich v. National Football League*, 352 U.S. 445] held that Congress 'has by legislative fiat, determined' that the activities prohibited by the Sherman Act 'are injurious to the public' ". But the *Radovich* case reaffirmed the *Apex* decision, and *Apex* plainly said that the Sherman Act provides "a remedy, public and private, for the public wrongs which flow from restraints of trade * * *", and it described the kind of restraints the Act prohibits as such as are "injurious to the public". If, as the Solicitor General seems to contend, *Apex* merely meant that whatever the Sherman Act prohibits is for that reason to be deemed injurious to the public, its careful discussion of public injury would seem pointless; the decision would then amount to no more than a holding that the Sherman Act prohibits what it prohibits. But what does it prohibit? The words "injurious to the public" were a criterion of what is prohibited—not all conspiracies working restrictions of trade—but only such as "had come to be regarded as a *special form* of public injury". This is exactly what this Court understood in *United States v. Masonite Corp.*, 316 U.S. 265, 282 (1942) when it referred to "the kind of public injury which the Sherman Act condemns."

In the *Radovich* case this Court rejected a contention that a private litigant must allege more (apart from his own damage) than the government must. But now petitioner and the Solicitor General ask the Court to hold that a private litigant need prove less. The Solicitor General's suggestion (Br. 3) that the ruling will affect public suits is unmeritorious. We know of no reported suit instituted by the government that has involved such a complete absence of public concern as the present case, and the role of the Department of Justice in enforcing the antitrust laws is much too important to be trivialized. As said in an article cited in the Solicitor General's brief:

> "The understandable search by enforcement agencies for universals in the interest of simplified enforcement and the trend toward more extensive coverage of the Sherman Act should not be permitted to obscure the aims of the statute."[45]

In order for petitioner to proceed with his alleged grievance in a federal court, nearly fifty years of construction of the Act must be rejected, for here there was no injury to the public, to the consumer, to the market. All this case involves is alleged denial to petitioner of a few brands. If he has been wronged, he should seek his remedy under common law principles or state statutes in state courts and should be denied access to a federal court because there is not the requisite diversity of citizenship.

CONCLUSION

The complaint and the undisputed facts show no case under the Sherman Act upon elementary principles long settled and never disturbed.

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45. Barber, "Refusals To Deal Under The Federal Antitrust Laws," 103 Univ. of Pa. L. Rev. 847, 885.

We respectfully submit that the judgment is right and should be affirmed.

Dated: December 22, 1958.

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